

P.E.R.C. NO. 2023-16

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CARTERET,

Petitioner,

-and-

Docket No. CU-2019-020

LOCAL 67, FIREFIGHTERS MUTUAL
BENEVOLENT ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants a request filed by Firefighters Mutual Benevolent Association, Local 67, for review of the Director of Representation's decision granting the Borough of Carteret's unit-clarification petition, excluding lieutenants from a negotiations unit of lieutenants and firefighters represented by Local 67 due to an inherent conflict of interest. The Commission finds the record presented indicates Carteret is a Civil Service jurisdiction wherein lieutenants do not have the statutory authority to hire, fire or formally discipline other employees; and it does not support a conclusion that lieutenants otherwise have such authority to a significant degree. In particular, the record shows no evidence of any specific disciplinary recommendations having either been made by lieutenants or considered by the Chief. As such, the Commission finds the lieutenants would not qualify under N.J.S.A. 34:13A-5.3 as supervisors having the power to hire, discharge, or discipline, and there is insufficient evidence to establish that they possess either the power to "effectively recommend" such actions or exercise "significant authority" over them.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, McManimon, Scotland & Bauman, LLC,
attorneys (Ted Del Guercio, III, of counsel)

For the Respondent, Kroll, Heineman, Ptasiewicz &
Parsons, attorneys (Raymond G. Heineman, of counsel)

DECISION

On August 11, 2022, Firefighters Mutual Benevolent Association, Local 67 (Local 67) filed a request for review of a decision of the Director of Representation (Director), D.R. No. 2023-2, 49 NJPER 90 (¶19 2022), which granted a clarification of unit (CU) petition filed by the Borough of Carteret (Carteret or Borough) to exclude lieutenants from a negotiations unit of lieutenants and firefighters represented by Local 67. The Director found that, due to an inherent conflict of interest created by the inclusion of lieutenants with rank and file firefighters, the CU petition should be granted to exclude lieutenants from the unit. Local 67 filed a brief in support of

its request for review, and Carteret filed an opposing brief. Having reviewed the record, we grant review.^{1/}

By way of background, Carteret is a civil service municipality. The CNA in effect when Carteret filed the CU petition, with a term from January 1, 2011 to December 31, 2015, covered all fire personnel within the Carteret Fire Department, excluding the Chief, in a single unit. Local 67 has also historically been a mixed unit, at least since the early 1960s, composed of officers, including captains, together with rank-and-file firefighters. By ordinance the title of lieutenant was created on December 20, 2012, upon which lieutenants joined Local 67 and were covered by its CNAs. The Carteret Fire Department is also a small force, composed of one fire chief, no fire captains^{2/}, five lieutenants, and fourteen firefighters.^{3/}

1/ At the Commission's October 27, 2022 meeting, an initial draft decision was presented to the Commission which resulted in a majority vote of one in favor and three opposed, with one recusal. A discussion ensued, followed by a motion, unanimously approved, to table the initial draft until the next meeting for consideration of a revised draft reflecting the majority vote of the Commission, set forth herein.

2/ According to the undisputed record, as a result of attrition no captains have been employed in the fire department since April, 2018. Prior thereto, captains were in the same unit as lieutenants and rank-and-file firefighters.

3/ Local 67's affidavit opposing the CU petition attests that the unit is composed of approximately twenty (20) employees, including seven (7) lieutenants and thirteen (13) rank and file firefighters. (Kurdyla Aff., ¶5.)

(Hruska cert., ¶2, 4.) Lieutenants report to the fire chief, and there are no other titles with managerial duties in the department besides lieutenants and the chief. D.R. No. 2023-2, at 4.

The grounds for granting a request for review are set forth in N.J.A.C. 19:11-8.2(a), which states, in pertinent part:

A request for review will be granted only for one or more of these compelling reasons:

1. A substantial question of law is raised concerning the interpretation or administration of the Act or these rules;
2. The Director of Representation's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the party seeking review;
3. The conduct of the hearing or any ruling made in connection with the proceeding may have resulted in prejudicial error; and/or
4. An important Commission rule or policy should be reconsidered.

Local 67 argues: the processing of the CU petition should have been blocked pending a resolution of related unfair practice charges, and the Director's failure to do so helped the Borough accomplish its goals of destabilizing the union, and punishing it for filing charges; the Director incorrectly concluded that the lieutenants were supervisors under the Act; severance of the lieutenants was improper in the absence of an actual conflict of interest or a potential substantial conflict of interest; the

Director improperly failed to apply the small unit exception in severing lieutenants from the combined unit. Local 67 also makes argumentative assertions, in its statement of facts, that the Director "ignored" certain determinations by the Civil Service Commission (CSC) relating to the lieutenant title.

Carteret argues: Local 67 has no basis for a grant of review of the Director's decision; the standard for severance does not require an actual conflict of interest, it requires only a potential for conflict inherent in having a combined unit where officers are supervising the rank and file; the Director correctly found that the supervisory responsibilities of these Lieutenants were sufficient to warrant bifurcation; the Director correctly found the small unit exception did not apply where the lieutenants' duties are not interchangeable with firefighter duties; the Director sensibly exercised his discretion in deciding the CU petition first while holding the unfair practice charges in abeyance; and, finally, the CU petition was not filed as a "nefarious" response to protected activity, because Carteret filed an identical CU petition in 2015, seeking the same relief, long before any of the grievance or arbitration proceedings cited by Local 67.

Among other reasons, N.J.A.C. 19:11-8.2(a) allows for review of the Director's decision if: (1) a substantial question of law is raised concerning the interpretation or administration of the

Act or its rules; or (2) it is clearly erroneous on a substantial factual issue, and such error prejudicially affects the rights of the party seeking review. We find such review is warranted here.

First, we note that the Director accurately summarized the presumptions (and exceptions thereto) that generally apply to CU petitions involving public safety departments as developed in controlling court and PERC precedent, including Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 (1971), and West New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1987):

We presume that in paramilitary organizations, such as fire departments, an inherent potential conflict of interest exists between superior officers and rank and file uniformed personnel. See West New York, supra. The presumption is not dependent upon a finding of the supervisory status of superiors or upon the presence of actual conflict among the groups. Id. An exception may be found in small units if the duties and authority of superiors and rank and file are virtually identical so that any potential for conflict between the ranks is de minimis. See Town of Harrison, P.E.R.C. No. 93-104, 19 NJPER 268 (¶24134 1993), affirming H.O. No. 93-1, 19 NJPER 39 (¶24018 1992). This situation is normally found in a very small public safety departments, where the lines of demarcation between ranks is slight.

[D.R. No. 2023-2, at 16-17.]

The potential for conflict between the interests of supervisory and nonsupervisory personnel in the same unit is also addressed in N.J.S.A. 34:13A-5.3, which states, in pertinent part (emphasis added):

[E]xcept where established practice, prior agreement or special circumstances dictate the contrary, . . . any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, [shall not] have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership[.]

In S. Plainfield Boro., D.R. No. 78-18, 3 NJPER 349 (1977), we held that while a finding of conflict is "not contingent" on superior officers being supervisors "within the meaning of" N.J.S.A. 34:13A-5.3, "the exercise of significant authority in a chain of command operation" nonetheless "produces an inherent conflict of interest" requiring the separation of "superior officers from rank and file notwithstanding a previous history of collective negotiations in a combined unit." Id. (emphasis added.) Thus, N.J.S.A. 34:13A-5.3 prohibits those who possess the power to hire, discharge, discipline, or "effectively recommend the same" from being represented in the same unit as nonsupervisory personnel; and we will otherwise find an inherent conflict of interest requiring the separation of superior officers who exercise "significant authority" over the rank and file. We must review all the circumstances of a case to determine whether the employee has and regularly exercises such power. City of Margate, P.E.R.C. No. 87-146, 13 NJPER 500 (¶18184 1987); Cherry Hill Tp. DPW, P.E.R.C. No. 30, NJPER Supp. 114 (¶30 1970).

Here, the Director determined:

[T]he lieutenants should be separated from the existing unit of rank and file firefighters. Impermissible potential conflicts of interest exist between the lieutenants and rank and file members because lieutenants are the sole remaining superior officers (other than the Fire Chief) to whom rank and file unit members report directly.

[D.R. No. 2023-2, at 17.]

The Director based the above conclusion on the "CSC job description for fire lieutenant, as well as the [Chief] Hruska certification [submitted by the Borough] and the [Lieutenant] Reynolds affidavit [submitted by Local 67], [which] detail the numerous duties and responsibilities that involve the supervision of rank and file firefighters, including the authority to direct assignments, and recommend discipline." Ibid. As such, the Director found "the facts of this matter do not meet the small force exception." Id., at 20.

In so finding, the Director emphasized S. Plainfield's holding that the presumption of a conflict of interest between superiors and subordinates "is not contingent upon a finding that the superior officers are supervisors within the meaning of N.J.S.A. 34:13A-5.3." D.R. No. 2023-2, at 19-20. But the Director did not otherwise expressly conclude that lieutenants exercise "significant authority" over the rank and file in this matter, such as would establish an inherent conflict of interest requiring unit bifurcation, regardless of whether they qualified

as supervisors within the meaning of the statute. S. Plainfield, supra.

We find a case relied upon by the Director, Woodbridge Tp., D.R. No. 96-19, 22 NJPER 216 (¶27116 1996), to be distinguishable from the facts of this matter. Woodbridge involved a much larger public safety department of about 200 police personnel, and a historically mixed unit of six captains, 13 lieutenants, 25 sergeants, and approximately 150 rank-and-file police officers. Id. Unlike this matter, the CU petition in Woodbridge was filed by a union seeking to represent the superior officers in a separate unit. Id. There, unit bifurcation was ordered where it was found to be undisputed that:

the superior officers [at issue] discipline subordinates with reprimands and prefer charges against subordinate officers involving major discipline. Thus, the significant exercise of authority over rank-and-file officers creates an impermissible conflict of interest between the superior officers and the rank-and-file members of the PBA unit."

[Woodbridge Tp., D.R. No. 96-19, 22 NJPER 216 (¶27116 1996) (emphases added).]

Here, we find the record presented does not support a conclusion that lieutenants have authority to hire, discharge or recommend discipline, to a significant degree. Chief Hruska admits that as "Carteret is a Civil Service jurisdiction, lieutenants do not have the authority to hire, fire or formally discipline other employees." (Hruska Cert., ¶14, (emphasis

added).) Lieutenant Reynolds certifies that lieutenants "do not provide input for the hiring process of firefighters."

(Reynolds Aff., ¶15.) The Chief further certifies that lieutenants "are responsible for corrective actions in immediate circumstances that may arise with their subordinates during their respective duty shifts, and are responsible to report potential disciplinary issues by subordinates to the Fire Chief for his review and ultimate determination regarding formal Civil Service disciplinary action(s)", and that "in reporting potential disciplinary issues, . . . [lieutenants] can certainly make recommendations for consideration," however "the ultimate decision lies with the Fire Chief." (Hruska Cert., ¶14.) But the Chief gave no examples of specific disciplinary recommendations made by lieutenants.

The record considered by the Director also contains a CSC audit determination dated April 11, 2019, regarding Reynolds' title, according to which: "A review of Lieutenant Reynolds' position reveals that he . . . makes recommendations but does not have the authority to hire and fire personnel, prepare performance evaluations, or implement disciplinary actions." The CSC audit also found that lieutenants: "report directly to the Fire Chief and provide limited 1st level supervision to Fire

Fighters and Emergency Medical Technicians (EMT) ^[4/], only when serving as the highest ranking officer on the work shift. The Fire Chief has sole responsibility for directly supervising all fire department personnel; evaluating employee performance and conduct, authorizing the hiring and firing of staff, implementing disciplinary actions; managing all investigations, [and] follow up actions, . . ."

The Director also cited Lieutenant Reynolds's affirmance that another, unspecified lieutenant "recommended that the Chief discipline a probationary [f]irefighter . . . for falling asleep during a training class and for not paying attention during another class," but "was not provided any feedback on his recommendation." D.R. No. 2023-2, at 10. But the corresponding documentary record apparently underlying this asserted disciplinary recommendation (an email exchange between Lieutenant Rhodes and the Chief, copies of which are attached to Chief Hruska's certification) appears to be more in the nature of a report. The lieutenant's email, and the Chief's response, shows no evidence of any specific disciplinary recommendation having either been made by the lieutenant or considered by the Chief. Lieutenant Rhodes reported to the Chief, in pertinent part:

During my [morning] lecture . . . on the topic of roof ventilation, I had noticed FF'r [M.] was dozing off to sleep. His eyes were

^{4/} EMTs are not in the Local 67 negotiations unit.

closed and his head was drifting down. I told him to wake up and pay attention and that this is important information. He corrected himself and sat there but did not seem to pay attention to the rest of the discussion....

[During] [t]he afternoon [training] session...[which included] a PowerPoint [presentation]...that went into great detail regarding what CO is an[d] what it does, how it affects the human body and etc. 110 slides in total[,]...[a]gain I witnessed FF [M.] with his head drifting downward and him to be in what I would assume to be a sleep position.

I wanted to make you aware of this actions [sic] and behavior like this from one of our Probationary Firefighters during not one but two training classes.

The stated purpose of the lieutenant's email was to make the Chief "aware" of the situation. It provided facts but no opinion or analysis. The Chief replied simply: "Thank you for bringing this to my attention. I have spoken to F/F [M.] about this. If there are any other issues please let me know." (Hruska Cert., ¶16, Exh. E.) To the extent that being "spoken to" by the Chief may be considered a disciplinary action, or a consequence of the lieutenant's report, it is not one that the lieutenant's email specifically directed, opined about or even suggested. The lieutenant's report was clearly subject to independent analysis, and action, by the Chief. The record also contains other email reports by lieutenants to the Chief that are factual and

similarly devoid of specific recommendations, opinions or analysis.

On this record, it is clear that under N.J.S.A. 34:13A-5.3, the lieutenants would not qualify as supervisors "having the power to hire, discharge, [or] discipline" unless they possess the power to "effectively recommend" such actions. On this question, there must be at least some evidence, which is not present here, demonstrating the lieutenants exercised the "effectively recommend" authority. Town of West Orange, E.D. No. 6, NJPER Supp 399 (¶97 1970) (fire department captains not supervisors under N.J.S.A. 34:13A-5.3 where captains lacked "effectively recommend" authority, as their disciplinary reports were subject to independent review and analysis); Hanover Tp., E.D. No. 41, NJPER Supp 516 (¶132 1971) ("The consideration of an opinion which is subject to independent analysis does not constitute the high order of reliance necessary to meet the test of effective recommendation").

Absent the power to effectively recommend, unit bifurcation may be required here if there is evidence that the lieutenants otherwise exercise "significant authority" over the rank and file. As discussed supra, "significant authority" will be found where there is evidence that superior officers "discipline subordinates with reprimands and prefer charges against subordinate officers involving major discipline." Woodbridge Tp., supra; see also, Park Ridge Boro, D.R. No. 2006-8, 32 NJPER 23 (¶12 2006) (police captain had significant authority where he

was "in charge of training, special investigations, headquarters, detention, court liaison and records...[and more importantly] has effectively recommended discipline in two recent instances, both of which were followed by the chief."); Atlantic City, D.R. No. 98-16, 24 NJPER 393 (¶29179 1998) (finding police captains have significant authority where, inter alia, they: institute oral reprimands and emergency suspensions; make recommendations for other forms of discipline; make recommendations for hiring, training, appearance, fitness for duty and job performance; and investigate disciplinary cases). The record in this matter does not contain such evidence.

Accordingly, as we reverse the Director's decision for the above-stated reasons, we do not address other arguments raised by Local 67.

ORDER

The request for review filed by Firefighters Mutual Benevolent Association, Local 67, is granted. The Director's decision, D.R. No. 2023-2, 49 NJPER 90 (¶19 2022), is reversed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Ford, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni recused himself.

ISSUED: November 22, 2022

Trenton, New Jersey