

D.R. NO. 98-2

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

In the Matter of

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Public Employer,

-and-

Docket No. RO-97-88

FOP LODGE NO. 155,
SUPERIOR OFFICERS,

Petitioner.

SYNOPSIS

The Director orders an election among police sergeants to determine whether a majority wish representation by FOP Lodge 155, Police Superiors. The Director rejects the employer's argument that Lodge 155 is disqualified from representing police superiors because another FOP lodge represents the department's rank-and-file police officers. Further, the fact that both lodges have retained the same attorney is not evidence of a conflict of interest.

D.R. NO. 98-2

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

In the Matter of

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Public Employer,

-and-

Docket No. RO-97-88

FOP LODGE NO. 155,
SUPERIOR OFFICERS,

Petitioner.

Appearances:

For the Public Employer
Peter Verniero, Attorney General
(Ann Marie Kelly, Deputy Attorney General)

For the Petitioner
Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

DECISION AND DIRECTION OF ELECTION

On February 24, 1997, Fraternal Order of Police Lodge 155, Superior Officers, filed a timely Petition for Certification of Public Employee Representative with the Public Employment Relations Commission. Lodge 155 seeks to represent police sergeants employed by the University of Medicine and Dentistry at its various campuses. UMDNJ refuses to consent to an election. It argues that the FOP is not an appropriate organization to represent its police superiors, and that permitting their representation by any FOP affiliate would create a conflict of interest with its rank-and-file police unit.

We have conducted an administrative investigation into the petition and find the following facts. N.J.A.C. 19:11-2.6.

The UMDNJ police department employs 24 sergeants. The sergeants directly supervise 85 patrol officers and 70 security guards. FOP Lodge 74 has represented UMDNJ patrol officers since 1981.

The police sergeants have been represented in a separate negotiations unit by the UMDNJ Superior Officers Association, an independent organization, since April 30, 1991. The SOA contract covering this unit expired on June 30, 1995. The SOA has disclaimed further representation interest in this unit and supports the FOP petition.

Lodge 155 has submitted a certification guaranteeing that, if elected, it will be and act as a separate organization from any other organization which represents or may represent nonsupervisory employees employed by UMDNJ; that it, rather than the majority representative of any nonsupervisory organization, will control the negotiations and administration of collective negotiations agreements covering supervisory employees; and that Lodge 155 has no nonsupervisory members.

* * * *

UMDNJ argues that permitting the superiors to be represented by an FOP affiliate would engender a potential Wilton^{1/} conflict of interest between the sergeants and the

^{1/} West Orange Bd. of Ed. v. Wilton, 57 N.J. 404 (1971).

patrolmen because sergeants directly command, evaluate, discipline and direct the patrolmen.

Additionally, UMDNJ asserts that, under the Act, the FOP is an inappropriate organization to represent superior officers as it is also the representative of the rank-and-file police.

In support of its position, UMDNJ submitted affidavits from Labor Relations Director Howard Pripas and Labor Relations Manager Paul Garnett. The affidavits, which make the following factual assertions, have not been rebutted.

On April 1, 1997, FOP attorney Stephen Richman submitted a Lodge 74 grievance concerning the suspension and termination of a police officer to arbitration. Richman also represents FOP Lodge 155 in this petition.

In a 1995 grievance arbitration, a sergeant appealing his termination was represented by an attorney retained by the Superior Officers Association, the then majority representative of superiors. A second sergeant, called as an employer witness, testified that at the time of the incident, he solicited advice from a representative of the SOA attorney's firm about what to include in his incident report; based upon this advice, he omitted certain facts from his incident report. This law firm then withdrew its representation of the terminated sergeant.

UMDNJ asserts that the same type of conflict of interest could occur if FOP affiliates represent the rank-and-file police and also the sergeants. It asserts that the disciplinary process

will be tainted if both FOP lodges use the same attorney. It points out that the FOP attorney filing this petition also submitted an arbitration on behalf of Local 74. It asserts that such "dual representation in grievance proceedings" will have a chilling effect on grievance proceedings where, like the 1995 incident cited above, the attorney advised both the grievant facing discipline and the witness for the employer.^{2/}

* * * *

N.J.S.A. 34:13A-5.3 provides that except in unusual circumstances, supervisors are prohibited from representation by an organization that has nonsupervisory employees as members. In City of Camden, P.E.R.C. No. 82-89, 8 NJPER 226 (¶13094 1982), aff'g D.R. No. 82-25, 8 NJPER 11 (¶13005 1981), the Commission identified an organization's responsibility to create a separate organizational structure to represent supervisors. The Commission outlined specific requirements which a petitioning organization must meet in order to seek representation of supervisors; specifically, it must certify that if elected it will have no nonsupervisory members; that it will be a separate organization from any organization that represents or may represent nonsupervisory employees; and that it will control the negotiations and contract administration for the supervisors unit. The certification submitted by FOP Lodge 155 complies with the Camden requirements.

^{2/} Employer brief at page 3.

Once a petitioner satisfies the Camden requirements, the Commission presumes that the organization (and its representatives) will act within the confines of the law. The Commission will not speculate about post-certification conduct. Camden at 227. That policy has been approved by the New Jersey Courts. Hudson Cty., D.R. No. 84-21, 10 NJPER 293 (¶15144 1984), req. for rev. den., P.E.R.C. No. 84-131, 10 NJPER 320 (¶15153 1984), aff'd App. Div. Dkt. No. A-989-84T7 (11/15/85); Essex Cty. Voc-Tech. Bd. of Ed., D.R. No. 94-6, 19 NJPER 522 (¶24242 1993), req. for review den., P.E.R.C. No. 94-48, 19 NJPER 584 (¶24278 1993), aff'd 21 NJPER 63 (¶26045 App. Div. 1995), certif. den. 141 N.J. 96 (1995). See also, Ocean Cty College, D.R. No. 93-23, 19 NJPER 293 (¶24152 1993). Any allegations of improper conduct could later be tested through unfair practice proceedings. Camden; Hudson; Town of Kearny, P.E.R.C. No. 81-137, 7 NJPER 345 (¶12155 1981).

No facts presented here show that a different result is required. UMDNJ contends that the Commission's earlier cases address the potential for conflict or supervisory domination only in the negotiations context. It argues that the FOP's assurances of separation provide no safeguards for the grievance process.

First, UMDNJ's argument that permitting representation by an FOP affiliate might lead to Wilton conflicts of interest seems misplaced. In West Orange Bd. of Ed. v. Wilton, 57 N.J. 404 (1971), the Court found that the inclusion of supervisors in the

same unit as employees they evaluate and supervise would pose an impermissible conflict of interest. But the FOP does not seek to consolidate units so that sergeants and patrolmen would be in the same negotiations unit. It seeks to maintain a separate unit for superiors. It seeks certification by a separate lodge to represent the superiors.

Second, as discussed above, once a petitioner is structurally qualified to represent a unit of supervisors, we will not speculate about whether it might later act inappropriately; rather, we will presume the organization and its representatives will comply with the requirements of the Act.

If elected in this representation process, Local 155 will negotiate and administer the collective agreement, including the handling of grievances and disciplinary hearings, just as Local 74 must do for rank-and-file police officers. In that context, the majority representative represents the employee/grievant, not the supervisor acting on the employer's behalf. In that context, the supervisor has no contractual rights being enforced -- he is merely a witness for the employer. In CWA and McDevitt, D.U.P. No. 94-24, 20 NJPER 114 (¶25058 1994), I found that the union had no duty to represent a supervisor who was acting as a witness in a hearing regarding a grievance filed by a subordinate. If the supervisor is later disciplined because of facts arising out of the grievance process, the supervisor's majority representative would then have an obligation to represent him in any appeal of the discipline.

Further, an employer may insist that its supervisor fulfill the obligations of his or her position -- to supervise subordinates. Whenever a supervisor's loyalties -- either organizational allegiances or personal ties -- impinge on the supervisor's willingness to perform those duties, the employer has a remedy at hand -- it may discipline the supervisor for nonperformance of duty. Moreover, the example proffered by the employer involved two employees in the same bargaining unit, and therefore, is not relevant to the matter here.

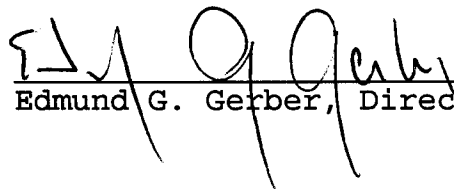
I find that UMDNJ has not proffered anything which would persuade me to alter Commission precedent. I find that FOP Lodge 155 is qualified to seek certification of this unit. Any allegation that an employee representative is violating the Act may be pursued in an unfair practice context, if such conduct were to occur. Kearny.

The election shall be conducted by mail ballot 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 the 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 of the election. A copy of the eligibility list shall be simultaneously provided to the employee organization 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.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Edmund G. Gerber, Director

DATED: July 7, 1997
Trenton, New Jersey