

D.R. NO. 2017-6

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

In the Matter of

CITY OF HACKENSACK,

Public Employer,

-and-

Docket No. RO-2016-047

FRATERNAL ORDER OF POLICE,  
LODGE NO. 16,

Petitioner,

-and-

POLICE BENEVOLENT ASSOCIATION  
LOCAL NO. 9,

Intervenor.

**SYNOPSIS**

The Director of Representation severs sergeants from a unit that included sergeants and all patrol officers. The Director finds that sergeants should be separated from the existing unit, given the inherent conflict of interest created by their inclusion, and orders an election to determine if sergeants wish to be represented by the Fraternal Order of Police, Lodge No. 16, Police Benevolent Association Local No 9, or no representative.

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Appearances:

For the Public Employer,  
Wiss & Bouregy, PC, attorneys  
(Raymond R. Wiss, of counsel)

For the Petitioner,  
Markowitz & Richman, attorneys  
(Matthew D. Areman, of counsel)

For the Intervenor,  
Loccke, Correia & Bukosky, attorneys  
(Corey M. Sargeant, of counsel)

**DECISION**

On May 20, 2016, Fraternal Order of Police, Lodge No. 16 ("FOP") filed a representation petition seeking to represent police sergeants employed by the City of Hackensack ("City"). The eighteen (18) sergeants employed by the City are currently

represented by Police Benevolent Association Local No. 9 ("PBA") in a collective negotiations unit which also includes all patrol officers. The PBA intervened in this matter pursuant to its collective negotiations agreement with the City. N.J.A.C. 19:11-2.7.

The PBA opposes the petition and will not consent to an election. It maintains that a community of interest exists among all unit employees and that it has fairly represented the petitioned-for employees. Furthermore, the PBA asserts that the sergeants are not supervisors within the meaning of the Act because they do not have traditional supervisory duties or powers. The PBA also asserts that no conflict of interest exists between the sergeants and rank and file officers.

The City takes no position on the petition or an election.

On June 2, 2016, PBA intervened in the petition, as it is the currently certified representative of the employees sought in the petition. N.J.A.C. 19:11-2.7(b). The PBA seeks to represent the petitioned for sergeants in the event that a separate unit is declared appropriate.

The parties participated in an investigatory conference on June 10, 2016, and later submitted position statements on June 24, 2016, and reply statements on June 29, 2016. We have conducted an administrative investigation of the facts regarding the petition. No disputed substantial material facts require the

convening of an evidentiary hearing. N.J.A.C. 19:11-2.6. Based upon our administrative investigation, I find the following facts:

**FINDINGS OF FACT**

The City and the PBA have signed multiple collective negotiations agreements, the most recent of which extended from January 1, 2013, through December 31, 2015. The recognition clause of the agreement specifies that the PBA is the majority representative of all police officers, detectives, sergeants and detective sergeants of the City of Hackensack Police Department, excluding the chief of police, deputy chiefs, inspectors, captains and lieutenants. The parties acknowledge that the PBA and the City have had a negotiations relationship for more than forty (40) years.<sup>1/</sup>

The City's police department consists of approximately 114 police personnel. A chief of police supervises two (2) deputy chiefs, three (3) captains, seven (7) lieutenants, 18 sergeants,

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<sup>1/</sup> On August 12, 2013, we severed captains and lieutenants from the historic wall to wall unit when we issued a Certification of Representative for Hackensack FOP Lodge 16 for the following unit: "all lieutenants and captains employed by the City of Hackensack". Among other excluded categories of employees were "chief, deputy chiefs, inspectors, [and] sergeants". City of Hackensack, D.R. No. 2013-14, 40 NJPER 87 (¶33 2013). In that matter, the PBA took the position that if captains and lieutenants were severed, sergeants should also be severed. We declined to sever the sergeants at that time because sergeants were not included in the FOP's petition. Id.

and approximately 83 patrol officers. The department has seven divisions: criminal identification, detective, narcotics, patrol, traffic, juvenile and internal affairs. A captain heads each division, with the exception of the juvenile and internal affairs divisions, which are headed by a lieutenant.

In support of its petition, FOP submitted the Certification of City of Hackensack Sergeant Walter Peterson. Sergeant Peterson's Certification included as an attachment a copy of the New Jersey Civil Service Commission's Job Specification 02739 for police sergeants, which states that the duties and responsibilities of police sergeants include, but are not limited to, being "in charge of police activities," and taking "appropriate action to assure . . . that police officers are doing their work properly." The job specification also requires that police sergeants must have the "[a]bility to organize police work during an assigned tour of duty, . . . and develop effective work methods and procedures," as well as the "[a]bility to give suitable assignments and instructions to the police officers on duty . . . , provide them with advice and assistance when difficult and unusual situations arise, and check their work to see that proper procedures are followed, that reasonable standards of workmanship, conduct, and output are maintained, and that desired police objectives are achieved."

Sergeant Peterson also certifies that as part of his duties as a police sergeant, he and the other sergeants regularly perform the following duties: "[e]valuate the job performance of officers in his/her squad (approximately 5-6 officers) on a regular basis;" "[e]valuate new police officers to determine whether they are equipped to 'graduate' from the FTO (Field Training Officer) program;" "[f]ile charges and investigate allegations concerning police officer misconduct, substandard performance or other violations of internal rules and regulations;" "[r]ecommend discipline for police officers, when appropriate;" "[m]aintain responsibility for entering information in the 'Guardian Tracking' system for Police Officers under their charge for purposes of performance tracking and early intervention;" "[s]erve as tour commander (the highest supervisory employee within a divisional component) in the absence of a Lieutenant," and "the Senior Sergeant on [Sergeant Peterson's] platoon is the tour commander on a daily basis;" and "[p]erform other duties of a 'frontline' supervisor, including but not limited to ensuring Police Officers meet the uniform standards of the department; monitoring work performance of Police Officers; and ensuring schedules are filled." Sergeant Peterson also certifies that "[s]ergeants sometimes perform duties that closely resemble those of Police Officers, though they are also responsible for immediate supervision of the

Officers," and it is for this reason that "[s]ergeants are commonly considered 'frontline' supervisors."

Sergeant Peterson further certifies that sergeants, "as the immediate supervisors of Police Officers, serve as the 'Step 1' . . . under the negotiated grievance procedure" contained in the most recent collective negotiations agreement. Also, Sergeant Peterson certifies that "[u]nder Section 3:1.13 of the Hackensack Police Rules and Regulations, Sergeants are to be saluted by Police Officers."

In opposition to the petition, PBA submitted the Certification of PBA President and Hackensack Police Officer Frank Cavallo. Officer Cavallo certifies that the City of Hackensack Police Department "operates in a para-military fashion, relying on the chain of command to operate its day to day business." Officer Cavallo also certifies that "[s]ergeants serve under the supervision of a Police Lieutenant during an assigned tour of duty and are in charge of police activities intended to provide assistance and protection for persons, safeguard property, and insure observance of laws." Officer Cavallo certifies that within the Hackensack Police Department, "conflict of interest between Sergeants and rank and file personnel is de minimis in nature," that "[t]here is an existing community of interest between Patrol Officers and Sergeants," and that sergeants "certainly do not have the traditional supervisory

duties or powers to fire, hire, promote or demote," without providing any factual detail in support of these statements. Officer Cavallo also certifies that sergeants "have a minimal disciplinary role that is basically witness in nature, the same as any other officer in the Department," and that sergeants "do not possess nor exercise any significant power or responsibilities over Patrol Officers." No additional facts in support of these statements are provided.

In City of Hackensack, D.R. No. 2013-14, 40 NJPER 87 (¶33 2013), FOP filed a representation petition seeking to sever police lieutenants and captains from the existing wall to wall unit, represented by PBA. In that matter, PBA took the position that if captains and lieutenants were severed from the existing unit, sergeants should also be severed. We declined to sever the sergeants at that time because sergeants were not petitioned for by the FOP at that time.<sup>2/</sup> Id.

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<sup>2/</sup> FOP notes in its reply brief that, in support of its opposition to FOP's 2013 petition, PBA submitted the Certification of John Herrmann, who was the President of the PBA and a police officer for the City of Hackensack Police Department at that time. In that certification, Officer Herrmann certified that sergeants should be severed from the historic wall to wall unit for a variety of reasons. We do not consider the 2013 Herrmann Certification because the facts therein might not be an accurate recitation of the current duties of the sergeants.



ANALYSIS

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

except where established practice, prior agreement or special circumstances dictate the contrary, . . . any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, [shall not] have the right to be represented in collective negotiations by an employee organization that admits non-supervisor personnel to membership . . . .

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

In Town of West New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1987), the Commission reaffirmed its long line of cases holding that we will ordinarily find a conflict of interest between superior officers and rank-and-file officers in a police department. In Union City, P.E.R.C. No. 70, NJPER Supp. 295, 297 (¶70 1972), cited in West New York, the Commission explained:

It is readily observable that the military-like approach to organization and administration and the nature of the service provided (which presumably accounts for that approach) set municipal police and fire departments apart from other governmental services. Normally there exist traditions of discipline, regimentation and ritual, and conspicuous reliance on a chain of command all of which tend to accentuate and reinforce

the presence of superior-subordinate relationships to a degree not expected to be found in other governmental units and which exist quite apart from the exercise of specific formal authorities vested at various levels of the organization. When the Commission is asked to draw the boundaries of common interest in this class of cases, it cannot ignore this background as it examines for evidence of whether or not a superior exercises any significant authority over a rank and file subordinate which would or could create a conflict of interest between the two. In our view, where these considerations are real rather than merely apparent, it would be difficult indeed to conclude, in contested cases, that a community of interest exists between the lowest ranking subordinate and his superior, absent exceptional circumstances. We do not intend that this observation extend to those cases where the points of division are so few and so insignificant as to be termed de minimis, such as might not unreasonably be expected to exist in a small police or fire department. We are persuaded, however, after almost four years experience with this statute that unless a de minimis situation is clearly established, the distinction between superior officers and the rank and file should be recognized in unit determination by not including the two groups in the same unit. [Union City at 350.]

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

. . . except in very small departments where any conflict of interest between superior officers and rank and file personnel is de minimis in nature, the quasi-military structure of police departments virtually compels that superior officers and patrolmen be placed in separate units. This is so inasmuch as the exercise of significant

authority in a chain of command operation produces an inherent conflict of interest within the New Jersey Supreme Court's definition of that concept in Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 (1971). The existence of an inherent conflict of interest in these circumstances must lead to a determination that separates superior officers from rank and file notwithstanding a previous history of collective negotiations in a combined unit. Moreover, the finding of such conflict is not contingent upon a finding that the superior officers are supervisors within the meaning of N.J.S.A. 34:13A-5.3. [Id. at 349.]

\* \* \*

Accordingly, in cases involving police department units, superior officers will normally be severed from rank and file personnel unless it is shown that there is an exceptional circumstance dictating a different result. Examples of such are the following: (1) A department in which there is a very small force where superior officers perform virtually the same duties as patrolmen, and where any conflict of interest is de minimis in nature; (2) Where it is determined that superior officers are supervisors, the existence of established practice, prior agreement or special circumstances dictate the continued inclusion of superior officers in a unit of rank and file personnel. [Emphasis added; footnotes omitted. Id. at 350.]

In West New York, the Commission ordered that superior officers be removed from the unit based upon the potential for a conflict of interest with rank and file officers, despite a history of a long relationship in one combined unit, and notwithstanding that the employer did not assert that an actual conflict existed. The Commission removed the superiors even in

the absence of direct evidence of actual conflict - - "where a superior officer was actually torn between his divided loyalties to his employer and his unit, thus damaging the public interest" - - finding that such a standard, i.e., actual conflict, is "too exacting and is inconsistent with West Paterson, especially when public safety employees are involved." West New York at 13 NJPER 279 (citing West Paterson Bd. of Ed., P.E.R.C. No. 77, NJPER Supp. 333 (¶77 1973)). The Commission wrote:

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

We presume that in police departments, an inherent potential conflict of interest exists between police superior officers and rank-and-file police officers. The presumption is not dependent upon a finding of the supervisory status of superiors or upon the presence of actual conflict among the groups. An exception may be found in small units if the duties and authority of superiors and rank-and-file are virtually identical so that any potential for conflict between the ranks is de minimis. See Town of Harrison, P.E.R.C. No. 93-104, 19 NJPER 268 (¶24134 1993), affirming H.O. No. 93-1, 19 NJPER 39 (¶24018 1992). This situation is normally found in a very small police force, where the lines of demarcation between ranks is slight. See Pine

Valley Borough, D.R. No. 99-15, 25 NJPER 269 (¶30114 1999)(unit of three (3) patrolmen and one (1) sergeant appropriate where sergeant is not a statutory supervisor and performs the same duties as patrolmen); Township of Greenwich, D.R. No. 99-7, 25 NJPER 61 (¶30023 1998) (small force exception applied where all ranks of small department have interchangeable responsibilities); Borough of Audubon Park, D.R. No. 88-6, 13 NJPER 741 (¶18278 1987) (small force exception applied to unit of one (1) sergeant and two (2) patrolmen); Borough of Merchantville, D.R. No. 80-38, 6 NJPER 305 (¶11147 1980) (unit appropriate where sergeant has no greater authority than patrol officers in ten (10) member department).

In this case, I find that the sergeants should be separated from the existing unit. Impermissible potential conflicts of interest exist between the sergeants and the rank-and-file members. The New Jersey Civil Service Commission's Job Specification 02739 for police sergeants, as well as the Certification of Sergeant Peterson, detail the numerous duties and responsibilities of police sergeants which involve the supervision of rank-and-file police officers, including the authority to direct assignments, discipline, and serve as the 'Step 1' official under the negotiated grievance procedure contained in the most recent collective negotiations agreement. In contrast, the Certification of Officer Cavallo supplied by the

PBA provided only conclusory statements in support of PBA's position that police sergeants do not supervise or evaluate police officers.

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

The facts of this matter do not meet the small force exception; the Hackensack Police Department has approximately 114 police personnel, sergeants have authority to discipline and evaluate, and are responsible to exercise of supervisory authority over subordinate officers.

No special circumstances support the continuation of the historic unit. Although the parties have a long history of a combined unit of sergeants with rank and file police officers, that history does not overcome the potential conflict or harm to

the public interest. West New York, 13 NJPER 277 (¶18115 1987) ; see also Woodbridge Tp., 22 NJPER 216 (¶27116 1996).

Given the conflict of interest created by the inclusion of sergeants with the rank-and-file, I find that the petitioned-for unit is the most appropriate unit for collective negotiations of sergeants. Accordingly, I direct an election among employees in the following appropriate unit:

**Included:** All regularly employed police sergeants employed by the City of Hackensack.

**Excluded:** Managerial executives, confidential employees, non-supervisory employees within the meaning of the Act; professional, craft and casual employees, chief, deputy chiefs, inspectors, captains, lieutenants, and all other employees employed by the City of Hackensack.

Sergeants will vote on whether they wish to be represented by Fraternal Order of Police, Lodge No. 16, PBA Local No. 9, or no representative.

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

Pursuant to N.J.A.C. 19:11-10.1, the public employer is directed to file with us an eligibility list consisting of an alphabetical listing of the names of all eligible voters in the units, together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by us no later than ten (10) days prior to the date on which the ballots are scheduled to be mailed. A copy of the eligibility list shall be simultaneously provided to the employee organizations with a statement of service filed with us. We shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances. The exclusive representative, if any, shall be determined by a majority of the valid votes cast in the election. The election shall be conducted in accordance with the Commission's rules.

The parties may be provided an opportunity to agree upon dates of the mail ballot election and designations on the ballot, within the time period set by this decision, subject to my approval. The assigned staff agent will convene a telephone conference call among the parties for this purpose. In the absence of an agreement among the parties, I shall determine the dates of the mail ballot election, the time and place of the counting of the ballots, and the designations on the ballot.

N.J.A.C. 19:11-5.1.



BY ORDER OF THE DIRECTOR  
OF REPRESENTATION

/s/ Gayl R. Mazuco  
Gayl R. Mazuco, Esq.  
Director of Representation

DATED: October 12, 2016  
Trenton, New Jersey

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

**Any request for review is due by October 24, 2016.**