

D.R. NO. 2017-13

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

In the Matter of

SUSSEX COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. CU-2017-018

POLICE BENEVOLENT ASSOCIATION,  
LOCAL 378,

Employee Representative.

**SYNOPSIS**

The Director of Representation clarifies an existing unit of corrections officers in the County of Sussex, Office of the Sheriff, Bureau of Prisons to exclude captains, lieutenants and sergeants. The Director found that: (a) superior officers are supervisors within the meaning of the Act; (b) that there is an inherent conflict of interest between superior officers and rank-and-file corrections officers, thereby necessitating their removal from the unit; and, (c) the authority exercised by superior officers, even if actual conflicts of interest do not now exist potential, substantial conflicts of interest are likely to be generated by the inclusion of superior officers and rank and file corrections officers in the same negotiations unit. Moreover, the Director found insufficient evidence to warrant either application of the small-unit exception or should the PBA claim that special circumstances exist that would support continuation of Local 378 as a historic unit.

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Appearances:

For the Petitioner  
Trimboli and Prusinowski, LLC, attorneys  
(James T. Prusinowski, of counsel)

For the Employee Representative  
Mets Schiro McGovern and Paris, LLP, attorneys  
(James M. Mets, of counsel)

**DECISION**

On January 12, 2017, the Sussex County Sheriff's Office (County or Sheriff's Office) filed a Clarification of Unit Petition (petition). The petition seeks clarification of a collective negotiations unit of rank-and-file corrections officers and superior officers represented by the Police Benevolent Association, Local 378 (PBA).<sup>1/</sup>

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<sup>1/</sup> We note that the within petition and the parties' collective negotiations agreement state that the majority  
(continued...)

The County asserts that the titles of captain, lieutenant and sergeant (collectively, referred to as superior officers) should be removed from the PBA's unit because they are supervisors and their inclusion in the PBA's unit generates an impermissible conflict of interest under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

Specifically, the County claims that superior officers supervise the rank-and-file officers, including oversight of their work schedules, performance, evaluations and disciplinary action. In support of the within petition, the County submitted certifications with exhibits of Mark Farsi, Warden of the Bureau of Corrections within the Sussex County Sheriff's Office, who manages the Koegh Dwyer Correctional Facility, and James Prusinowski, Petitioner's counsel.

The PBA opposes the County's petition and asserts that superior officers have limited authority and may make only preliminary decisions over minor matters concerning the rank-and-file corrections officers which do not warrant the exclusion of superior officers from the current unit. Moreover, the PBA argues there is no conflict between superior officers and the rank and file officers because final, decision-making authority

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1/ (...continued)  
representative is the "Police Benevolent Association Local 378." However, the parties at varying times refer to the majority representative as the "Policemen's Benevolent Association Local 378." (emphasis added)

on hiring, promotion, scheduling and discipline rests solely with the Warden.

The PBA submitted identical certifications by three sergeants and a similar certification by one lieutenant. Certifications by Sergeants David Hameier, Kelly Mizerde and William Nicolaro recited descriptions of their duties and responsibilities, the gravamen of which is their limited authority regarding discipline, salary adjustments, employee evaluations, shift assignments, and hiring. (Hameier, Mizerde and Nicolaro Cert., respectively; collectively referred to as the Certifying Sergeants). Additionally, the certification of Lieutenant Allan O'Gorman substantively mirrors the described certifications from the sergeants. (O'Gorman Cert.)

We have conducted an administrative investigation to determine the facts. N.J.S.A. 19:11-2.2. The parties attended an investigatory conference on March 3, 2017. On March 16, 2017, we sent a letter to both the PBA and the County requesting information in support of their respective positions. On May 12, 2017, the parties submitted statements of position and supporting briefs. No disputed substantial material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.6. I find the following facts:

The first collective negotiations agreement (CNA) between the County and PBA covered the term of 2004 to 2006. (Farsi

Cert., ¶ 4) The most recent CNA between the parties expired on December 31, 2016. (Prusinowski Cert., Ex. 12). The recognition clause in the parties' CNA states that the unit consists of all corrections officers including sergeants, lieutenants and captains. (Id.)

The current PBA unit has approximately eighty (80) corrections officers, including seventeen (17) superior officers consisting of one (1) captain, four (4) lieutenants, and twelve (12) sergeants. (Farsi cert., ¶ 5) The Sheriff's Office is a Civil Service employer, subject to the job descriptions promulgated by the Civil Service Commission (CSC). (Prusinowski Cert., Exhibits 3, 4 and 5; Farsi Cert., ¶ 18).

According to the County, the superior officers are "the first line of authority" and are primarily responsible to oversee the rank-and-file corrections officers and ensure the proper performance of their assigned duties. (Farsi Cert., ¶ 7). Lieutenants, or sergeants in the absence of the lieutenant, act as shift commanders (Id.). A shift commander has authority to "request additional manpower, grant personal/emergency leave time . . . and establish operational break relief and post rotation sequences." (Farsi Cert., ¶ 14). Superior officers are "tasked with assigning officers to their specific tours and assignments each day." (Farsi Cert., ¶ 8). They also have some discretion and authority regarding work schedules. (Farsi Cert., ¶ 9). The

County acknowledges that the sergeants do not determine dates when corrections officers report, but they are involved in the yearly scheduling of benefit leave time, and may "independently approve individual days" of leave time, as can captains and lieutenants. (Farsi Cert., ¶ 10, 11, 15). According to the County, a corrections officer, who is also the PBA president, was recently denied union leave time by a Captain. (Farsi Cert., ¶ 17). Corrections officers are required to both notify and obtain approval from "superior officers" for absences. (Farsi Cert., ¶ 16). In addition, "a sergeant acting as an Administrative Scheduling Unit Supervisor is responsible for establishing a staffing analysis, providing guidance regarding shift operating numbers and assuring that fixed security positions, as well as specialized posts are scheduled in an efficient manner. He is also responsible for determining an evenly distributed regular day off schedule for each shift and unit, coordinating shift transfers, shift assignments, training date notifications and any temporary shift transfers to cover manpower shortages. Each Sergeant acting as a Shift Supervisor is responsible for composing the daily shift assignments in conjunction with the Shift Commander." (Farsi Cert., P 12, 13).

The PBA asserts that sergeants have "limited, preliminary authority" to make decisions regarding scheduling, and that all "decisions are reviewed for final approval by the Warden's

office." (Certifying sergeants, ¶ 3; O'Gorman Cert., ¶ 3). In addition, the PBA certifications state that sergeants and lieutenants have "limited, formal authority to preliminarily approve requests for time off," with all decisions subject to approval by the Warden's office. (Certifying sergeants, ¶ 9; O'Gorman Cert., ¶ 8).

The County is a civil service jurisdiction, subject to CSC regulations regarding the hiring and promotion of officers which limit discretion or individual input with respect to those decisions. (Farsi Cert., ¶ 18). However, the process permits superior officers to have a role in the hiring and promotion of officers. (Farsi Cert., ¶ 19). The Training Division, overseen by an Administrative Sergeant, conducts background investigations, home interviews, and reviews of recommendations. (Farsi Cert., ¶ 19; Prusinowski Cert., Ex. 6 and 7). According to the County, superior officers make non-binding written recommendations for hiring and promotions. (Farsi Cert., ¶ 21-23; Prusinowski Cert., Ex. 7).

The certifications submitted by the sergeants and the lieutenant each state that they "play no part in the hiring process." Specifically, they certify that they do not complete any documents, render recommendations or assessments, nor conduct

employment interviews. (Certifying sergeants, ¶ 4; O'Gorman Cert., ¶ 4).<sup>2/</sup>

Superior officers can recommend disciplinary action against a corrections officer. (Farsi Cert., ¶ 25). Sergeants have authority to impose verbal or written reprimands, counseling and training notices "without approval from a higher ranking officer" subject to review by "the proper chain of command." (Id. at 26).

Internal Affairs investigations may be initiated upon the "request and recommendation" of a superior officer. (Farsi Cert., ¶ 27). However, all disciplinary action is reviewed through the chain of command. (Id. at 26). Superior officers may also be required to testify or provide information in support of a charge against an officer. (Id., ¶ 30).

The sergeants and the lieutenant certify that they have "limited, preliminary authority to make on-the-ground decisions concerning discipline." (Certifying sergeants, ¶ 6; O'Gorman Cert., ¶ 6). However, according to the PBA, "in practice superior officers do not generally make on-the-ground decisions concerning discipline," but rather, "submit a report to Internal Affairs, which investigates the matter and recommends a punishment." (Certifying sergeants, ¶ 7; O'Gorman Cert., ¶ 6).

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<sup>2/</sup> There is a clear factual dispute between the County and PBA as to the superior officer's role in hiring and promotion. Assuming, arguendo, that this factual difference was resolved in favor of the PBA, it would have no substantive bearing on the outcome of this decision.



Lt. O'Gorman acknowledges he is "authorized to give verbal reprimands and order counseling." (O'Gorman Cert., ¶ 6). Final disciplinary authority rests with the Sheriff. (Farsi Cert., ¶ 26 - 28; Certifying sergeants, ¶5; O'Gorman Cert., ¶ 8).

Pursuant to the grievance procedure set forth in the parties' CNA, grievances must first be submitted to the individual's immediate supervisor. (Farsi Cert., ¶ 32). The CNA provides that the "supervisor shall attempt to adjust the matter and shall respond in writing to the aggrieved employee and the Association representative. . ." (Prusinowski Cert., ¶ 14, Ex. 12).

Each sergeant is required to "make rounds" during their shift and "check in on" 8 to 15 corrections officers, 2-3 rounds per shift. (Certifying sergeants, ¶ 8). Lt. O'Gorman certifies that he "supervise[s] the sergeants immediately below me. There are approximately 2-3 sergeants per shift." (O'Gorman Cert., ¶ 10).

Corrections officers must notify their superior officers regarding any questions or issues pertaining to performance of their duties. (Farsi Cert., ¶ 8). In turn, the superior officers are required to provide guidance. (Id.)

All rank and file officers and superior officers are evaluated annually (Farsi Cert., ¶ 33). Sergeants evaluate corrections officers, lieutenants evaluate sergeants, and

captains evaluate lieutenants. (Farsi Cert., ¶ 34-37; Certifying sergeants Certs., ¶ 11; O'Gorman Cert., ¶ 11-13). Evaluations include review of appearance, attendance, and job performance.

Id. In addition to yearly evaluations, sergeants and lieutenants write shorter, more informal evaluations periodically throughout the year. (Certifying sergeants, ¶ 12; O'Gorman Cert., ¶ 11-12).

Corrections officers' annual evaluations can result in an award, discipline, counseling or retraining. (Farsi Cert., ¶ 37). Superior officers are required to complete specific evaluation forms as part of the annual evaluation process.

(Prusinowski Cert., ¶ 15, Ex. 13)

#### ANALYSIS

Our Act provides in pertinent part:

. . . 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-supervisory personnel to membership.  
[N.J.S.A. 34:13A-5.3]

In West Orange Bd. of Ed. v. Wilton, 57 N.J. 404, 425-427 (1971), the N.J. 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 subordinates and the personnel exercising power over them.

In Town of West New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1987), the Commission reaffirmed its well-settled policy that we will ordinarily find a conflict of interest between superior officers and rank-and-file officers in a police department. The Commission further explained the rationale for its analysis, citing with approval South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977), in which the Director of Representation found:

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

The Commission then 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 long history of a relationship in a combined unit, and notwithstanding that the employer did not assert that an actual conflict existed. The Commission removed the superiors in the absence of direct evidence of actual conflict because superior officers could

potentially be torn between divided loyalties to their employer and their unit. This conflict, the Commission concluded, damages the public interest. Id. at 279.

Based upon these cases, we presume that in police departments and other paramilitary organizations, an inherent potential conflict of interest exists between superior and rank-and-file officers. The presumption is not dependent upon a finding that a superior officer is a statutory supervisor. City of Hackensack, D.R. No. 2013-14, 40 NJPER 87, 89 (¶33 2013).

An exception may be found in small units if the duties and authority of superiors and rank-and-file officers 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 37 (¶24018 1992). The facts establish that the size of the County's Sheriff's office unit precludes application of the small force exception.

Additionally, no special circumstances exist which would support continuation of the current PBA unit as a historic unit. West New York. See also Woodbridge Tp., D.R. No. 96-19, 22 NJPER 216 (¶27116, 1996) (severance of superior officers appropriate despite 26 year negotiation history in the unit of 200 sworn police personnel where exercise of authority to discipline or

direct assignments of rank-and-file created intolerable conflict of interest).

The facts establish numerous instances wherein superior officers exercise supervisory authority over corrections officers with respect to scheduling, performance, hiring, discipline, grievances and evaluations. The primary responsibility of superior officers is to oversee the corrections officers to ensure they are properly performing their assigned duties. (Farsi Cert., ¶ 7). Superior officers are the first line of inquiry for problems raised by corrections officers and must provide them with guidance (Id., and ¶ 7-8).

Superior officers, particularly the Shift Commander and Unit Supervisor, are tasked with extensive administrative responsibilities regarding the corrections officers, including the assignment of specific work details and tours, obtaining additional manpower to ensure adequate staffing of the jail, and authorizing benefit leave time. (Farsi Cert., ¶ 11-12, 13-16).

The superior officers have somewhat limited authority over scheduling, including preliminary approval of time off.

(Certifying sergeant, ¶3 & 9; O'Gorman Cert., ¶ 3 and 8).

Superior officers can recommend disciplinary action and have discretionary authority to issue reprimands or counseling notices. (Farsi Cert., ¶ 25; O'Gorman Cert., ¶ 6). Step One of the parties' grievance procedure requires superior officers to

receive grievances, attempt to resolve them and respond in writing to the corrections officers and the PBA. (Prusinowski Cert., ¶ 15, Ex. 13).

Further, superior officers have a significant role in performing annual employee evaluations, as well as periodic evaluations throughout the year. (*Id.* at ¶ 33-38, 19-23; O'Gorman Cert., ¶ 10-13; Certifying Sergeants, at ¶ 11-12).

These facts are clear indicia of the type of supervisory authority that creates, minimally, a substantial, potential conflict of interest between the corrections officers and the superior officers. West New York.

The PBA asserts that the within petition should be dismissed because the County failed to raise a timely argument that the superior officers lacked a "community of interest" with non-supervisory officers. Local 378 claims that if a conflict existed between superior and corrections officers, it should have been raised during the approximately thirteen (13) years since Local 378 was formed.

Such assertions are unpersuasive in view of well settled precedent that the conflict of interest between supervisors and their subordinates negates the community of interest those groups might otherwise share. Wilton, supra, 57 N.J. at 407 (1971).

The County suggests that PERC may elect to create three separate units: corrections officers, sergeants, lieutenant, and

captains. That issue is not before us. The petition seeks the severance of sergeants, lieutenants and captains from the existing unit. Based upon the record before me, I find no facts that would favor creation of a separate unit for each rank.

I find that the continued inclusion of superior officers in a unit with rank-and-file officers creates an impermissible conflict of interest under the Act. Given the size of the unit, its para-military structure and the authority exercised by superior officers -- even if actual conflicts of interest do not now exist -- potential, substantial conflicts of interest are likely to be generated by the inclusion of superior officers and rank and file corrections officers in the same negotiations unit.

Since I have determined that superior officers should be removed from the PBA's unit based on an impermissible conflict of interest, I need not address whether the superior officers are statutory supervisors. Borough of Madison, D.R. No. 99-1, 24 NJPER 441, 444 (¶29203 1998) (Director declines to address whether sergeants are supervisors since evidence supported existence of an impermissible conflict).

Accordingly, I hereby remove sergeants, lieutenants and captains from PBA's unit.<sup>3/</sup>

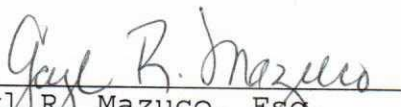
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<sup>3/</sup> Upon removal, the superior officers will be unrepresented unless or until a majority representative is recognized or certified.

ORDER

Effective immediately, the titles sergeant, lieutenant and captain are removed from PBA's unit.

Very truly yours,

  
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Gayl R. Mazuco, Esq.  
Director of Representation

DATED: May 31, 2017  
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 June 14, 2017.