

P.E.R.C. NO. 92-116

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. RO-H-91-169

NEWARK FIRE DEPARTMENT DEPUTY
CHIEFS ASSOCIATION,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission determines that deputy fire chiefs employed by the City of Newark are neither managerial executives nor confidential employees. The Commission orders the Director of Representation to conduct an election among the deputy fire chiefs to determine whether they wish to be represented for purposes of collective negotiations by the Newark Fire Department Deputy Chiefs Association.

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Petitioner.

Appearances:

For the Respondent, Oliver Cato, Assistant Corporation
Counsel

For the Petitioner, Loccke & Correia, attorneys
(Manual A. Correia, of counsel)

DECISION AND ORDER

On April 18, 1991, the Newark Fire Department Deputy Chiefs Association filed a petition seeking to represent a unit of all deputy chiefs employed by the fire department of the City of Newark. The City opposed the petition and refused to consent to a secret ballot election.

On October 23, 1981, the Director of Representation found that the deputy chiefs were managerial executives and removed them from the supervisory unit represented by the Professional Fire Officers Association, Local 1860, IAFF, AFL-CIO. City of Newark, D.R. No. 82-18, 7 NJPER 640 (¶12288 1981). In the new petition, the Association contended that changed circumstances within the department warranted reconsideration of this issue. The City

maintained that the deputy chiefs remain managerial executives or are confidential employees and that the Director's original determination is still valid.

On June 3, 1991, the Director of Representation determined that substantial and material disputed factual issues warranted an evidentiary hearing. On July 9 and 10, 1991, Hearing Officer Elizabeth J. McGoldrick conducted a hearing. The parties examined witnesses and introduced exhibits. Both parties filed post-hearing briefs and the Association filed a reply by December 2, 1991.

On March 18, 1992, the Hearing Officer recommended finding that the deputy chiefs are neither managerial executives nor confidential employees within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. H.O. No. 92-2, 18 NJPER ____ (¶ ____ 1992). She further recommended that a representation election be ordered among the deputy chiefs.

The Hearing Officer served her decision on the parties and informed them that exceptions were due March 31, 1992. The City requested an extension of time until April 10, 1992 to file exceptions, but no exceptions have been filed.

Pursuant to N.J.A.C. 19:11-8.8, we transfer this case to ourselves. We have reviewed the record. We adopt and incorporate the Hearing Officer's undisputed findings of fact (H.O. at 2-16). Based on those facts, we adopt her finding that the deputy fire chiefs are neither managerial executives nor confidential employees within the meaning of the Act. See N.J.S.A. 34:13A-3(f) and (g).

Accordingly, we remand this matter to the Director of Representation to direct an election among the deputy fire chiefs to determine whether they wish to be represented for purposes of collective negotiations by the Newark Fire Department Deputy Chiefs Association.

ORDER

The deputy fire chiefs employed by the City of Newark are neither managerial executives nor confidential employees. The Director of Representation shall conduct an election consistent with this opinion.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: May 15, 1992
Trenton, New Jersey
ISSUED: May 18, 1992

H.O. NO. 92-2

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

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. RO-91-169

NEWARK FIRE DEPARTMENT DEPUTY
CHIEFS ASSOCIATION,

Petitioner.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission recommends that a negotiations unit composed of Deputy Chiefs employed by the City of Newark is appropriate and an election should be conducted to determine the majority representative, if any, of these employees. The Hearing Officer recommends that the deputy chiefs are neither managerial executives nor confidential employees within the meaning of the Act and therefore are eligible for representation.

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. 92-2

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

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. RO-91-169

NEWARK FIRE DEPARTMENT DEPUTY
CHIEFS ASSOCIATION,

Petitioner.

Appearances:

For the Respondent,
Oliver Cato, Assistant Corporation Counsel

For the Petitioner,
Loccke & Correia, attorneys
(Manual A. Correia, of counsel)

HEARING OFFICER'S RECOMMENDED
REPORT AND DECISION

On April 18, 1991, the Newark Fire Department Deputy Chiefs Association ("Association") filed a timely Representation Petition with the Public Employment Relations Commission ("Commission"), seeking to represent a unit of all deputy chiefs employed by the Fire Department of the City of Newark ("City"). The City opposes the petition and refuses to consent to a secret ballot election.

In a case decided October 23, 1981, the Director of Representation adopted a Hearing Officer's recommendation that

deputy chiefs in the Newark Fire Department were managerial executives within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), and removed them from the supervisory unit represented by the Professional Fire Officers Association, Local 1860, IAFF, AFL-CIO. City of Newark, D.R. No. 82-18, 7 NJPER 481 (¶12213 1981).

In the current petition, the Association contends that changed circumstances within the Fire Department warrant reconsideration of this issue. The City maintains that the deputy chiefs remain managerial executives or are confidential employees and that the Director's original determination is still valid.

On June 3, 1991, the Director of Representation determined that substantial and material disputed factual issues warranted an evidentiary hearing. On July 9, and 10, 1991, I conducted hearings where the parties examined witnesses and introduced exhibits. ^{1/} Both parties filed post-hearing briefs and the Association filed a rebuttal which were received by December 2, 1991. Based upon the entire record I make the following:

Findings of Fact

1. The City of Newark is a public employer within the meaning of the Act. It employs the fourteen deputy fire chiefs who are the subject of this petition.

^{1/} The transcript citations 1T1 and 2T1 refer to the transcripts developed on July 9th and 10th, 1991, respectively, at page 1. Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "P" and "R" refer to the Petitioner's and Respondent's exhibits, respectively. Those exhibits marked "J" refer to joint exhibits.

2. The Newark Fire Department Deputy Chiefs Association is an employee representative within the meaning of the Act.

3. The City's fire department is composed of approximately 770 employees; approximately 570 are assigned to firefighting duties and 200 to administrative support duties (J-1, 1T19-1T20, 1T68).^{2/} In 1980 the department had almost 900 employees (1T75). Fire Director Stanley J. Kossup ("Director") is the head of the department; he reports to City Business Administrator Richard Monteilh (1T18). There are 14 deputy chiefs, 25 battalion chiefs and 150 captains who act as higher level and first line supervisors, respectively, in a paramilitary chain of command (1T12-1T14). Reporting directly to the Director are various administrative divisions and the firefighting, or "line" division (1T14, J-1).

4. The administrative divisions consist of the planning division, headed by a battalion chief; a community relations division, headed by a captain; a business division, headed by a chief clerk; a fire prevention and life safety division, headed by a fire official; an emergency management section; a labor relations section; a fire signals/communications section headed by a chief, fire signals; and the Director's immediate staff (J-1, 1T14-1T15, 1T21-1T22, 1T78).

^{2/} I note that there was conflict concerning the actual employment figures. Those figures contained in J-1, the organization chart, differ from the Director's statements about the size and complement of firefighting and administrative personnel. I conclude that the numbers on J-1 are less reliable and find that the Director's statements are more correct. The component numbers within J-1 are internally inconsistent.

5. Ten of the fourteen petitioned-for deputy chiefs work in the line division, and supervise firefighting (1T22). The four remaining administrative deputy chiefs are in charge of Special Services, Arson/Investigation, Training and Hazardous Materials (1T22).

6. The department is a hierarchical paramilitary organization with the Director as chief executive (1T12, 1T124). Formerly, a chief and an assistant to the chief were immediately subordinate to the Director and played important roles in the day-to-day management of the department (1T75-1T77). The director and chief titles are now merged into one position held by Director Stanley J. Kossup (1T12, 1T18, 1T68-1T69).

The Director relies upon the administrative support divisions, field deputy chiefs, battalion chiefs and captains to manage the department. He retains a significant amount of control. Deputy Chief Raymond, who is in charge of the Arson/Investigations division, is second in command and fills in for the Director in his absence. He also acts as the liaison with the ten field deputy chiefs on routine matters (1T23, 1T108, 1T149, 1T168). Battalion Chief Fitzpatrick, in charge of the planning section, assists the Director in deployment, training and budget issues (1T88-1T89, 1T138-1T140, 1T176, 2T147, 2T156-2T157).

7. The department budget process is initiated each year by the preparation of budget requests by all administrative section heads, including the four deputy chiefs (1T48, 1T111-1T114, 2T164,

2T166). Detailed procedures to be followed in completing the budget are sent from the City's budget and finance office (1T177, 1T179-1T180). Those deputy chiefs who prepare their section's budget rely upon prior years' experience in compiling their reports (2T163-2T164). The Director seldom changes the content of these requests, but passes them along to the finance department (1T113-1T114, 1T176-1T180). The Director then directs his chief clerk to compile the overall budget and forwards it to the budget department and business administrator and meets with them (1T49). Newark City Council has final approval of the budget (1T179).

Operations/Line Deputy Chiefs

8. Within Operations there are two divisions; the first or upper division, responsible for firefighting in the western side of Newark, and the second or lower division, responsible for the eastern side of the city. There are four deputy chiefs assigned to each division, a total of eight. There are two additional roving deputy chiefs who are assigned where needed. Scheduling in the operations division requires 24-hour coverage. There are four tours, each requiring two deputy chiefs, one each for the upper and lower divisions (1T22, 1T62-1T63).

Role in Deployment, Overtime, Leave and Transfers

9. On each tour there are 140 fire fighters and each deputy chief is responsible for directing 70 fire fighters (2T6). A unit or "company" requires a captain and three fire fighters to

function. A company of one officer and three fire fighters are assigned to each piece of apparatus (1T64-1T65, 1T99, 1T140-1T141, 2T7). To meet this standard, deputy chiefs "balance the roll call," by deploying and reassigning personnel. In carrying out this function, however, deputy chiefs' authority is limited to temporary (ie., one-two tours) reassignments (1T53-1T54, 2T9, P-2). As unanticipated longer absences occur, these are reported to planning, which makes appropriate adjustments to solve the problem (1T56).

10. The planning section is responsible for coordinating overall deployment, for preparing overtime lists and schedules, and for overseeing and processing transfers (1T176, 1T139-1T140, 2T147, 2T155-2T157).^{3/} It maintains the table of organization, schedule and lists of fire fighters' names (1T143-1T144). It advises the Director, who ultimately determines the department's staffing and overtime level (1T142). The battalion chief in charge of planning has been delegated responsibility for assigning the two roving deputy chiefs (1T145-1T147, 2T134-2T135, P-5). Roving deputy chiefs do not have authority to override the planning division's assignments (2T152-2T153).

^{3/} Although the Director testified that the "planning department has very little to do with deployment and assigning of personnel" (1T143), I do not credit this testimony. On many other occasions the Director testified as to planning's role in maintaining and advising him about deployment statistics (leave, overtime, transfers, scheduling), and stated that planning assigns the two roving deputy chiefs.

11. Overtime and leave rates are anticipated each year as part of the development of the overall schedule (1T139). Deputy chiefs do not have authority to approve additional overtime to balance roll call (1T99-1T101). Only the Director can authorize overtime or the closing down of a company in situations where there are fewer than the required three men per piece of apparatus (2T12).

12. In deciding whether to authorize overtime, the Director is guided by the budget, by labor contracts and by conditions in the City (1T99-1T101, 1T139-1T140). Article VIII (b) of the agreement between the City and the Newark Firemen's Union contains procedures by which overtime assignments will be made (P-7). It states:

Section 3. (a) The Department shall establish and maintain an overtime roster of employees on a Departmental seniority basis. Whenever overtime work is required, it shall be rotated among employees on the roster with the goal of equalizing firefighting overtime. If an employee refuses an assignment to work overtime, he/she shall be considered as having worked such overtime assignment for the purpose of maintaining a proper order of rotation for future assignment.

Once called in, overtime fire fighters are assigned by deputy chiefs or battalion chiefs (2T8-2T10).

12. Deputy chiefs' authority to control the use of leave is controlled by labor agreements. Requests for leave must be granted as long as the rules contained in the department's labor contracts are satisfied, especially with respect to seniority (1T156-1T157, P-6, P-7). If an individual situation falls outside the rules, the request is sent, along with comments and recommendations by the captain, battalion chief and deputy chief to the Director, who decides whether the request shall be approved (1T158).

13. Requests for permanent transfers are only accepted and processed twice a year. These requests are reviewed by the planning section and approved by the Director, who works in cooperation with the fire department unions. Generally, if a fire fighter or officer requests a permanent transfer, the department tries to accomodate him or her (1T102, 1T143). Article XXI of the agreement between the City and the Newark Firemen's Union states that transfers will be made at the Director's discretion (P-7). Article 5 of the agreement between the City and the Professional Fire Officer's Association, Local 1860, IAFF, AFL-CIO states that:

The Director has the exclusive authority to assign or transfer all officers. Prior to making actual assignments. . . the Director will consult with the Union concerning transfers within the firefighting division. In making his decision, the Director will give consideration to such factors as qualifications, seniority and the good of the department (P-6, p. 4).

Scope of Control at Fire Scene

14. Deputy chiefs respond to all significant fires; battalion chiefs and/or captains respond to less serious fires (1T57-1T58). At the fire scene a deputy chief directs fire fighting activity unless the Director/Chief appears or unless a lower ranking officer is the most senior officer to appear (1T56). All three of these ranks have authority as officers in charge at the scene, to order the communications operator to dispatch additional companies to the scene (1T126). Deputy chiefs must maintain adequate units on the scene as well as among the remaining resources (1T58-1T59). They are expected to assess the numbers of pumping and ladder

companies available in their divisions and to notify or instruct the communications section to put other companies on alert or have companies from contiguous communities placed on alert or respond, when needed (1T125-1T127).

There was conflicting testimony as to who has authority to call for "mutual aid", or, soliciting help from five contiguous communities. I conclude that the department's policy calls for shared responsibility. Deputy chiefs inform the communications section from field positions of their needs for additional companies (1T59). The Chief in the communications section and his dispatchers estimate when the numbers of companies remaining are declining to a critically low level and notify field deputy chiefs (2T107-2T108). Deputy chiefs may then order the communications office to activate mutual aid (2T108). The Director is always notified of this decision, and his prior approval is sometimes sought (2T43-2T44, 2T123). Deputy chiefs are not involved in the decision to provide mutual aid outside of Newark (1T58, 1T125-1T127). This is handled by the chief in the communications office (2T101-2T102, 2T106). The department policy for mutual aid was determined by the Director, without input from operations deputy chiefs (2T100-2T103, 2T203-2T204).

Role in Policy-Making and Budget Control

15. In 1986, under the direction of then-Director Claude Coleman, the department promulgated a comprehensive rules manual containing many policies, standards of conduct and the chain of

command for fire department employees of all ranks (P-4). Director Coleman was assisted by the Fire Chief and chief of planning in preparing this manual (1T121-1T122). No evidence was produced indicating that deputy chiefs had input or review of these policies before they were issued to the department.

16. In March 1991 there was a reorganization in the department in which all operations deputy chiefs were reassigned. The purpose was to train and give them experience in both industrial and residential fire fighting. The deputy chiefs did not participate in this decision to reorganize; this decision was made by the Director (1T94-1T95).

17. Deputy chiefs are constrained from communicating with outside agencies, private organizations or companies, news media, or department heads without the Director's approval (2T30, 2T49-2T50, 2T66-2T67, P-9). Formerly, a deputy chief was in charge of community relations. He was involved in an organization known as the Newark Fire Safety Council. This organization was formed in about 1986 to provide and enhance community education about fire safety; it was endorsed by the Director and involved representatives from the department, private industry, the schools and the city administration. The department provided information, training and conducted fire drills through the community relations office (2T72-2T75, 2T84-2T89). In May 1990 the City ordered the community relations deputy chief to resign from the council because of concerns it had about intrusion into city authority and policy (P-9, R-4).

18. Operations deputy chiefs do not submit budget requests or participate in formulating or allocating the department's budget (1T112-1T113, 2T192). Operations deputy chiefs do not participate on the City's behalf in collective negotiations with the other fire department unions (1T180-1T182, 2T195).

19. Deputy chiefs regularly pass along procedures and policy recommendations from lower ranks as well as offering their own recommendations to the Director. He investigates and responds or, takes these suggestions to other parties, accepts or rejects them, and may or may not respond directly to the suggester (1T42-1T43, 1T45, 1T50-1T52, 1T137-1T138, 1T174-1T176, 2T50-2T52, 2T200-2T202).

For example, one deputy chief recommended the use of standardized foam application apparatus. This suggestion was adopted (2T23-2T24). Another deputy chief recommended the use of certain radio packs; this suggestion was rejected for two years and then eventually adopted (2T200-2T202).

Finally, a new firehouse was constructed which went into operation in Spring 1991. During the planning phase deputy chiefs were not consulted about the location or design of the new structure. Location and design are important because most accidents occur as fire apparatus are backed into quarters. And, the location of the firehouse affects the efficiency with which the area can be covered and the ease of ingress and egress from the firehouse (2T21-2T22, 2T34, 2T187-2T189, 2T208). One deputy chief identified

several problems with the firehouse to the Director, who acted upon some of them, but this was at a stage when the building was almost complete (2T189-2T192, 2T196-2T197).

Role in Discipline and Training

20. Disciplinary charges may be brought by captains, battalion chiefs and deputy chiefs. When appealed, they are sent to the Director who holds a hearing. Discipline is also subject to the State Department of Personnel ("DOP") rules and regulations, and to the department's labor contracts (P-6, P-7). DOP rules require that any disciplinary action be signed by the Director (1T194-1T195, 1T205, 1T212-1T213, 1T215-1T216). Some disciplinary standards are outlined in the department's rules and regulations manual (P-4).

21. Training in the fire department has both centralized and decentralized components. Operations deputy chiefs are responsible for observing the fire fighters under their commands to identify training needs (1T106-1T107). They, along with battalion chiefs and captains may directly train fire fighters (1T107). In addition, there is a training academy and centralized comprehensive training program. This program is overseen by an administrative deputy chief (1T31).

Administrative Deputy Chiefs -- Training

22. The training division staff consists of one deputy chief, one battalion chief, two captains and one fire fighter (1T129). Its mission is to insure that all fire fighters and officers are properly trained in equipment use, fire fighting

techniques and new fire situations (1T31). State law requires new fire fighters to receive 84 hours of training, however, the Newark fire department trains its new recruits for 240 hours or 6 weeks. The decision to give 240 hours was made jointly by the Chief and deputy chiefs in charge of training over a period of time (1T32-1T33). New recruits are also trained on an ongoing basis by their company officers (2T139). Recently, the Director ordered the training deputy chief to prepare an 84-hour course for a group of fire fighters who are about to be hired, instead of the 240 hour course (2T132-2T133). The deputy chief in charge of training does not have independent authority to change the number of hours of training (1T172). However, in developing programs and identifying new areas of skill or knowledge, the deputy chief exercises independent judgment (1T34-1T36).

23. The training schedule and content are developed and updated by the deputy chief and his staff (1T34-1T36). He relies on standards and procedures developed by the University of Oklahoma, called IFSTA standards (2T132, 2T135). Training programs are submitted to the Director, who has never disapproved a training plan (1T36).

24. The deputy chief in charge of training has not participated in formulating the budget, though he has only been in that job for eight months (2T139).

Administrative Deputy Chiefs -- Special Services

25. The Special Services division, charged with the procurement of equipment and supplies for the department, consists of one deputy chief, one battalion chief, three captains and 16 fire fighters (2T159). It is organized into six sections. The repair shop tests and maintains automotive apparatus. The other five sections are the hose shop, supply, ladder shop, mask and canvas shop (2T160).

26. There is an initial allotment of equipment spelled out in general orders, which states what equipment will be allocated to each piece of apparatus. These general orders were promulgated by the Director (2T163). Items which need to be replaced or repaired are brought to the special services section (2T162). The supply shop also receives and fills requests for supplies from captains in firehouses (2T161).

27. The division prepares and submits a budget each year to the Director. The budget is developed by reviewing and estimating from past experience what equipment and supplies will need to be replaced or stocked (2T163-2T165). The Director forwards these budget needs to the City Council. In the past, the deputy chief for special services has been not been included in meetings with the City's budget and finance officers, administrator or City Council concerning the items in the special services budget (2T184). Rather, the Director has later informed him that the requested amount was cut or approved; this amount became the department's spending limit (2T166-2T168). Once the annual budget

is established, this deputy chief does not have authority to switch money allocated for certain categories to be used for other categories of equipment and supplies (2T170, 2T174, 2T184). He can inform the Director that an emergency allocation is needed when the supply of an important item, such as hose, is depleted (2T170-2T171, 2T185).

28. The deputy chief for special services interviews manufacturers of fire fighting equipment and supplies to keep abreast of new developments, but does not have independent authority to order such items. All vendors must be approved through a competitive bidding process administered through the city finance department (2T179-2T180). Recently, a helmet manufacturer contacted the special services deputy chief to ask that the department test a newly developed mask. This request was disapproved by the Director (2T177-2T178).

Administrative Deputy Chiefs -- Arson/Investigations

29. The deputy chief in charge of Arson/Investigations supervises a battalion chief and two captains (1T37). This section is charged with investigating fires in which arson is suspected (1T24). This section works directly with the prosecutor's office in these investigations (1T38). It also investigates fire fighter candidates by performing police and background checks, and verifying references and information provided on applications (1T24-1T27). Both arson and candidate reports are submitted to the Director for his information and further action (2T37). This section also

investigates criminal and civil charges brought against fire fighters and reports its findings to the Director (1T27).

30. This deputy chief acts as liaison between all field deputy chiefs and the Director on certain administrative matters, but he does not supervise them (1T23, 1T36). He is in command in the Director's absence (1T23, 1T108).

Administrative Deputy Chiefs -- Hazardous Materials

31. Hazardous materials are those other than normal combustible materials. They are substances or items that might have an effect on the environment and on the fire fighter who is handling the materials in a fire situation (1T28). There is a city agency which is licensed to dispose of hazardous waste. A special unit of the fire department responds when there is a fire on the premises of this agency. This unit is supervised by Deputy Chief Freda and is comprised of several specially equipped and trained companies which also respond to any fire wherein hazardous materials are implicated (1T28-1T29).

Deputy Chief Freda was instrumental in setting up the hazardous materials ("Haz-Mat") unit. He was given permission to study other cities' approaches and to decide how the unit would operate (1T177-1T178).

Analysis

The Association seeks to represent a unit of all deputy chiefs employed by the Newark Fire Department. In City of Newark the Director of Representation held that these deputy chiefs were

managerial executives within the meaning of the Act, and removed them from the extant supervisory unit. The Association contends that changed circumstances within the Fire Department warrant reconsideration of this issue. The City maintains that the deputy chiefs remain managerial executives and/or confidential employees that the Director's original determination is still valid. I conclude, based on the record developed in this case and relevant law, that the Newark Deputy Fire Chiefs are neither managerial executives nor confidential employees within the meaning of the Act.

The standard for managerial executive status originates in the Act. N.J.S.A. 34:13A-3(f) provides:

managerial executives are . . . "persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district."

This definition was first applied in Borough of Avon, P.E.R.C. No. 78-21, 3 NJPER 373 (1977). There, the lifeguard captain was found not to be a managerial executive although he prepared the beach operations budget, authorized and modified rules and regulations, created the disciplinary point system, authorized changes in work week, added guards to the payroll in emergencies, participated in management meetings, influenced the Borough and mayor's policies, trained and scheduled all guards, managed the beach and supervised the guards daily. The Commission stated that:

The term "managerial executive shall be narrowly construed and that the relevant National Labor Relations Board precedent...indicates that a wider range of discretion than that possessed by...[the lifeguard captain] is needed. [He]... was clearly a supervisor and in that capacity could be said to be effectuating management policy, but the Act clearly distinguishes managerial executives --excluded from coverage-- from supervisors--eligible to be represented in an appropriate unit.
Id. at 374.

Borough of Montvale, P.E.R.C. 81-52, 6 NJPER 507, 508-09

(¶11259 1980) states:

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 for 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 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. (emphasis added)

In Montvale, the Commission found that the Borough's chief of police was not a managerial executive. The Borough's mayor and commissioners exercised almost complete control over the department. The chief had no discretion to hire, assign overtime, promulgate policies or plan schedules. In addition, he had no control over or effective input into the budget, deployment,

discipline or investigations. The Commission concluded that the chief played no role in the formulation of policy and little role in directing its effectuation in any but routine matters.

Applying the foregoing principles, I find that the Newark Deputy Fire Chiefs do not "formulate management policies and practices" or "direct the effectuation" of such policies. The record reveals that many or most fire department policies, procedures, rules and regulations have already been formulated and codified without input from deputy chiefs. The deputy chiefs' authority to formulate and effectuate policy is circumscribed by the existence of a comprehensive policy manual (P-4) and by two labor agreements covering terms and conditions of employment. The nature of fire fighting requires the highest ranking fire officer to be in command at the scene of a fire. This could be a captain or battalion chief as well as a deputy chief. Decisions about the extent of the fire, strategies to fight the fire and whether additional companies or equipment are needed are made by that officer alone. Dispatching companies to a fire scene is handled through the central communications office. Decisions about when to call for mutual aid are made by deputy chiefs in conjunction with the communications office and sometimes by the Director.

Other examples of policy making and implementation in the Newark fire department demonstrate that the deputy chiefs' independent authority is restricted and not characteristic of a managerial executive within the meaning of the Act. For example, in

March 1991 the Director decided to reorganize operations deputy chiefs to give them experience in both residential and industrial fire fighting. In making this decision the Director did not consult with any of the affected deputy chiefs. Also, the rules manual developed in 1986 was compiled by the Chief and Assistant Chief and approved by the Director, without reliance on deputy chiefs' input. The department policy for mutual aid was determined by the Director, without input from operations deputy chiefs. Operations deputy chiefs do not directly participate in collective negotiations on the City's behalf. Operations deputy chiefs do not participate in formulating or controlling the department's budget. Administrative deputy chiefs' input into the budget is ministerial and not policy-making. They have no independent authority to transfer money between accounts; approval for the purchase of equipment or supplies is subject to the competitive bidding process which is administered in large part by city administrators.

The limited role the Deputy Chiefs have in formulating policy -- such as making suggestions or passing along the suggestions of their subordinates -- is subject to the Director's approval and authority.

This is not to say that deputy chiefs are not important to the effectiveness and efficiency of the department or are never included in policy decisions. Operations deputy chiefs are in charge of their "tour;" they may be in command at fire scenes and play a role in assessing the department's fire fighting capabilities

at all times. They make recommendations to the Director. But these important functions do not constitute policy formulation or even make them responsible for developing the means to reach the policy objective.

The deputy chief in charge of the hazardous materials unit was given authority to investigate other similar units and to select the organizational format for the Newark unit. He also works with other agencies, independent of the Director's oversight, in dealing with hazardous materials situations. Similarly, the Arson unit works with the prosecutor's office without direct supervision by the Director. On the other hand, there is a broad ban on communications with outside agencies, news media, and organizations.

The training deputy chief has independent authority to develop and monitor training, but his programs are, nonetheless, subject to the Director's approval and standardized guides. The fact that the Director unilaterally decided to reduce training hours for one class of new recruits is evidence that the training deputy chief's scope of control is limited.

That deputy fire chiefs in Newark do not possess a level of authority and independent judgment sufficient to affect broadly the organization's mission or means of effectuating its mission is also illustrated by their limited role in deployment. Each deputy chief in operations is responsible for supervising one-half of that tour of duty, or 70 fire fighters. Their ability to deploy personnel is limited by a departmental policy of centralized assignments and

transfers. Thus, a field deputy chief can only reassign a lower ranking fire fighter for two days or nights. The Director and planning section develop and maintain the overall schedule, allowing permanent transfers only twice per year, and controlling overtime to adhere to the budget allocation. The granting of overtime, leave and transfers must comply with labor agreements and the Director and planning section work cooperatively with union representatives to that end.

In City of Newark, the Director of Representation found that the deputy chiefs had the authority and discretion to deploy men in their respective divisions, discipline subordinates, transfer men within their divisions, participate in budget formulation, purchase equipment and assist in the development and drafting of departmental policies and orders. However, deputy chiefs no longer have this level of responsibility. The record here discloses that in addition to the limits on their authority outlined above, the deputy chiefs do not have authority to call fire fighters in on overtime or to adjust their leave. The Director and planning section decide the appropriate overall level of overtime based upon the department's need to balance roll call and to stay within its overtime budget allocation. Leave benefits are negotiated by the city and fire fighters and officers' associations. The department is bound to the terms of labor agreements. No evidence was presented that deputy chiefs can override the planning section's deployment decisions. far less input by deputy chiefs in the areas

of budget, transfers, and leaves, and set limits on purchase of equipment and supplies.

In City of Newark, the large size of the department was cited as a factor supporting the need for managerial executive levels, and here also, the City advances the same argument. While the total size has been reduced by about 100 employees, more important is the fact that the deputy chiefs at issue do not possess the level of independence and authority characteristic of managerial executive status, nor do they possess the same level as reflected by the earlier decision. Notably, the department today has 11 non-fire fighting support units (200 employees), only four of which are headed by deputy chiefs, which function to provide technical and administrative support, act as liaison with outside agencies, and perform many "managerial" functions.

In sum, I find that the deputy chiefs' authority is circumscribed by: (1) limits as to their scope of responsibilities, (2) the extent of control exercised by the Director, and (3) by established comprehensive agreements, policies, rules and procedures. Accordingly, I conclude that because of these limits, many of which were not present in the earlier decision, City of Newark, circumstances surrounding these positions have changed sufficiently to warrant a finding that deputy chiefs in the Newark Fire Department are no longer managerial executives within the meaning of the Act. Accord, Bloomfield Township, P.E.R.C. No. 86-104, 12 NJPER 237 (¶17098 1986) and City of Newark, P.E.R.C. No.

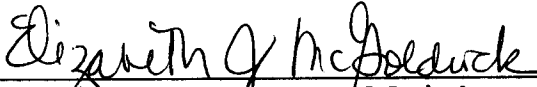
86-140 12 NJPER 513 (¶17192 1986)(police deputy chiefs not managerial executives)

N.J.S.A. 34:13A-3(g) defines confidential employees as those: "...whose functional responsibilities or knowledge in connection with issues involved in the collective negotiations process would make their membership in any appropriate negotiations unit incompatible with their official duties." Confidential employees may not appropriately be included in any negotiations unit. N.J.S.A. 34:13A-5.3. The deputy chiefs here do not have responsibilities which involve them in the collective negotiations process at the fire department. The Director is consulted by the City's negotiating team, but even he is not usually present at negotiations. Compare, Tp. of Springfield, P.E.R.C. No. 85-88, 11 NJPER 138 (¶16061 1985)(police captain's participation on employer's bargaining team demonstrated confidential status)

The deputy chiefs are identified as part of the second grievance step in both fire department union agreements, however, no other evidence was introduced which showed that they play a significant role in choosing among possible alternatives in administering these agreements or determining management's response to grievances. Both agreements are comprehensive and detailed, leaving little discretion to deputy chiefs in adjusting grievances. See, State of New Jersey (Div. of State Police), D.R. 84-9, 9 NJPER 613 (¶14262 1983); County of Essex, D.R. No. 84-7, 9 NJPER 574 (¶14239 1983) Accordingly, I find that they are not confidential employees within the meaning of the Act.

RECOMMENDATION

I recommend that Deputy Fire Chiefs in the City of Newark are neither managerial executives nor confidential employees within the meaning of the Act. Accordingly, I recommend that the Commission order an election among the Deputy Chiefs to determine whether a majority wish to be represented for purposes of collective negotiations by the Newark Fire Department Deputy Chiefs Association.


Elizabeth J. McGoldrick
Hearing Officer

DATED: March 18, 1992
Trenton, New Jersey