

D.R. NO. 85-26

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

In the Matter of

CITY OF ASBURY PARK,

Public Employer-Petitioner,

-and-

DOCKET NO. CU-84-102

POLICEMENS BENEVOLENT ASSOCIATION,
LOCAL NO. 6,

Employee Representative.

SYNOPSIS

The Director of Representation clarifies an existing unit of police officers in the City of Asbury Park to exclude captains, lieutenants and sergeants. The Director found that: (a) superior officers are supervisors within the meaning of the Act; and (b) that there is an inherent conflict of interest between superior officers and rank-and-file police, thus dictating their removal from the unit. The Director found insufficient evidence to support the PBA's claim that a pre-1968 relationship existed which may warrant the continued inclusion of superior officers in the unit.

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Appearances:

For the Public Employer
Murray & Granello, Esqs
(Karen Bulsiewicz of counsel)

For the Employee Representative
Harold Crenshaw, State Delegate

DECISION

On May 21, 1984, the City of Asbury Park ("City") filed a Petition for Clarification of Unit with the Public Employment Relations Commission ("Commission"), requesting that the collective negotiations unit currently represented by the Policemens Benevolent Association, Local No. 6 ("PBA") be clarified to exclude superior officers (captains, lieutenants and sergeants). The PBA opposes the removal of superior officers from the existing unit.

In accordance with N.J.A.C. 19:11-2.6, the Director has caused an administrative investigation to be conducted into the matters and allegations set forth in the Petition in order to

determine the facts.

1. The disposition of this matter is properly based upon the administrative investigation conducted herein, there being no substantial and material factual issues in dispute which would warrant the convening of an evidentiary hearing.

2. The City of Asbury Park is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., ("Act"), is subject to its provisions and is the employer of the employees who are the subject of this Petition.

3. The Patrolmen's Benevolent Association, Local No. 6 is an employee organization within the meaning of the Act, and is subject to its provisions.

4. The PBA is the current exclusive negotiations representative of a unit of employees comprised of all patrolmen, sergeants, lieutenants, and captains employed by the Police Department of the City of Asbury Park. The Chief of Police is excluded from the unit. There is a collective negotiations agreement covering this unit which is currently in effect for the period January 1, 1984 through December 31, 1985.

5. The Asbury Park Police Department is staffed by the following law enforcement personnel: 39 patrol officers, and 13 superior officers (1 detective sergeant, 5 sergeants, 5 lieutenants, 1 detective captain, 1 captain) and the Chief of Police.

6. The City seeks to exclude all superior officers (sergeants, lieutenants and captains) from the existing collective

negotiations unit. The basis for the proposed exclusion is an alleged inherent conflict of interest between superior officers and rank-and-file patrol officers. Further, the City alleges that superior officers are supervisors within the meaning of the Act.

In support of its position, the City cites the Police Department Rules and Regulations, Section 5:3.1, which provides that: "sergeants, lieutenants and captains have the authority to recommend disciplinary action against patrolmen to the Chief and/or Deputy Chief regarding those officers that they supervise." That rule section also provides that "any commanding or supervisory officer shall have the authority to impose suspension until the next business day against a member or employee..."

7. The PBA will not agree to the proposed unit clarification to exclude superior officers from the negotiations unit. The PBA contends that the extant unit is and continues to be appropriate for purposes of collective negotiations.

However, the PBA has not disputed the City's assertions that the Asbury Park Police Department has a para-military structure with a strict chain of command and that superior officers are supervisors within the meaning of the Act. The PBA argues that there has never been an actual conflict of interest between superior officers and rank-and-file patrol officers and that historically, the unit has included all ranks of police except the Chief. The PBA contends that there is a pre-1968 collective negotiations relationship between the PBA and the City for the all-inclusive unit

of rank-and-file and superior officers. Finally, the PBA argues that because the City had previously filed a similar clarification of unit petition with the Commission through which it sought the exclusion of superior officers from the extant unit, and then withdrew that petition, it was now estopped from bringing the instant Petition in the absence of a change in circumstances.

8. In support of its claim that a pre-1968 relationship existed, the PBA has proffered municipal ordinances dating from 1911 through 1975 which provide for salary increases for police employees. However, none of these salary ordinances made reference to any collective negotiations having taken place between the parties.

9. The City alleges that the first written agreement between the City and the PBA was in 1974, covering all grades of police employees. This agreement immediately followed the formal recognition of the PBA as the exclusive negotiations representative of the unit of police employees.

10. Although there was no current contract in effect at the time that the Petition was filed, the City and the PBA have agreed that should the Commission grant the unit clarification, the superior officers would remain in the current unit until the expiration of the parties' 1985 contract.

* * *

In In re Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977), the Director stated:

There is now a long line of Commission decisions on the question of whether superior officers may be included in negotiations units with patrolmen. The standards utilized by the Commission in reaching these determinations are presented in In re City of Elizabeth, P.E.R.C. No. 71 (1972), In re City of Union City, P.E.R.C. No. 70 (1972), and In re City of Camden, P.E.R.C. No. 52 (1971). Generally, these decisions provide that, except in very small departments where any conflict of interest between superior officers and rank and file personnel is de minimus in nature, the quasi-military structure of police departments virtually compels that partolmen and superior officers 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.

So. Plainfield, supra, at 349 (emphasis added).

Moreover, in the South Plainfield case, the Director of Representation went on to express the standard by which all such future cases would be determined, the Director stated:

In all cases involving police departments, 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 minimus 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.

So. Plainfield, supra at 350.

To substantiate a claim of established practice, there must be clear and convincing evidence in the record which shows that such a negotiations relationship existed. ^{1/} The mere labeling of an event as negotiations or calling a document a demand or proposal will not suffice to demonstrate the substantive nature of the offered item. ^{2/} It must be demonstrated in the record that there exists a consistent and exclusive bilateral negotiations relationship between the parties such as is evidenced by an exchange of negotiations proposals on substantive terms and conditions of employment such as salary, method of payment, and various other economic and non-economic fringe items. Further, it must be shown that both parties entered the give-and-take relationship with an intent to consummate a mutually acceptable agreement. See, In re Willingboro Bd. of Ed., E.D. No. 3 (1970); In re Tp. of Teaneck, E.D. No. 23 (1971); and In re West Paterson Bd/Ed, P.E.R.C. Nos. 77 and 79 (1973).

^{1/} In re Tp. of Teaneck, E.D. No. 23, p. 7-8 (1971).

^{2/} Id., p. 8.

By letter dated May 31, 1985, the parties were apprised of my proposed findings of fact and conclusions of law in this matter, and were afforded an additional opportunity to proffer factual allegations and any further documentary evidence in support thereof. No papers have been filed disputing the proposed findings.

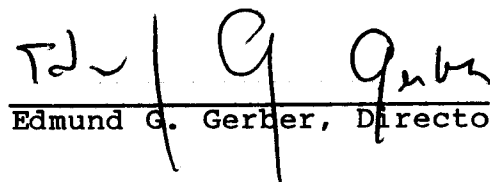
Based upon the foregoing, I conclude that the superior officers employed by the Asbury Park Police Department are supervisors within the meaning of the Act. ^{3/} Given the size of the department, its para-military structure and the authority exercised by superior officers, even if actual conflicts of 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 patrol officers in the same negotiations unit. Further, the PBA has failed to substantiate its claim that an established practice existed herein of such a nature as would dictate the continuance of a mixed supervisory,

3/ The PBA submitted a letter requesting the recognition of a separate superior officer unit. I would note, however, that the City and the PBA have already agreed that the order contained in this decision will not be effective until December 31, 1985. Accordingly, the superior officers will continue to be in the PBA's existing unit until then. At that time, the PBA, as would any organization seeking to become a majority representative of the employees, may request recognition as the majority representative of the superior officers pursuant to N.J.A.C. 19:11-3.1(a). Alternatively, should the PBA seek to be certified by this Commission as the majority representative of a unit of superior officers, it would be required to timely file a representation petition and to comply with all of the rules and requirements of the Commission. See, N.J.A.C. 19:11-1.1 et seq. and In re City of Camden, D.R. No. 82-25, 8 NJPER 11 (¶13005 1981), aff'd. as modified, P.E.R.C. No. 82-89, 8 NJPER 226 (¶13094 1982).

nonsupervisory negotiations unit. Finally, the PBA's claim that the City is somehow estopped from filing the instant Petition because it had previously filed -- and then withdrew -- a similar action is without merit inasmuch as no determination had been made by the Commission concerning the City's claim in that earlier matter.

Accordingly, the superior officers (sergeants, lieutenants and captains) of the Asbury Park Police Department are hereby removed from the existing negotiations unit, effective December 31, 1985.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Edmund G. Gerber, Director

DATED: June 26, 1985
Trenton, New Jersey