

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

In the Matter of

BOROUGH OF METUCHEN,

Public Employer-Petitioner,

-and-

DOCKET NO. CU-82-50

POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL NO. 60,

Employee Representative.

SYNOPSIS

The Director of Representation determines that the Police Lieutenant of Operations is a supervisor and must be excluded from the PBA's negotiations unit which includes non-supervisors. The Lieutenant of Operations title is newly created as the result of a reorganization. The Lieutenant of Operations has a greater supervisory role than the Captain title which no longer exists. Although the Captains had been supervisors, their previous inclusion in the PBA unit was permitted under the Employer-Employee Relations Act's "established practice" exception. The facts developed at a hearing did not demonstrate a chain of continuity between the Captain positions and the Lieutenant of Operations position to permit a continued application of the "established practice" exception.

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LOCAL NO. 60,

Employee Representative.

Appearances:

For the Public Employer-Petitioner
Martin A. Spritzer, attorney

For the Employee Representative
Gary Weingart, Delegate

DECISION

On January 22, 1983, a Petition for Clarification of Unit was filed with the Public Employment Relations Commission ("Commission") by the Borough of Metuchen ("Borough") seeking to determine whether the newly created title of Lieutenant of Operations should be included in the negotiations unit represented by the Policemen's Benevolent Association, Local No. 60 ("PBA").

The Borough contends that the Lieutenant of Operations should not be included in the unit because the title is supervisory, managerial, and/or that there is a conflict of interest between the Lieutenant of Operations and unit members. The PBA alleges

that the title is appropriate for inclusion in the unit and that the Petition should be dismissed.

Pursuant to a Notice of Hearing, hearings were conducted before Commission Hearing Officer Mark A. Rosenbaum on August 9, 10, 17 and September 8, 1982, at which all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Thereafter, the Hearing Officer, on March 25, 1983, issued his Report and Recommendations, a copy of which is attached hereto and made a part hereof.

The Hearing Officer found that the Lieutenant of Operations was a supervisor within the meaning of the Act and that there was no basis for invoking the statutory exceptions which might permit the inclusion of the title in the PBA unit which includes nonsupervisors. He also found that the Lieutenant of Operations was a managerial executive within the meaning of the Act and that a substantial conflict of interest existed compelling the exclusion of the title from the unit. Neither party has filed exceptions.

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

1. The Borough of Metuchen 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 the employer of the employees who are the subject of this Petition, and is subject to the provisions of the Act.

2. The Policemen's Benevolent Association, Local No. 60 is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Borough has filed a Petition for Clarification of Unit seeking a determination that the Lieutenant of Operations is a supervisor, a managerial executive, and/or that a conflict of interest exists warranting exclusion of that title from the PBA's negotiations unit.

The PBA, while admitting that the title is supervisory, argues that the Lieutenant of Operations may nevertheless be included in its unit. It claims that the duties of the Lieutenant of Operations are the same as the duties previously performed by two Captains and argues that the Director of Representation, in an earlier decision involving the same parties, D.R. No. 78-27, 3 NJPER 394 (1977), found the Captains to be supervisory personnel but permitted their continued inclusion in the unit because of the "established practice" exception embodied in N.J.S.A. 34:13A-5.3 and 6(d) ^{1/} and because no actual conflicts of interest were demonstrated in the record.

1/ N.J.S.A. 34:13A-5.3 provides, in relevant part:

... nor, except where established practice, prior agreement or special circumstances, dicatate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership...

N.J.S.A. 34:13A-6(d) repeats this statutory admonition.

4. The Hearing Officer found that the duties and responsibilities of the Lieutenant of Operations no longer matched the duties and responsibilities of the two Captains who were the subject of the 1977 decision. The Police Department is comprised of an Investigative Division, a Patrol Division, a Communications Section and a Records Bureau. All sections, with the exception of the Records Bureau, are under the direction of the Lieutenant of Operations, who is second in command to the Chief. In 1977, the Patrol Division and the Investigative Division were supervised, respectively, by Captains. The Captains reported directly to the Chief, and neither Captain had division-wide authority in the manner in which the Lieutenant of Operations functions today.

The Hearing Officer found that the Lieutenant of Operations is a key figure in the budgeting process. He prepares the annual budget along with the Chief, and defends the proposal before the Borough Council. He also is involved in the purchasing process and has been responsible for the purchase of many items for the Department.

The Lieutenant of Operations' duties also include the deployment of personnel. He not only makes the routine staffing decisions but also has made deployment changes in the Detective Bureau and has designated certain officers for assignment to sub-bureaus. He also has altered the shift schedules for Sergeants within the Patrol Division and altered the weekend hours in the Investigative Division. He has been responsible for the transfer of one officer from the Patrol Division to the Investigative Division.

The Hearing Officer further found that the Lieutenant of Operations also approves the officers' time sheets for court appearances as well as their requests for attendance at training programs, vacation and compensation days, and for overtime pay.

The Lieutenant of Operations is also involved in hiring, disciplining and evaluating personnel. It is his direct responsibility to hire the civilian dispatchers and he has hired as well a part-time records clerk. There have been no other employees hired within the Department since the title was created.

Although, since the creation of the title, no employees have been dismissed, it is within the authority of either the Chief or the Lieutenant of Operations to bring an officer before the Borough Council on charges leading to dismissal. The Lieutenant has been responsible for issuing warnings to an officer with an alcohol problem, and for relieving that officer of his weapon and enrolling him in an alcohol rehabilitation program. The Lieutenant testified that he would prefer charges against an officer before the Borough Council if the drinking was to reoccur. The Lieutenant also is responsible for conducting semi-annual evaluations of all supervised employees. The evaluation form used is one which was revised by the Lieutenant. To date, no employee has been disciplined as a result of these evaluations.

Based upon the foregoing the Hearing Officer concluded that the Lieutenant of Operations was a supervisor and that the scope of his supervisory responsibilities was greater than that

previously exercised by the Captains. In re Ramapo-Indian Hills School Dist. Bd. of Ed., D.R. No. 81-26, 7 NJPER 119 (¶ 12048 1981). He found that although each Captain may have had supervisory duties within his own division, neither of them had the Department-wide responsibilities now exercised by the Lieutenant of Operations.

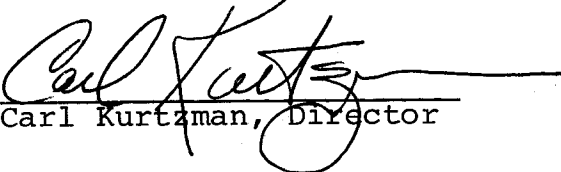
The Hearing Officer also found significant conflicts of interest between the Lieutenant of Operations and unit members. His role in grievance processing, resulting from the disciplining of unit members, would be in direct conflict with other unit members.

5. The undersigned adopts the above factual findings of the Hearing Officer and his conclusion that the Lieutenant of Operations is a supervisor. The factual record supports this conclusion as well as the conclusion that there has been a significant modification in the scope of supervisory responsibilities exercised by the Lieutenant of Operations as compared with the Captains. This significant increase in supervisory responsibility resulted from the implementation by the Borough of a reorganization plan for the police department recommended by the New Jersey Department of Community Affairs. Moreover, the record does not bear out a chain of continuity between the Captains and the Lieutenant of Operations inasmuch as the Lieutenant of Operations title is newly created under a departmental reorganization and is assigned supervisory responsibilities of greater dimension. For this reason, the PBA's reliance on the earlier 1977 decision and the statutory exception of "established practice" is misplaced.

Where the underpinnings which justify the application of the statutory exceptions are removed, ordinary principles of supervisor/nonsupervisor conflict of interest prevail and the Act's normal prohibition against mixed units is applicable. Ramapo, supra.

Accordingly, for the above reasons, the undersigned determines that the newly created position of Lieutenant of Operations may not be included in the negotiations unit represented by the PBA. 2/

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: August 1, 1983
Trenton, New Jersey

2/ The undersigned, having determined that the position of Lieutenant of Operations is supervisory and should not be included in the negotiations unit containing nonsupervisory personnel, need not address the additional question of whether or not the title is managerial.

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

In the Matter of

BOROUGH OF METUCHEN,

Public Employer-Petitioner,

-and-

DOCKET NO. CU-82-50

P.B.A. Local No. 60,

Employee Representative.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission recommends that the Police Lieutenant of Operations employed by the Borough of Metuchen be excluded from the collective negotiations unit represented by P.B.A. Local No. 60.

The Hearing Officer finds that the Lieutenant of Operations is a supervisor within the meaning of the New Jersey Employer-Employee Relations Act, and that no statutory exclusion warrants the inclusion of the Lieutenant of Operations in the P.B.A.'s negotiations unit, which includes non-supervisors. The Hearing Officer also finds that the Lieutenant of Operations is a managerial executive within the meaning of the Act and that substantial conflicts of interest exist which compel the exclusion of the Lieutenant of Operations from the P.B.A.'s negotiations unit.

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, and 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. 83-11

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

In the Matter of

BOROUGH OF METUCHEN,

Public Employer-Petitioner,

-and-

DOCKET NO. CU-82-50

P.B.A. Local No. 60,

Employee Representative.

Appearances:

For the Public Employer
Martin A. Spritzer, Esquire

For the Employee Representative
Gary Weingart, Delegate

HEARING OFFICER'S
REPORT AND RECOMMENDATIONS

On January 22, 1982, the Borough of Metuchen (the "Borough") filed a Petition for Clarification of Unit with the Public Employment Relations Commission (the "Commission") seeking a clarification of the negotiations unit represented by the Policemen's Benevolent Association, Local No. 60 (the "PBA"). The Borough seeks a determination that a new title, namely Lieutenant of Operations, cannot be represented by the PBA for the purpose of collective negotiations, contending that the title is managerial, supervisory, and/or that conflicts of interest preclude the inclusion of this title in

the PBA's negotiations unit. The PBA disputes these contentions ^{1/} and urges that the petition be dismissed.

Pursuant to a Notice of Hearing dated June 23, 1982, hearings were held before the undersigned on August 9, 10, 17 and September 8, 1982. At the hearings, both parties were given opportunities to examine and cross-examine witnesses, present evidence and argue orally. Subsequent to close of the hearing, the parties filed timely briefs in this matter. ^{2/}

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

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

2. The Policemen's Benevolent Association, Local No. 60 is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Borough seeks a clarification of a collective negotiations unit of its employees currently represented by the

^{1/} The PBA does not dispute the Borough's contention that the Lieutenant of Operations is a supervisor. However, the PBA argues that the Lieutenant of Operations is essentially responsible for the same duties previously performed by the Captains in the employ of the Borough, and that, consistent with the decision by the Commission's Director of Representation involving these same parties (D.R. No. 78-27, 3 NJPER 395 (1977)), established practice will permit the inclusion of the contested title in the PBA's negotiations unit.

^{2/} The PBA also filed certain documentary evidence subsequent to the close of the hearing. These materials have not been entered into evidence, and accordingly are not considered by the undersigned in this decision.

PBA, namely a determination that the Lieutenant of Operations cannot be represented by the PBA for the purpose of collective negotiations. The PBA asserts that this position is appropriately represented within its negotiations unit. Accordingly, there is a question concerning the composition of the collective negotiations unit, and the matter is properly before the undersigned for a Report and Recommendation.

The Borough of Metuchen functions under a mayor-council form of government. The Mayor and Council are elected officials who serve on a part-time basis. Council members also serve as commissioners of the various departments of the Borough. In addition, the Borough Administrator is in daily contact with the Borough departments.

The petition concerns a new title in the Borough's Police Department, Lieutenant of Operations. The Metuchen police organizational chart (Exhibit P-2) indicates that the Police Department has an Investigative Division, a Patrol Division, Communications Section which is staffed by civilian dispatchers, and a Records Bureau, which consists of a Lieutenant of Records and a stenographer. ^{3/} The organizational chart, as well as substantial testimony, establishes that, with the exception of the Records Bureau, all divisions report to the Lieutenant of Operations, who is second in command to the Chief, and serves as Acting Chief in the Chief's absence (Tr. 1 at p. 138). In total, the department is comprised of 28 police officers, including the Chief and the Lieutenants (Tr. 2 at p. 98).

The above organizational structure represents a significant change in the structure of the Police Department. When Commission agents last reviewed the structure of the Metuchen Police Department

^{3/} Lieutenant of Records position is not a subject of the instant petition.

in 1977, the Investigative and Patrol Divisions were commanded by Captains who reported directly to the Chief. The department did not have civilian dispatchers in 1977. In the Chief's absence, the officer with the most years on the force became Acting Chief (Tr. 1 at p. 138). The Records Bureau functioned in the same manner as it does presently (Exhibit P-1 and J-13).

John Wiley, Mayor of the Borough, and Thomas Atkins, former Borough Administrator, testified that the above changes in the organizational structure of the Borough's Police Department resulted from a study conducted by the New Jersey Department of Community Affairs in 1979. DCA recommended, inter alia, that the Department be reorganized to concentrate middle management authority in a Lieutenant of Operations, who would supervise both the Investigative and Patrol Divisions (Exhibit J-4; Tr. 1 at p. 21; and Tr. 4 at p. 110). The Investigative and Patrol Divisions would no longer be commanded by Captains; instead Detective-Sergeants and Staff Sergeants would supervise squads in their respective divisions. None of these sergeants are vested with division-wide authorities, but all report to the Lieutenant of Operations.

The Lieutenant of Operations, Edward Studnicki, was appointed to his position on November 2, 1981 (Tr. 1 at p. 145). His testimony, as well as that of the Borough Administrator, Mayor and Chief, establishes that his responsibilities are extensive. The Lieutenant of Operations is active in the budgetary process; along with the Chief, and prepares annual budgets and requests for the Police Department.

The budgetary proposal is submitted to the Borough Administrator, who reviews the request with the Lieutenant of Operations and proposes modifications. Ultimately, budgetary proposals are presented to Borough Council for review and modification and/or adoption. The Lieutenant of Operations and the Chief appear before Council to defend their budgetary proposal (Exhibit P-3 at pp. 51-53; P-4 at pp. 144-147; and pp. 211-213).

In addition to his role in the budgetary process, the Lieutenant of Operations is involved in the purchasing process. During the course of the budget year he recommended the purchase of items, setting classifications or actually purchasing items up to \$4,500 (Tr. 1 at pp. 102 and 103, 160-162). Purchases above \$4,500 may not be made without the approval of the Mayor and Council (Tr. 1 at p. 159). All purchases, whether below or above the \$4,500 limitation, must be within the budgetary allotments approved by Council. Within these confines, the Lieutenant of Operations has been particularly active in the purchase of ammunition, duplicating machines, typewriters and dictaphone equipment (Tr. 3 at pp. 101-103). The Lieutenant of Operations also authorized the revamping of the department's booking room (Tr. 4 at p. 219).

The Lieutenant of Operations has substantial authority to deploy the personnel of the department. In addition to day-to-day staffing decisions, Lieutenant Studnicki has made and implemented deployment changes in the staff of the Detective Bureau (Tr. 2 at pp. 14 and 95; Tr. 3 at p. 10 and 16). In addition, the Lieutenant of Operations has designated certain officers for assignment to sub-bureaus

within the department, specifically the Narcotics and Speakers Bureaus (Tr. 3 at pp. 21-24). At the same time, the Lieutenant of Operations has consolidated the Juvenile and Adult Divisions within the Investigative Division (Tr. 1 at pp. 97 and 98). The Lieutenant of Operations has altered the shift schedules of Sergeants in the Patrol Division (Tr. 3 at pp. 20-21), and also altered weekend hours in the Investigative Division (Tr. 4 at pp. 163-164).

The Lieutenant of Operations also initiated, recommended, and, with the approval of Council, implemented the transfer of one officer from the Patrol Division to the Investigative Division. This action changed the manning in each Division and resulted in an increase in pay for the transferred officer (Tr. 1 at pp. 97-98). In all of these deployment decisions, the Lieutenant of Operations informs the Chief either before or after such actions are taken. While the Chief testified that he would like the Lieutenant of Operations to discuss such changes "...with me first to see whether I approve or not...", the record reveals that the Lieutenant of Operations routinely made changes on his own and informed the Chief subsequently (Tr. 3 at pp. 21-23; Tr. 2 at p. 95). In addition, the Lieutenant of Operations is responsible for the ultimate approval of time sheets for court appearances (Tr. 3 at p. 64), requests for attendance at training programs (Tr. 3 at p. 70) and for over-time pay, vacation days and compensation days (Tr. 3 at pp. 58, 133; Tr. 2 at p. 112). ^{4/}

^{4/} The PBA argues that its collective agreement with the Borough authorizes the Chief, Borough Administrator, and/or Borough Council to control these decisions. This argument is misplaced. The undersigned is not an arbitrator, reviewing alleged noncompliance with contractual provisions. Instead, the undersigned is responsible for reviewing actual practices in the workplace related to the contested position. If these practices prove to be inconsistent with contractual provisions, the parties can consider alternative remedies in an appropriate forum.

Testimony also establishes that the Lieutenant of Operations is directly involved in the hiring, evaluation and discipline of employees. The Lieutenant of Operations role in the hiring process has been limited to the hiring of civilian dispatchers and a part-time records clerk (Tr. 1 at p. 149; Tr. 4 at pp. 159-161). No employees who are members of the negotiations unit represented by the PBA have been hired since the creation of the Lieutenant of Operations position; consequently, there is no established role for the Lieutenant of Operations has no clear role in the hiring of police officers (Tr. at p. 159).

Since the end of 1981, the Police Department has conducted a semi-annual evaluation of all employees for the first time since a prior evaluation program in 1968 (Tr. 1 at pp. 11-13; Tr. 2 at p. 71 and 72). While the Chief was responsible for these evaluations in 1981, the Lieutenant of Operations is conducting these evaluations with an evaluation form which the Lieutenant of Operations revised on his own initiative (Tr. 2 at pp. 72 and 73; Tr. 3 at pp. 11 and 12). To date, the evaluation process has not led to any form of discipline of any police officer by the Lieutenant of Operations or the Chief (Tr. 2 at p. 78). The Lieutenant of Operations has also become involved in personnel matters, outside of discipline per se, which impact on manpower concerns. For example, when a Sergeant was out on sick leave due to an injury, the Lieutenant of Operations monitored the Sergeant's recuperation and ultimately ordered him to report back to work. The Sergeant objected, whereupon the Lieutenant of Operations brought the matter to Council. Upon Lieutenant Studnicki's

recommendation, Council determined that the Sergeant could remain on sick leave and instead Council hired an additional dispatcher at Studnicki's request to meet the department's needs (Tr. 3 at pp. 73-77; Tr. 4 at p. 161). The Lieutenant of Operations also handled a situation involving an officer with an alcohol problem. Lieutenant Studnicki testified that after making several warnings to the officer in question, the Lieutenant relieved the officer of his weapon and enrolled him in an alcohol rehabilitation program. Lieutenant Studnicki further testified that he indicated to the officer that if the problem was not resolved, the Lieutenant would bring him up on charges before the Borough Council (Tr. 3 at pp. 77-90). The Lieutenant of Operations further testified that either he or the Chief can bring an officer before Borough Council on charges leading to dismissal, but that there has been no occasion for such charges in his term as Lieutenant of Operations (Tr. 3 at pp. 98-100). ^{5/}

^{5/} The undersigned notes that suspension and removal of a police officer in New Jersey is governed by N.J.S.A. 40A:14-147. The PBA has argued that recent amendments to N.J.S.A. 40A:14-118, which set for the powers and duties of a chief of police in New Jersey municipalities, empower that chief with disciplinary responsibilities, and that in the absence of delegation of that responsibility by Metuchen's Chief to the Lieutenant of Operations, the Lieutenant of Operations could not bring an officer up on charges before Council. The undersigned is not convinced that this argument is relevant to the instant petition. As noted above, no officer has been brought to Council on disciplinary charges since the creation of the Lieutenant of Operations position. In the absence of evidence of a disciplinary proceeding before Council, the undersigned is not convinced that the PBA's argument is ripe or dispositive in these proceedings. At the same time, the undersigned notes that the Lieutenant of Operations' opinion as to his disciplinary responsibilities within the department is relevant to the conflict of interest issues discussed infra.

ANALYSISI. Statutory Supervisor Issues

N.J.S.A. 34:13A provides in pertinent part:

5.3 ...nor, except where established practice prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in a collective negotiations by an employee organization that admits non-supervisory personnel to membership....

6(d) ...the division shall decide in each instance which unit of employees is appropriate for collective negotiations, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and nonsupervisors...

The parties do not dispute that Lieutenant of Operations is a supervisor within the meaning of the Act. ^{6/} As noted above, the PBA argues that Lieutenant of Operations is essentially responsible for the same duties previously performed by the two Captains. The PBA further argues that the decision by the Commission's Director of Representation in 1977, wherein the Director found that established practice permitted the inclusion of the Captains in the PBA's negotiations unit, is dispositive of the Lieutenant of Operations position as well. The Borough stipulates that established practice permitted the Captains to be included in the PBA's negotiations unit in 1977 and thereafter, but notes that the Captains' positions have been abolished and argues that the Lieutenant of Operations position is a new position to which the established practice exception does not apply (Tr. 1 at pp. 9-11).

^{6/} Brief of PBA at p. 15.

In numerous cases involving the application of the "established practice" exception, the Commission's Director of Representation has emphasized that the exception is narrow. Thus, in In re Ramapo-Indian Hills School District Board of Education, D.R. No. 81-26, 7 NJPER 119, 120 (¶12048 1981), the Director noted that "...where the scope of the [contested employee's] supervisory responsibilities had been significantly upgraded...", the established practice exception is no longer applicable. This principle has been applied by the Director in a series of decisions involving department chairpersons. For example, in Delaware Valley Regional High School Board of Education, D.R. 82-11, 7 NJPER 530, 531 (¶12234 1981), the Director found that, assuming arguendo proof of established practice allowing department chairpersons to be included in the same collective negotiations unit as teachers, "...a substantial increase in their duties would vitiate the legal significance of that status and operate as a bar against invoking the statutory exception...." ^{7/} Thus, the undersigned now proceeds to consider whether or not the duties of the contested position herein have "...substantially increased in scope, formality and import...", as compared with the duties of the Captains so as to bar the inclusion of the Lieutenant of Operations in the PBA's negotiations unit under the "established practice" exception.

The record in this matter, which includes the transcript and decision in the previous representation matter between these parties concerning the representational status of the Captains, demon-

^{7/} See also, In re Paramus Bd. of Ed., D.R. No. 82-7, 7 NJPER 556 (¶12247 1981); In re Cinnaminson Twp. Bd. of Ed., D.R. No. 81-39, 7 NJPER 274 (¶12122 1981); In re Ramapo-Indian Hills, supra.

strates that the Captains, like the Lieutenant of Operations, had responsibility in the hiring (see e.g. Tr. 2 at p. 107), deployment and evaluation of personnel (see e.g. Tr. 2 at p. 54; Exhibits J-13 and 14). Without reviewing these responsibilities at length, the undersigned notes that the obvious distinction between the responsibilities of the Captains and the responsibilities of the Lieutenant of Operations is that while the Captains were each responsible for supervisory duties within their respective divisions, the Lieutenant of Operations has supervisory responsibilities for both the Patrol and Investigative Divisions. As noted above, the elimination of the Captains positions and consolidation of their duties into a single Lieutenant of Operations position represents an attempt by the Borough to strengthen the middle management of its police department. Nowhere in the voluminous record herein is there any evidence to indicate that either Captain had responsibilities for supervising personnel in the other Captain's division, nor for coordinating deployment of personnel between their divisions. Therefore, at a minimum, the Lieutenant of Operations' responsibilities can be distinguished from the responsibilities of the Captains in the department by virtue of the department-wide scope of his responsibilities.

In addition, the undersigned finds that the formality and import of the Lieutenant of Operations' functions are also substantially increased from that of the Captains. As noted above, annual evaluation of the police employees now takes place in the department in written form. This was not the case when the Captains evaluated employees as reviewed in the 1977 representation matter. Moreover, the Lieuten-

ant of Operations has an important role in the budgetary process of the department, while the record is devoid of any evidence of a similar role by the captains. ^{8/} The Captains, like the Lieutenant of Operations, were responsible for approval of compensatory time (J-14 at p. 44), vacation requests (P-4 at p. 62) and shift and schedule changes (J-14 at p. 40). However, while the Captains were responsible for these functions with respect to employees in their respective divisions, the Lieutenant of Operations performs these functions with respect to all employees of the department.

Based on the foregoing, the undersigned concludes that the Lieutenant of Operations is a position which, in scope, formality and import, has substantially increased duties in comparison to the predecessor Captain position. ^{9/} Accordingly, the undersigned recommends a finding that established practice, stipulated by the parties, which permitted the inclusion of the Captains in the PBA's unit of

^{8/} In this regard, the undersigned notes that on September 12, 1982, PBA moved to reopen the hearing in this matter to allow the examination of additional witnesses. Upon review of the record the undersigned denied that motion on November 10, 1982, based on a determination that the record contained adequate testimony and documentation for a determination in this proceeding. It is certainly possible that additional witnesses may have testified to input by the Captains in the budgetary process as well as other information relevant to the above issues. However, notwithstanding any possible testimony by additional witnesses, the undersigned is convinced that no testimony could have altered the most basic distinction between the Lieutenant of Operations and the Captains, i.e. that the Lieutenant of Operations, at a minimum, was responsible for all functions throughout the department which the Captains previously performed solely in their respective divisions.

^{9/} The PBA also argues that the Borough plans to create an additional Lieutenant position, and that each Lieutenant would be responsible for a division, resulting in an identical hierarchy as the department had in 1972, except that Captains would be called Lieutenants. Since the Borough has not implemented such a plan, the undersigned rejects this speculative argument by the PBA.

supervisory and non-supervisory employees, does not apply to the Lieutenant of Operations position. Therefore, in the absence of established practice, prior agreement or special circumstances which would allow the inclusion of the Lieutenant of Operations position in the PBA's negotiations unit, the undersigned recommends a finding in the PBA's unit be clarified to exclude the Lieutenant of Operations position. 10/

II. Managerial Executives

Managerial executives are defined in 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 Borough asserts that the Lieutenant of Operations is a managerial executive within the above-definition and relevant Commission case law. Cases relied upon by the Borough 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. 82-21, 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

10/ Having ruled that the "established practice" exception does not apply here due to the substantial increase between the Captains position and the Lieutenant of Operations, the undersigned need not focus on the question of whether or not actual conflicts of interest would prevent the inclusion of the Lieutenant of Operations in the PBA's negotiations unit, as discussed in West Paterson Bd. of Ed., P.E.R.C. No. 77 (1973). However, assuming arguendo that no substantial increase is found between the Captain and Lieutenant of Operations position, and that West Paterson would apply, the undersigned concludes that actual conflicts of interest, as reviewed infra, would compel the exclusion of the Lieutenant of Operations from the PBA's negotiations unit.

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 purpose 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 Lieutenant of Operations is second in command of a department of 28 police officers, and is also responsible for coordinating the functions of personnel within the department who are not police officers (i.e. the civilian dispatchers and records clerk). The Lieutenant of Operations meets regularly to discuss departmental operations with the Borough's Police Commissioner, Jack Belowich, who is also a member of the Borough Council (Tr. 1 at pp. 103 and 104). As noted above, the Lieutenant of Operations has a substantial role in the budgetary process as it concerns his department, and has regular contact with the Borough Administrator and Borough Council in the formulation of the ultimate departmental budget.

As to the functions, responsibilities and extent of discretion exercised by the Lieutenant of Operations, 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 535 (¶13425 1982), request for review denied, P.E.R.C. No. 83-76, 9 NJPER 47 (¶14022 1982), appeal pending, App. Div. Docket No. A-564-82-T2.

The record in this matter, as reviewed above, reveals that the Lieutenant of Operations possesses and exercises a level of authority and independent judgment in his duty. This determination, alone, does not establish that the Lieutenant of Operations is a managerial executive within the meaning of the Act. Instead, the undersigned must determine whether or not his level of authority and independent judgment exercised by the Lieutenant of Operations is "...sufficient to broadly affect the department's policies" (Newark,

supra, at 7 NJPER 646, emphasis supplied). In making this determination, the undersigned is guided by comparisons to factual patterns in the cases cited above.

One of the initial factors considered in managerial executive cases has been the size of the work force in question. In Newark, deputy chiefs found to be managerial executives commanded divisions of 5 employees and up. In cases where contested employees were not found to be managerial executives, the number of employees per work force were as follows: Lavallette - 14, Avon - 15 and Montvale - 19. In cases where a number of employees were not found to be managerial executives, some of the contested employees had little or no work force which they directed, while others were responsible for sizable work forces. See Bergen, supra; State of N.J. and Council of N.J. State College Locals, D.R. No. 82-35, 8 NJPER 87 (¶13036 1982).

A review of the above cases and the record in the instant matter indicates that the size of the work force is a relevant factor in a managerial executive analysis, but not a dispositive factor. To date, the Commission and the Director of Representation have not adopted an objective standard with respect to unit size and managerial executive status. For example, the Pennsylvania Labor Relations Board has adopted a rebuttable presumption in this area; absent compelling considerations to the contrary, a police chief in a department of less than ten employees is presumed to be a supervisor but not a managerial executive. Lower Allen Township, 8 PPER 376 (1977); O'Hara Township, 10 PPER 1175 (¶10313 1979). In the absence of an objective standard, the undersigned finds that the unit in question is not too small, nor is the Lieutenant

of Operations, as second in command of the department, too low in the hierarchy, to preclude a finding of managerial executive status. Accordingly, the undersigned proceeds to review other relevant factors in managerial executive analysis.

As noted above, the Lieutenant of Operations possesses and has exercised substantial discretion in purchasing goods and equipment for his department. The record indicates that, within the confines of the budgets adopted by Council, the Lieutenant of Operations makes expenditure decisions on amounts up to \$4,500. By comparison to contested positions in Lavallette and Montvale, the Lieutenant of Operations is vested with a substantial degree of discretion in making expenditures. For example, in Lavallette, the Chief was limited to making expenditures of up to \$25; even for those expenditures, the Chief had to obtain a signed purchase order prior to making such purchases. Similarly, in Montvale, the Commission found that a chief's inability to purchase even a needed radio was indicative of his lack of discretion in the purchase of department equipment.

As noted above, the Lieutenant of Operations has substantial control over the deployment of personnel, including discretion to change shifts, assign overtime, as well as transfer individuals from one division to another. ^{11/} By comparison, Chief and Captains in Lavallette had to clear all of these kinds of decisions through the employer's

11/ The PBA notes that Sergeants also have roles in some of these decisions, and argues that this fact compels a finding that the Lieutenant of Operations has little more authority than the Sergeants, and urges that the Lieutenant of Operations remain in the same unit as those Sergeants. The undersigned rejects the central premise of this argument; notwithstanding the Sergeants roles in these areas, the Lieutenant of Operations has significantly greater authority than the Sergeants in all department-wide decisions.

Police Committee. Similarly, in Montvale, the Police Commissioners intervened routinely in these kinds of decisions. In Newark, where the Chief and Deputy Chiefs were found by the Commission to be managerial executives, the Commission found that the Chief and Deputy Chiefs had substantial discretion to deploy and transfer their personnel.

Perhaps the most important area of inquiry when considering the ability of an employee to broadly affect his department's policy is the day-to-day operations of the department. Surely this was the critical factor in Montvale, where the Commission found that members of Borough Council routinely gave orders to police concerning the conduct of their duties. The Mayor and Council members in Montvale participated in and directed investigations. While this was not true in Lavallette, nonetheless that the day-to-day operations of the department were controlled by the Police Committee, and the Chief and Captain were primarily responsible for typical police officer functions in crime detection and arrests. Similarly in In re Borough of Avon, P.E.R.C. No. 78-21, 3 NJPER 373 (1977), the Commission found that, notwithstanding the lifeguard captain's substantial involvement in the day-to-day operations of his department, the overwhelming portion of his time was spent "...on the beach patrolling and filling in for other lifeguards...." In the instant matter, the contrast to Montvale, Lavallette and Avon is striking. The Lieutenant of Operations position is an administrative position which rarely if ever requires his presence out of the office with other police officers. Instead, the Lieutenant of Operations spends the overwhelming majority of his time in the office making the kinds of day-to-day operations decisions made by elected officials in Lavallette, Montvale and Avon. In summary, the Lieutenant

of Operations is more accurately compared to the Chiefs and Deputy Chiefs in Newark than the contested employees in Montvale, Lavallette and Avon.

This is not to say that the Borough Council and its members, as well as the Borough Administrator, do not have substantial input in their police department. Indeed, the record indicates that Borough officials and committees do make recommendations to the police department as to the day-to-day operations of the department (See e.g. Tr. 4 at p. 195), as well as make requests for action by the department with regard to specific problems (See e.g. Tr. 1 at pp. 80-81). Nonetheless, the undersigned is convinced that the role of Borough officials in the day-to-day operations in the Metuchen Police Department is consistent with and limited to their responsibilities as elected officials who are accountable to the public. There can be no doubt that, unlike the police departments in Lavallette and Montvale, the Metuchen Police Department is primarily directed by full-time police personnel. ^{12/}

At the same time, the undersigned notes that final budgetary formulations, as well as the fundamental decisions to reorganize the department and create the civilian dispatcher and Lieutenant of Operations positions, were policy decisions made with or without the support of even the Chief, let alone his top assistant. However, a

^{12/} As noted above, the PBA sought to reopen the hearings in this matter and contended that it could prove additional involvement by Borough officials in the day-to-day operations of the Police Department. Denying that motion, the undersigned noted that the record was adequate for determination in this matter. The record clearly indicates primary control of the Police Department in its day-to-day operations by the highest officers of the department. The undersigned is convinced that isolated events, both in the record and events which might have been testified to had the record been reopened, do not alter the fundamental control of the day-to-day operations by Police Department personnel.

policies. ^{13/} Accordingly, the undersigned recommends a finding that the Lieutenant of Operations is a managerial executive within the meaning of the Act and thus is ineligible for the inclusion in any negotiations unit.

III. Conflict of Interest

The principles of conflict of interest were established by the New Jersey Supreme Court in Board of Education of West Orange v. Wilton, 57 NJ 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 NJ at 425.

Recognizing the varied levels of conflict of interest which might occur in the work place, the Court in Wilton limited the concept as follows:

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 public interest. 57 NJ at 425-426.

^{13/} The undersigned recognizes that the Lieutenant of Operations is subordinate to the Chief, and that it is unusual to find an employee to be a managerial executive at the lieutenant level. Nonetheless, in the absence of objective standards or express statutory language (e.g. the Act specifically includes school superintendents and assistant superintendents in the managerial executive definition and excludes all other school employees), the undersigned must consider the claim of managerial executive status in the factual context presented. The record herein portrays a Lieutenant of Operations who has significantly more discretion than his rank would normally indicate and functions at a level nearly equal to that of his superior, the Chief. This could be a matter of historical accident (i.e. the Chief and (continued)

The initial Commission decisions regarding conflict of interest involved police and fire superior officers. In City of Linden, P.E.R.C. No. 52 (1971) and City of Union City, P.E.R.C. No. 70 (1972), the Commission found that certain superior officers had substantial conflicts of interest with subordinate personnel. In so ruling, the Commission in Union City, found: "[T]he duties and responsibilities of officers are such as to generate grievances among patrolmen and it may be reasonably anticipated that representation of both groups as one would be inimical both to the prosecution and resolution of any grievances." Reaching a similar conclusion in City of Elizabeth, P.E.R.C. No. 71 (1972), the Commission emphasized the nature of a conflict of interest inquiry: "Required is a complete examination of the nature of authority over subordinates, the nature and responsibility to superiors and the context within which they function." Applying these principles in educational settings, the Commission's Director of Representation has removed employees from negotiations units where potential conflicts of interest existed due to both evaluative and disciplinary functions. See e.g. Ridgewood Board of Education and Ridgewood Education Association, D.R. No. 80-33, 6 NJPER 209 (¶11102 1980); Board of Education of Paramus and Education Association of Paramus, NJEA, D.R. No. 82-7, 7 NJPER 556 (¶12247 1981).

In the context of the above standards for reviewing alleged conflicts of interest, the undersigned proceeds to review the record

13/ (continued) the Lieutenant of Operations have been with the department for 36 and 30 years, respectively); of course, should circumstances change with the appointment of a subsequent Chief and Lieutenant of Operations, the PBA could make applications to the Commission for a new determination.

in the instant matter. As noted above, the Lieutenant of Operations is responsible for the deployment, discipline, and evaluation of all subordinates. The record reveals that the Lieutenant of Operations has never had occasion to discipline a subordinate beyond an oral reprimand. However, his conduct with respect to the officer with an alcohol problem, as well as the injured officer, reflects the nature of the Lieutenant of Operations' authority over subordinates, as well as his responsibility to the department. While these incidents did not result in the filing of grievances by the officers in question, nor in discipline of those officers, the potential for discipline and grievances in these types of situations is obvious. Moreover, as noted above, the Lieutenant of Operations testified that he will bring the officer with the alcohol problem up on charges before Borough Council should the problem reoccur. Even if charges were ultimately brought by the Chief, rather than the Lieutenant of Operations (see footnote 5), the Lieutenant of Operations would be a likely witness at a disciplinary hearing before Borough Council.

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 Lieutenant of Operations does not serve as a hearing officer on disciplinary charges; nonetheless, he functions at the last stage

managerial executive need not broadly affect all department policies. Instead, the totality of the policies and operations within the department of the contested employee must be reviewed if the contested employee broadly affects those operations and policies. Through formulation and effectuation of policies, managerial executive status is manifest. Surely the Act's definition of a managerial executive neither requires nor contemplates an employee with total managerial authority. Invariably, as noted above, official and ultimate authority and responsibility in public employment rests within officials elected by the public. What does vary between governmental authorities is the degree to which elected officials delegate authority and responsibilities to public employees at or near the top of departmental hierarchies.

The undersigned concludes that the record in this matter indicates that the Borough Mayor and Council retain and/or delegate to the Borough Administrator control of final budgetary figures, as well as departmental reorganizations. Even in these fundamental decisions, the input of the top officials of the Police Department is considered. Beyond these decisions, and sporadic suggestions concerning specific problems which constitutes bringing to their attention, the Borough Mayor and Council delegate responsibilities for the day-to-day operations and policy decisions to the Chief and Lieutenant of Operations. The record in this matter, on its own and in comparison to the records and decisions in the cases cited above, indicates that the Lieutenant of Operations exercises a level of authority and independent judgment sufficient to broadly affect his department's

prior to a disciplinary hearing. In this pivotal final prehearing step, the Lieutenant of Operations 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 Lieutenant of Operations from the negotiations unit represented by the PBA.

In addition to these potential conflicts which compel the exclusion of the Lieutenant of Operations from the PBA's negotiations unit, the record reveals that prior occurrence of actual conflicts of interest between the Lieutenant of Operations' responsibilities to his superiors and his membership in the PBA's negotiations unit. Exhibit P-5 is a "Bill of Rights" which the PBA proposed for inclusion in their collective agreement with the Borough. The Bill of Rights primarily concerns procedures to be undertaken by the Borough in contemplation of disciplinary action. The record reveals that the Lieutenant of Operations was approached concerning the Bill of Rights by both the Mayor (Tr. 1 at pp. 85 and 86; Tr. 3 at p. 114) and the President of the PBA, James Seabasty (Tr. 4 at pp. 216 and 235). The Lieutenant of Operations testified that he objected to several aspects of the Bill of Rights, including its breadth and its limitation

on the investigation of anonymous complaints. Clearly, the Bill of Rights presents an actual conflict to the Lieutenant of Operations; his view of his responsibility to management is clearly at odds with the views of his responsibility to his union in an area of considerable importance to both the Borough and the PBA.

The Lieutenant of Operations also found himself with divided loyalties concerning a grievance filed by the PBA. The grievance concerned the Lieutenant of Operations refusal to grant a request for overtime pay. The Lieutenant of Operations originally rejected the request for overtime pay because he "...objected to paying the man for six hours pay for working ten minutes...." (the contract required a minimum of six hours overtime pay in this situation). Prior to filing of a formal grievance, the PBA president, delegate and the officer in question stopped into the Lieutenant of Operations' office. "They expressed a desire to settle it amicably...and after some discussion it was agreed that...I would reimburse the officer with comp time." Clearly, this type of situation placed the Lieutenant of Operations in an actual conflict between the PBA and the Borough concerning a compensation issue (Tr. 3 at pp. 132-135).

Another actual conflict occurred in the context of the contract negotiations. The Borough Administrator contacted the Lieutenant of Operations and asked him to draw up a proposed five-day-on-two-day-off shift schedule. Lieutenant Studnicki testified: "After thinking about it a few minutes, I told him it was an exercise in futility...[b]ecause the PBA demanded a 4-2 shift, and there was no way they were going to

change. I would be wasting my time going through it all." (Tr. 3 at pp. 125-126)

The undersigned does not suggest that the Lieutenant of Operations' decisions in the three situations reviewed above were necessarily affected by the conflicts which were apparent. Indeed, the record indicates that neither the Lieutenant of Operations (Tr. 3 at pp. 141-148) nor the Mayor (Tr. 1 at pp. 84-85) believed that Studnicki would compromise his position due to these conflicts. However, conflict of interest is not a concept which turns on the integrity of the individual holding the position in question. Instead, conflict of interest relates to the position; if there is a substantial conflict of interest which compels the exclusion of the position from the negotiations unit, the integrity of the individual who holds the position is irrelevant. Accordingly, due to the potential and actual conflicts described above, the undersigned determines that a substantial conflict of interest exists which compels the exclusion of the Lieutenant of Operations from the negotiations unit represented by the PBA.

RECOMMENDATIONS

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

1. The Lieutenant of Operations employed by the Borough of Metuchen is a supervisor within the meaning of the Act; neither established practice, prior agreement nor special circumstances exist which would allow the inclusion of the Lieutenant of Operations position in the PBA's negotiations unit, which includes non-supervisors; and the Lieutenant of Operations must therefore be excluded from the

collective negotiations unit represented by the PBA.

2. The Lieutenant of Operations is a managerial executive within the meaning of the Act and thus may not be represented for the purposes of collective negotiations by the PBA.

3. Substantial conflicts of interest exist which compel the exclusion of the Lieutenant of Operations position from the negotiations unit represented by the PBA.

RESPECTFULLY SUBMITTED,



Mark A. Rosenbaum
Hearing Officer

DATED: March 25, 1983
Trenton, New Jersey