D.R. NO. 83-33

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

In the Matter of

CITY OF TRENTON,

Public Employer-Petitioner,

-and- DOCKET NO. CU-82-65

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL NO. 2281,

Employee Representative.

## SYNOPSIS

The Director of Representation determines that the City's Street Superintendent and its Sanitation Superintendent are neither confidential employees nor managerial employees and, in the absence of any conflict of interest, they should remain in the negotiations unit with other City supervisory personnel. In so holding, the Director adopts the recommendations of a Hearing Officer as to the issues of confidential employee status and managerial executive status and the Hearing Officer's conclusion that the exercise of informal evaluative responsibilities by the Superintendents does not present substantial actual or potential conflict of interest. The Director concludes, however, after a review of the parties' experience in a negotiation setting for several years, that there is no basis to speculate that a substantial potential conflict of interest would arise from the Superintendents' exercise of certain disciplinary responsibilities.

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Employee Representative.

Appearances:

For the Public Employer-Petitioner
Michael L. Bitterman, City Attorney

For the Employee Representative
Carlton Steger, Council Representative
Council No. 73, AFSCME

DECISION

Pursuant to a Petition for Clarification of Unit filed on March 17, 1982, with the Public Employment Relations Commission ("Commission") by the City of Trenton ("City"), hearings were conducted before a designated Hearing Officer on the claims raised by the City that two division directors within the Department of Public Works should be removed from a negotiations unit of supervisors represented by Local 2281, American Federation of State, County, and Municipal Employees ("Local 2281"). The City asserts

that the Street Superintendent (the Director of the Division of Streets), and the Sanitation Superintendent (the Director of the Division of Garbage and Trash), are confidential employees and/or managerial executives within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), and that a Wilton-type conflict of interest exists between the two disputed employees and other members of the supervisors unit. 1/

Hearings were held before Commission Hearing Officer Mark A. Rosenbaum, on May 26 and 27, 1982, in Trenton, New Jersey, at which time all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Post-hearing briefs were submitted by the parties in a timely fashion. The Hearing Officer thereafter issued his Report and Recommendations on December 29, 1982, a copy of which is attached hereto and made a part hereof.

The City and Local 2281 both filed exceptions, which were received on January 21, 1983.

The undersigned has carefully considered the entire record herein, including the Hearing Officer's Report and Recommendations, the transcripts, the exhibits, both parties' exceptions and finds and determines as follows:

1. The City of Trenton is a public employer within the meaning of the Act, is the employer of the employees who are the subject of this Petition, and is subject to its provisions.

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

2. The American Federation of State, County and Municipal Employees, Local 2281 is an employee representative within the meaning of the Act and is subject to its provisions. Local 2281 is the recognized representative of a unit comprised of supervisors in various departments and divisions throughout the City of Trenton.

3. The City argues that its Street Superintendent and its Sanitation Superintendent are confidential employees and/or managerial executives within the meaning of the Act, and that a Wilton-type conflict of interest exists between these two employees and certain other unit members.

4. Local 2281 argues that the above two employees are neither confidential employees nor managerial executives within the meaning of the Act, and that a Wilton-type conflict of interest does not exist between the above employees and other members of the negotiations unit.

5. The Hearing Officer found the following:

(a) The Street Superintendent and Sanitation Superintendent are not confidential employees within the meaning of the Act.

(b) The Street Superintendent and Sanitation Superintendent are not managerial executives within the meaning of the Act.

(c) Based on a review of the responsibilities of the Street Superintendent and the Sanitation Superintendent, their evaluative function does not pose a conflict of interest as to other unit members; however, a substantial potential conflict of interest exists arising from their role in the disciplinary function.

Accordingly, the Hearing Officer recommended that the Street Superintendent and Sanitation Superintendent be removed from Local 2281's unit based upon his conclusion that a potential for conflict of interest exists in the performance of their disciplinary function.

6. The City partially accepts the Hearing Officer's findings relative to the conflict of interest issue and it supports the Hearing Officer's recommendation that the Street Superintendent and Sanitation Superintendent be removed from the unit. 2/ However, it urges reversal of the Hearing Officer's findings and recommendations regarding the confidential and managerial executive issues.

7. The Street and Sanitation Superintendents are division directors within the City's Department of Public Works. They report to the Director of Public Works, who in turn is responsible to the Mayor and Business Administrator. The City's Street Superintendent supervises approximately 49 employees, one of whom is the General Foreman. The General Foreman is a member of the supervisors unit and is the only employee in that unit who is supervised by the Street Superintendent. An Assistant Superintendent position is not currently filled. The Sanitation Superintendent supervises 65 employees, including the Assistant Sanitation Superintendent. The Assistant Sanitation Superintendent is a member of the supervisors

2/ The City urges that a conflict of interest should have been found arising from the Superintendents' evaluation responsibilities as well as their disciplinary responsibilities.

unit and is the only employee in that unit who is supervised by the Sanitation Superintendent.

There are 24 divisions, excluding police and fire, within the City's seven departments. The two disputed division directors are the only division heads placed in the supervisors unit and are the only division heads that are represented in any negotiations unit. The present dispute arose during the course of negotiations with regard to the 1981-82 collective negotiations agreement when the City, for the first time, sought to exclude both Superintendents from the unit. At no point in the record has the City argued that its request to remove the Superintendents is predicated upon any assignment of new responsibilities.

The undersigned shall review, in order, the issues relating to confidentiality, managerial authorities, and, lastly, conflict of interest.

8. The City states that it relies upon the record to support its claim that the Superintendents are confidential employees, but it fails in its exceptions to specify in any detail testimony in the record which either contradicts the factual findings of the Hearing Officer, or may have been overlooked. Moreover, the City has not pointed to the specific factual findings of the Hearing Officer with which it disagrees or any particular conclusion which it disputes.

The undersigned's review of the record leads to the conclusion that the Hearing Officer has properly analyzed the facts and has properly applied the factual findings to the statutory

definition of a confidential employee. The Hearing Officer's Report and Recommendation in this regard is adopted for the reasons set forth therein.

The City further takes exception to the Hearing Officer's finding that the disputed employees are not managerial executives within the meaning of the Act. In specifying its exception, the City asserts that the Hearing Officer erred in his conclusion that the level of authority and independent judgment exercised by each superintendent is not sufficiently broad with regard to departmental policy to sustain a finding that the employees are managerial executives. By way of example, the City submits, in part, that the Hearing Officer's conclusions were based on his erroneous interpretation of evidence concerning the periodic compilations of five year plans and the hiring of new employees.

The undersigned is satisfied that the Hearing Officer properly examined all testimony relative to the managerial executive issue, including the testimony relative to the superintendents' role in presenting five year plans and their hiring recommendations, and that the Hearing Officer properly applied the definition of managerial executive to the weight of all evidence. The record confirms that the superintendents are placed at the upper levels of the City's operating structure and, to that extent, initiate recommendations concerning policy determinations. However, they do not possess the authorities or powers of managerial executives as that term is defined at N.J.S.A. 34:13A-3(f) and interpreted in

In re Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶ 11259 1980). The undersigned adopts the Hearing Officer's factual findings and conclusions as to the managerial executive issue for the reasons stated in his report.

9. Local 2281 excepts to the Hearing Officer's conclusion that, as a result of the Superintendents' assigned role in disciplinary matters, a substantial potential for conflict of interest exists between the superintendents and the supervisors immediately below them who are fellow unit employees. Again, the undersigned has reviewed the record with respect to this issue and the caselaw which has developed concerning conflict of interest.

In Wilton, supra, n.1, the Court established the principle that an underlying factor in community of interest determinations was the presence, if any, of any substantial actual or potential conflict of interest among employees. In Wilton, as in the present matter, concern was focused upon conflicts among differing levels of supervisory personnel. The court found that where a substantial conflict of interest exists, " ... among supervisors with respect to their duties and obligations to the employer in relations to each other, the requisite community of interest among them is lacking and ... a unit which undertakes to include all of them is not an appropriate negotiating unit within the intendment of the statute." Wilton, supra at 427. The Court remanded to PERC the question of whether Elizabeth Wilton, the Board of Education's Director of Elementary Education, had substantial conflicts with

other Board supervisory personnel. It cautioned that the facts of each case presented before the Commission requiring an examination of conflict warranted individual attention.

There are certain factual distinctions between the circumstances involved in Wilton and the present circumstances that should be noted at the outset of this review. First, Wilton arose in the context of an employment relationship where supervisors had not previously been represented for collective negotiations purposes. Thus, there was no experiential factor present under the Wilton setting which could enter into the analysis of whether a potential for conflict of interest could be deemed, in the words of the Court, "tolerable" or "de minimis."

In its determinations reviewing Wilton considerations in the context of a history of collective representation, the Commission has found that the experiential factor, rather than the speculative factor, should be utilized to gauge the potential for substantial conflict arising in the future. In In re West Paterson Bd. of Ed., P.E.R.C. No. 77 (1973), the Commission observed:

> Future contingencies are an acceptable and, in fact, generally controlling consideration in most determinations concerning supervisors because, in the absence of a history, there is only expectation and probability that the interests of supervisors and those supervised will clash, to the detriment of some right entitled to protection. But where past experience exists, such can obviously be a more accurate gauge of probabilities than mere speculation not benefited by hindsight.

An examination of the record in the instant matter reveals an absence of any incident demonstrating an incompatibility of interest between the superintendents and their assistants, a compromise of interest, or a significant detriment to the rights of either the City or AFSCME. The basis for the Hearing Officer's finding of potential conflict was his conclusion that it was possible that disciplinary proceedings relating to potential wrongdoings of the Assistant Sanitation Superintendent or the General Foreman might never be initiated because the respective superintendents might not bring wrongdoings to the attention of the Department Director who is responsible for disciplining all but minor infractions. The reasonable foreseeability of such conduct arising, however, is not borne out by any record evidence, notwithstanding the Street Superintendent's inclusion in the unit since 1977 and the Sanitation Superintendent's inclusion since 1979. Speculation as to future contingencies is not a compelling consideration given the evidence as to the history of the parties' relationship.

A second factual distinction from Wilton relates to the extent of supervisory or managerial authority delegated to the Superintendents. In Wilton, the court stated:

> ... if there are grades or echelons of supervisors having differing relations to each other because of the quantum of managerial or supervisory authority delegated by the employer, the general exclusory language of N.J.S.A. 34:13A-5.3 ... would seem to throw some light on the legislative intention with respect to the organizational rights of such supervisors.

From the record in Wilton, it appears that Elizabeth Wilton not only exercised supervisory authority over nonsupervisors, but was also vested with significant authority to evaluate all the building principals and to recommend their tenure and salary increments to the Board Superintendent and the Board of Education. Miss Wilton, as well, regularly attended Board meetings. It was apparent that Miss Wilton played a significant role in the Board's managerial determinations.

The dispute in the instant matter does not involve employees who share the same community of managerial interests as evident in Wilton. Rather, as noted by the Hearing Officer, the respective superintendents are rarely given the opportunity to appear before City Council even to argue a policy or budgetary position which they initially recommend. They do not discipline even nonsupervisory employees, except for minor misconduct, but must refer matters of discipline to the Department Director who would conduct a hearing, if deemed necessary. Under these facts, the undersigned cannot find that the superintendents exercise a quantum of managerial and supervisory authority that has the tendency to produce intolerable conflicts between them and fellow supervisors.

The City submits, in its exceptions, that the Hearing Officer should have found a conflict of interest based upon the Superintendents' evaluative functions. However, the City did not challenge the Hearing Officer's finding that evaluations are performed on an informal basis, and there is no basis that can be

found in the record, or even a basis suggested by the City, to support the proposition that the nature of these informal evaluations has presented a substantial conflict of interest. Further, the undersigned cannot envision that the nature of informal evaluations, as opposed to formal evaluation procedures, produces a likelihood that a conflict will inevitably arise. Cf. In re Bd. of Ed. Borough of Paramus, D.R. No. 82-7, 7 NJPER 556 (¶ 12247 1981). As the undersigned has previously observed, had the Court in Wilton found that the evaluative function, per se, constituted evidence of substantial actual conflict of interest, there would not have been need to remand Wilton to PERC for further consideration. In re Edison Tp. Bd. of Ed., D.R. No. 82-8, 7 NJPER 560 (¶ 12249 1981).

For the above reasons, therefore, the undersigned finds that the Street and Sanitation Superintendents are not confidential employees or managerial executives. Neither have there been demonstrated substantial actual or potential conflicts of interests which warrant their removal from the AFSCME supervisory unit. Accordingly, AFSCME Local 2281's unit of supervisory employees properly includes the Street Superintendent and the Sanitation Superintendent.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Carl Kurtzman, Director

DATED: June 10, 1983
Trenton, New Jersey

H.O. NO. 83-6

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

In the Matter of

CITY OF TRENTON,

Public Employer-Petitioner,

-and-

Docket No. CU-82-65

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL NO. 2281,

Employee Representative.

## SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission recommends that the Sanitation Superintendent and Street Superintendent employed by the City of Trenton be excluded from the collective negotiations unit represented by AFSCME Local 2281.

The Hearing Officer finds that a potential for substantial conflict of interest exists between the Superintendents and their respective immediate subordinates, who are represented by AFSCME Local 2281. The Hearing Officer also finds that the Superintendents are neither confidential employees nor managerial executives within the meaning of the New Jersey Employer-Employee Relations Act.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The report is submitted to the Director of Representation who reviews the Report, any exceptions 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. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

H.O. NO. 83-6

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
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LOCAL NO. 2281,

Employee Representative.

Appearances:

For the Public Employer
Katz, Bitterman & Doughtery
(Michael L. Bitterman, Esquire)

For the Employee Representative
Carlton Steger, Council Representative
Council No. 73, AFSCME

HEARING OFFICER'S
REPORT AND RECOMMENDATIONS

On March 17, 1982, the City of Trenton (the "City") filed a Petition for Clarification of Unit with the Public Employment Relations Commission (the "Commission") seeking a clarification of a negotiations unit represented by the American Federation of State, County and Municipal Employees, Local 2281 ("AFSCME"). The City seeks the removal of the Sanitation Superintendent and Streets Superintendent titles from AFSCME's negotiations unit, contending that the titles are confidential, managerial executives and/or that conflicts of interest preclude the inclusion of these titles in AFSCME's negotiations unit. AFSCME disputes these contentions

and urges that the petition be dismissed.

Pursuant to a Notice of Hearing dated April 21, 1982, hearings were held before the undersigned on May 26 and 27, 1982. At the hearings, all parties were given opportunities to examine witnesses, cross-examine witnesses, present evidence and argue orally. Subsequent to the close of the hearing, the parties filed timely briefs in this matter.

Based upon the entire record in these proceedings, the Hearing Officer finds as follows:

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

2. The American Federation of State, County and Municipal Employees, Local 2281 is an employee representative within the meaning of the Act and is subject to its provisions.

3. The City seeks a clarification of the collective negotiations unit of its employees currently represented by AFSCME, namely, the removal of the Sanitation Superintendent and Streets Superintendent from that unit. AFSCME asserts that these positions should remain within the negotiations unit. Accordingly, there is a question concerning the composition of a collective negotiations unit, and the matter is properly before the undersigned for a Report and Recommendations.

4. The instant petition concerns two titles which are at the same level in the City's hierarchy. The City of Trenton Organization Chart (Exhibit J-2) indicates that beneath the Mayor and Business Administrator, the executive branch of the City government is divided into seven departments. Within those departments there are 24 divisions. The Street Superintendent is the division director of the Division of Streets, and the Sanitation Superintendent is the division director of the Division of Garbage and Trash. Both of these divisions are within the City's Department of Public Works.

5. Mr. Pasquale Capone is the City's Street Superintendent and has held that position since 1977. (Tr. at p. 160). His uncontested testimony establishes that there are 49 employees in the Division of Streets (Tr. at p. 154) and that the Division's budget for fiscal year 1982 is approximately $505,000. (Tr. at p. 161, Exhibit P-1). Street Superintendent is a Civil Service title. (Tr. at p. 110). The Street Superintendent is assisted by a General Foreman, who is also represented by AFSCME, Local 2281. (Tr. at p. 180). The remainder of the employees in the Division of Streets are represented by AFSCME, Local 2286.

6. Mr. William Wade is the Sanitation Superintendent and has served in that capacity since 1979. (Tr. at p. 185). Wade's uncontested testimony establishes that the Division of Garbage and Trash has 65 employees (Tr. at p. 191) and a budget for fiscal year 1982 of approximately $931,000. (Tr. at p. 186, Exhibit P-2). Sanitation Superintendent is a Civil Service position. (Tr. at p. 110).

The Sanitation Superintendent and Assistant Sanitation Superintendent are represented by AFSCME, Local 2281. (Tr. at pp. 151-152). The remainder of the employees in the Division of Garbage and Trash are represented by AFSCME, Local 2286.

7. Both the Street Superintendent and Sanitation Superintendent report to and are supervised by the Director of the Department of Public Works, Mr. Joseph Tuccillo. Tuccillo is an appointed official of the City of Trenton. (Tr. at p. 110).

8. Testimony of Capone, Wade, Tuccillo and David Williams, the Business Administrator, establishes that both the Street Superintendent and the Sanitation Superintendent are responsible for preparing budgetary requests for their respective divisions prior to each fiscal year. (Tr. at pp. 18-24, 160, and 187). These submissions of the Sanitation Superintendent and the Street Superintendent are reviewed and subject to modification by the Business Administrator and Director of the Department of Public Works. (Tr. at p. 22). Ultimately, the budget proposals are presented to the City Council for review, modification and/or adoption. (Tr. at p. 24). In addition to their roles in the budgetary process, the Street Superintendent and the Sanitation Superintendent are involved in the purchasing process during the course of the budget year by recommending the purchase of items, setting specifications, or actually purchasing items up to $50. (Tr. pp. 43 and 163-165). Purchases beyond $50 may not be made without approval by the Director of the Department of Public Works. (Tr. at pp. 31, 115 and 210). All purchases, whether below or above the $50 limitation, must be

within the budgetary allotments approved by Council.

9. Testimony by Tuccillo, Wade and Capone establishes that the Sanitation Superintendent and Street Superintendent have substantial authority to deploy their work forces. (Tr. at pp. 156 and 189). In the deployment of their employees, both Superintendents work within City policies and union contract limitations (Tr. at p. 175) and are assisted in these functions by their foremen. (Tr. at pp. 208 and 264).

10. Testimony also establishes that the Sanitation Superintendent and Street Superintendent are involved in the evaluation and discipline of employees. While evaluation within the Department of Public Works is informal (Tr. at p. 150), the disciplinary process can lead to a formal procedure. In both the Division of Streets and the Division of Garbage and Trash, the Superintendents are ultimately reponsible for determining whether or not disciplinary charges are brought against their employees. (Tr. at pp. 71-75). In all cases brought by one of the Superintendents, the Director of the Department of Public Works serves as the hearing officer. (Tr. at pp. 71-72). However, if the Superintendent determines that a hearing is not necessary for a disciplinary matter, the Superintendent has the authority to take certain disciplinary action short of processing the charges. (Tr. at pp. 158, 170 and 199). The Superintendent is limited to imposing summary disciplinary action for the day of the infraction, or may take no disciplinary action at all. If the Superintendent deems further disciplinary action to be necessary, he must submit paperwork requesting a hearing before the Department Director. (Tr. at pp. 198-199).

## ANALYSIS

### I. Confidential Employees

N.J.S.A. 34:13A-5.3 excludes confidential employees from the right to collective representation. A confidential employee is defined in N.J.S.A. 34:13A-3(g)(1) as an employee:

> ...whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate unit incompatible with their official duties.

The City asserts that both the Sanitation Superintendent and the Street Superintendent are confidential employees under the Act because of their roles in the City's budgetary process. As noted above, both Superintendents are responsible for preparing their budgets for the review of the Director of the Department of Public Works, the Business Administrator and ultimately the Mayor and City Council. Moreover, the record establishes that, while the Director of the Department of Public Works, the Business Administrator and the Mayor and Council can all make changes in the budgets proposed by the Superintendents, nevertheless the budgets have been routinely adopted by Council with only minor changes. (Tr. at pp. 24-36).

However, a finding of confidential status does not merely require an involvement in the budgetary process; instead, confidential status requires an employee who has access to or knowledge of sensitive labor negotiations material. While the testimony establishes that the Superintendents' budgetary proposals included figures for wages of division employees, nonetheless both Superin-

tendents testified that the budgetary wage figures were known prior to the budgetary proposals and were compiled by the City computers. (Tr. at pp. 169 and 203-205). The record herein establishes that the Street Superintendent and the Sanitation Superintendent do not play an active role on behalf of the City in collective negotiations. (Tr. at pp. 173-174 and 203-205). In fact, the record establishes that the Business Administrator does not consult with the Superintendents as to collective negotiations proposals. (Tr. at pp. 54-58 and 173-174).

Therefore, notwithstanding their roles in the budgetary process, the Sanitation Superintendent and Street Superintendent are not involved in the collective negotiations process in any functional way which would preclude their membership in the negotiations unit. Accordingly, the undersigned recommends the finding that the Street Superintendent and Sanitation Superintendent are not confidential employees within the meaning of the Act.

II. Managerial Executives

Managerial executives are defined at N.J.S.A. 34:13A-3(f), in pertinent part, as follows:

> "Managerial executives" of a public employer means 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....

The City asserts that the Sanitation Superintendent and the Street Superintendent are managerial executives in accordance with the above definition and relevant Commission case law. As noted above, the record reveals that the Sanitation Superintendent and Street Superintendent have a level of authority to deploy and

discipline their personnel and have routinely exercised such authority.

Cases relied upon by the City are In re Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980) and City of Newark and Newark Superior Officers Association, D.R. No. 82-81, 7 NJPER 644, (¶12291 1981). In Montvale, supra, the Commission set forth guidelines for managerial executive status:

> 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 method, means, and extent of 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 of its 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.
> [6 NJPER, at 508]

The undersigned now proceeds to apply the above standards to the record in this matter.

As noted above, the hierarchy of the executive branch of the City of Trenton reveals that the Sanitation Superintendent and the Street Superintendent are subordinate to the Director of the Department of Public Works, who in turn reports to the Business Administrator on budgetary matters and to the Mayor and Council on other policy issues. As noted above, the Street Superintendent has

49 employees in his division and the Sanitation Superintendent has 65 employees within the Division of Garbage and Trash. 1/

As to the functions, responsibilities and extent of discretion exercised by the Sanitation Superintendent and Street Superintendent, the undersigned notes preliminarily that in public employment, ultimate authority rests with elected or appointed governing bodies. Notwithstanding this legal premise, the Commission confers managerial executive status upon public employees subordinate to governing bodies when the subordinates exercise significant authority and discretion. For example, in Newark, supra, the Director of Representation found the Newark Chief of Police and Deputy Chiefs of Police to "...possess and exercise a level of authority and independent judgment sufficient to broadly affect the department's policies." (7 NJPER, at 646). Conversely, in Montvale, supra, and Borough of Lavallette and Superior Officers Association of Lavallette, D.R. No. 83-17, 8 NJPER 617 (¶13293 1982), the Commission and the Director of Representation found that police chiefs in those municipalities were not managerial executives, based on the lack of authority and independent judgment exercised by those police chiefs in the formulation and effectuation of department policies. See also, County of Bergen (Bergen Pines County Hospital) and Council No. 5, New Jersey Civil Service Association, D.R. No. 83-8, 8 NJPER 35 (¶13425 1982), request for review denied, P.E.R.C. No. 83-76, 8 NJPER ___ (¶_____ 1982), appeal pending,

1/ As the Director of Representation noted in Newark, supra, the size of the workforce involved is an important factor in determining managerial executive status. The magnitude of the budgets involved, as noted above, may also be a factor. However, given the moderate size and budget of each of the two divisions reviewed herein, the undersigned concludes that these factors are not compelling in the instant petition.

App. Div. Docket No. A-564-82-T2.

The record in this matter reveals that the Sanitation Superintendent and Street Superintendent do possess and exercise a level of authority and independent judgment in their duties. As noted above, the Superintendents have the authority to make expenditures less than $50 on their own. They may exercise independent judgment in determining whether or not to impose immediate minor discipline, as opposed to processing formal charges to be reviewed at a higher level. In addition, the record reveals that the Superintendents exercise independent judgment in coping with every day work situations. For example, the Street Superintendent testified that it is his responsibility to declare and supervise all snow emergencies that might occur on a weekend or during the evening, without consultation with the Department Director. (Tr. at pp. 167-168). Other examples of the level of independent judgment exercised by the Superintendents are found in the directives they issue to their employees. For example, in Exhibit P-7, the Sanitation Superintendent issued a memorandum to all foremen and inspectors reviewing their hours and responsibilities. Clearly, the Superintendents use their judgment to determine when it is appropriate to reinforce existing regulations. Moreover, as noted above, the Superintendents may impose limited forms of discipline at their discretion.

The Sanitation Superintendent has an additional responsibility which involves the exercise of independent judgment. The City of Trenton and the Township of Ewing jointly operate a trash transfer station. The Sanitation Superintendent represents the

City of Trenton on the joint transfer station committee. In that capacity, the Sanitation Superintendent joins in the study of transfer station operations and formulation of reccommendations for both the City and the Township of Ewing. (Tr. at pp. 25-29 and 202). The record clearly establishes that that committee does not have a formal voting procedure, nor does it have the authority to make purchases or policy changes at the transfer station. (Tr. at pp. 201 and 215). Instead, the committee's recommendations are reviewed by the City and the Township, and those governing bodies determine the policies and purchases of the transfer station committee.

In summary, a review of the functions, responsibilities and extent of discretion exercised by the Sanitation and Street Superintendents reveals that the Superintendents both exercise a level of independent judgment in the formulation and effecutation of division policies. This determination, alone, does not establish that the Superintendents are managerial executives within the meaning of the Act. Instead, the undersigned must determine whether or not the level of authority and independent judgment exercised is "...sufficient to broadly affect the department's policies" (7 NJPER at 646, emphasis supplied). Accordingly, the undersigned now reviews the substantial record in this matter to determine the effects of the level of authority and independent judgment exercised by the Superintendents upon the policies of their respective divisions.

The record is replete with references to policy determinations effecting the Division of Streets and Division of Garbage and Trash. For example, the Street Superintendent is periodically

responsible for compiling a five year program listing streets in need of resurfacing. (Exhibit P-14, Tr. at pp. 165 and 166). In his tenure as street superintendent, Capone has submitted two five year plans to the Director of the Department of Public Works. Capone testified that the first five year plan which he submitted was only "[p]artially" implemented. As to his most recent five year plan, which Capone submitted on April 22, 1982, Capone testified on May 26, 1982 that he had yet to receive any response from the Director as to his submission. (Tr. at p. 166). With reference to the five year plan, Director Tuccillo testified that the five year program requires Council's approval and that he and the Business Administrator would appear before Council to seek its approval. When asked whether the Street Superintendent would attend, Tuccillo testified "...sometimes out of courtesy, we bring him." (Tr. at p. 138). Thus, the record reveals that while the Street Superintendent may have an important preliminary role in identifying possible policy objectives, the Street Superintendent is not given the opportunity to have a subsequent broad effect on those policy objectives.

This conclusion is further supported by other exhibits in testimony. For example, Exhibit P-15 is a request by the Street Superintendent to Richard Porth, Assistant Business Administrator for the City. In this memorandum the Street Superintendent requests a total of ten additional employees who assist in "...services that are expected and required of this Division...you must also realize that in order to even operate at the minimum, truck drivers and laborers are desperately needed in this Division." Testimony of

the Director of the Department of Public Works indicates that only one or two out of a total of ten additional employees requested in Exhibit P-15 were actually hired as a result of the Superintendent's request (Tr. at p. 139); it would appear that the Superintendent's vehement request had a minimal affect in ultimate division policy. Of course, further evidence of the Street Superintendent's limited ability to broadly effect the operation of this division was noted above; the Street Superintendent cannot purchase any items costing more than $50. In a context of a division budget of approximately $505,000, the Street Superintendent's discretion to authorize expenditures would appear to be extremely limited.

Notwithstanding his level of authority and exercise of independent judgment, the Sanitation Superintendent is similarly limited in his ability to broadly affect policies in his division. Like the Street Superintendent, the Sanitation Superintendent is limited to purchases of less than $50, which involves a minimal exercise of discretion in the context of a budget of approximately $931,000. Like the Street Superintendent, the Sanitation Superintendent is rarely given the opportunity to appear before City Council to argue a policy or budgetary position. The only occasion referenced in the record when the Sanitation Superintendent appeared before the Council was when he was called to explain a recommendation for awarding a contract to the second lowest bidder and eliminating the lower bidder. (Exhibit P-10; Tr. at p. 197). This unusual circumstance does not indicate an ability to broadly affect division policies. Additional exhibits in the record only further support the conclusion that the Sanitation Superintendent does not broadly

affect division policy. For example, Exhibit P-7 is a memorandum from the Sanitation Superintendent addressed to foremen and inspectors within his division. While the memo sets forth various work rules and regulations, the Director of the Department of Public Works testified that P-7 did not represent a change in any of these areas. Instead, Exhibit P-7 is merely a restatement of the existing rules and regulations, issued with the intent of reminding employees of areas which they may have forgotten. (Tr. at pp. 123 and 124). As noted above, this type of memorandum represents an exercise of independent judgment on the part of the Sanitation Superintendent, namely, a determination as to when certain policies require reinforcement. However, this kind of independent judgment does not have the broad effect on division policies which would manifest managerial executive status. Similarly, Exhibit P-8 is a memo from the Sanitation Superintendent to the Director of the Department of Public Works requesting that a memo be sent to all divisions reminding them of certain environmental protection obligations. Even in this relatively mundane area, the Sanitation Superintendent either does not possess the authority to make a directive or at least did not believe he had the authority to make such a directive.

The testimony and exhibits lead the undersigned to conclude that both the Sanitation Superintendent and the Street Superintendent are not managerial executives within the meaning of the Act. While the record reveals that both Superintendents exercise a level of authority and independent judgment, nonetheless that authority and independent judgment does not prove to have a broad affect on policies in either division. In light of the above-referred testimony and exhibits, it is not surprising that

neither the Sanitation Superintendent nor the Street Superintendent are invited to attend weekly staff meetings with the Mayor. (Tr. at pp. 216-218). Similarly, the disciplinary process reviewed supra, vests responsibility for major disciplinary action with the Director of Public Works, not with the Superintendents. From the record in this matter, the undersigned concludes that the formulation and effectuation of policy in the City's Division of Streets and Division of Garbage and Trash begins at the Department Director level. 2/

III. Conflict of Interest

The principles of conflict of interest were established

2/ In this regard, the undersigned notes that while there are twenty-four division directors within the City's seven departments, the instant Clarification of Unit Petition was filed only in reference to the directors of the Division of Streets and Division of Garbage and Trash. Notwithstanding this limitation of the petition, both parties have made arguments with respect to the other division directors within the City. Noting that the remaining twenty-two division directors in the City are not represented by AFSCME for the purpose of collective negotiations, the City argues that the two titles in question are anomalous, and should therefore be removed from AFSCME's unit. AFSCME acknowledges that it does not represent division directors other than the two in question, but argues that this fact is not relevant to the instant petition because unit placement has previously been determined by individual rather than by title.

The undersigned finds that the lack of collective representation for the other division directors in the City, who are not the subject of the instant petition, is not dispositive of the unit placement of the two contested titles herein. The Commission has not previously considered the appropriate unit placement of any of the City's division directors, and is not bound by the party's previous agreement in this area. At the same time, the Commission's ultimate determination in this matter does not necessarily compel a finding that all other division directors within the City should be similarly placed. While the undersigned deems it unlikely, it is conceivable that other division directors within the City have substantially more or substantially less authority and responsibility than the titles in question here in a variety of areas, perhaps compelling a different unit placement. See State of N.J. and Council of N.J. State College Locals, D.R. No. 82-35, 8 NJPER 87 (¶13036 1982).

by the New Jersey Supreme Court in Board of Education of W. Orange v Wilton, 57 N.J. 404 (1971).

In Wilton, the Court held:

> If performance of the obligations or powers delegated by the employer to a supervisory employee whose membership in the unit is sought creates an actual or potential substantial conflict between the interests of a particular supervisor and the other included employees, the community of interest required for inclusion of such supervisors is not present. 57 N.J. at 425.

The Court also stated:

> While a conflict of interest which is de minimis or peripheral may in certain circumstances be tolerable, any conflict of greater substance must be deemed opposed to the public interest. 57 N.J. at 425-426.

In applying these principles, the Commission's Director of Representation has removed employees from negotiations units where potential conflicts of interest existed due to both evaluative [3/] and disciplinary [4/] functions. As noted above, evaluations in the divisions are performed on a informal basis. The undersigned concludes that those informal evaluation processes do not have potential for creating a substantial conflict of interest between the superintendents in question and other employees represented by AFSCME Local 2281.

The undersigned now proceeds to consider whether the disciplinary responsibilities of the Sanitation Superintendent and

3/ See, e.g. Ridgewood Board of Education and Ridgewood Education Association, D.R. No. 80-33, 6 NJPER 209 (¶11102 1980).

4/ See, e.g. Board of Education of the Borough of Paramus and Education Association of Paramus, NJEA, D.R. No. 82-7, 7 NJPER 556 (¶12247 1981).

Street Superintendent create an actual or potential substantial conflict of interest between those employees and other employees represented by AFSCME Local 2281. As noted above, the Street Superintendent is assisted by a General Foreman, who is also represented by AFSCME Local 2281. The remainder of the employees in the Division of Streets are in the blue collar rank and file unit represented by AFSCME Local 2286. Similarly, the Sanitation Superintendent is assisted by an Assistant Sanitation Superintendent who is also represented by AFSCME Local 2281. The remainder of the employees in the Division of Garbage and Trash are in the blue collar rank and file unit represented by AFSCME Local 2286. Therefore, if a potential for a substantial conflict of interest exists which would compel the removal of the Superintendents from AFSCME Local 2281, that conflict could only exist between the Superintendents and their respective assistants, who are second in the hierarchy of their respective divisions.

Both the Street Superintendent and the Sanitation Superintendent testified that while they have the authority to discipline their immediate subordinates, they never had occasion to do so. (Tr. at pp. 181 and 199). Thus, the record reveals there have been no actual conflicts of interest that would bar the inclusion of the Sanitation and Street Superintendent in the same negotiations unit as their immediate assistants. However, for the reasons stated below, the undersigned concludes that the potential for a substantial conflict of interest compels the exclusion of the Sanitation Superintendent and the Street Superintendent from the negotiations unit represented by AFSCME Local 2281.

As noted above, the Superintendents have an important role in the discipline of employees. Disciplinary proceedings within both the Division of Streets and the Division of Garbage and Trash can ultimately result in a hearing before the Director of the Department of Public Works. However, if the Superintendent determines that a hearing is not necessary for disciplinary matter, the Superintendent has the authority to take minor disciplinary action, or no action at all.

Under the circumstances, the undersigned concludes that the potential exists for each of the Superintendents in question to be caught in a substantial conflict of interest with respect to his immediate subordinate. Where appropriate, each Superintendent is responsible for referring charges to the Director of Public Works for hearing. At the same time, given the significant discipline which could result from that hearing, the Superintendent may be subject to intense pressure from a fellow member of AFSCME Local 2281 (i.e.his immediate subordinate) or from the Union itself to take only minor disciplinary action, if any action at all. Moreover, if the Superintendent forwards charges against his immediate subordinate to the Director, and if the subordinate (and/or AFSCME Local 2281) contests the charges, the Superintendent could be responsible for testifying against the subordinate (and/or AFSCME Local 2281) at the hearing held by the Director. The above forms of conflict were precisely the kinds of situations which the Court sought to avoid in Wilton (supra at p. 426). The undersigned notes that the conflicts described above are not inherent in the responsibilities of any supervisor having any role in the discipline of

any subordinate. Instead, the undersigned notes that the particular stage in the disciplinary process is critical in any conflict of interest analysis. In the instant matter, the Superintendents do not serve as hearing officers on disciplinary charges; nonetheless, they function at the last stage prior to a disciplinary hearing. In this pivotal final prehearing step, the Superintendent is subject to a significantly greater level of pressure to eschew the presentation of charges than a supervisor at a prior stage in a disciplinary process. The undersigned notes that earlier and less formal stages in a disciplinary process are not as likely to cause substantial conflicts requiring the removal of a supervisor from a supervisory unit. However, given the level and formality of the disciplinary process as reviewed above, the undersigned determines that a potential for substantial conflict of interest exists which compels the exclusion of the Sanitation Superintendent and Street Superintendent from the negotiations unit represented by AFSCME Local 2281.

## RECOMMENDATIONS

For the above stated reasons, the undersigned recommends the following findings:

1. The Sanitation Superintendent and Street Superintendent employed by the City of Trenton are not confidential employees within the meaning of the Act.

2. The Sanitation Superintendent and the Street Superintendent employed by the City of Trenton are not managerial executives within the meaning of the Act.

3. The potential for a substantial conflict of interest

exists which compels the exclusion of the Sanitation Superintendent and Street Superintendent from the negotiations unit represented by AFSCME Local 2281.

Respectfully submitted,

Mark A. Rosenbaum
Hearing Officer

DATED: December 29, 1982
Trenton, New Jersey