

E.D. NO. 6

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF WEST ORANGE

Public Employer

and

LOCAL 692, INTERNATIONAL ASSOCIATION  
OF FIRE FIGHTERS

Petitioner

Docket No. RO-19

DECISION AND DIRECTION OF ELECTION

Pursuant to a Notice of Hearing to resolve a question concerning the representation of certain employees of Town of West Orange, a hearing was held on March 16, 1970 before Hearing Officer Theodore A. Winard, at which all parties were given an opportunity to examine and cross-examine witnesses, present evidence, to argue orally, and to submit briefs.

Thereafter, on April 8, 1970, the Hearing Officer issued a Report and Recommendations. Exceptions have been filed to this Report and Recommendations by the Employer. The Executive Director has considered the record, the Hearing Officer's Report and Recommendations and the exceptions, and on the facts in this case finds:

1. Town of West Orange is a public employer within the meaning of the Act and is subject to the provisions of the Act.
2. Local 692, International Association of Fire Fighters is an employee representative within the meaning of the Act.
3. The Employer refuses to recognize Petitioner as the exclusive representative of certain employees; therefore a question concerning the representation of public employees exists and the matter is properly

before the Executive Director for determination.

4. The Hearing Officer found that the Employer's Fire Department Captains are not supervisors within the meaning of the Act and that the Petitioner may therefore represent them. The Employer has filed exceptions claiming that Captains are supervisors and therefore may not be represented by Petitioner in collective negotiations.

The record discloses that the Fire Department of West Orange consists of a Director, a Chief, 6 Assistant Chiefs, 20 Captains and 68 Firemen. The Firemen are already represented by Petitioner in a separate unit. The petition here seeks to establish another unit, limited to Captains. If, however, Captains are supervisors, the Act will preclude Petitioner's representation of them in negotiations unless one of the statutory exceptions is met.

It should be observed initially that the Commission has, in reliance upon the statute, construed the term supervisor to mean one having the authority to hire, discharge, discipline or effectively recommend the same. <sup>1/</sup> If the record fails to establish the exercise of one or more of these specific authorities by the person in question, then he will be found to be a non-supervisory employee. The exercise of other kinds of authority, however supervisory in character they may seem to be, does not constitute one a supervisor within the meaning of this Act. Thus for example, the testimony relied upon in the Employer's exceptions that Captains review rules and regulations with the firemen is irrelevant to the issue of supervisory status.

Such may be pertinent to the assessment of the role of superior officer or to the operation of the department, but lacking

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<sup>1/</sup> Cherry Hill Township, Department of Public Works, P.E.R.C. No. 30.

any direct relation to matters of hiring, firing or discipline, it does not establish one as a supervisor. These observations apply with equal force to testimony, cited in the Employer's exceptions, that Captains take command at fires and exercise control until a superior arrives, investigate firemen delinquencies and report same in writing to the Chief, are in charge of station houses and are responsible for the efficiency of the men, give orders and carry them out, and finally, that under the terms of a proposed labor agreement covering a unit of the Employer's firemen, the Captain 2/ is the one to whom the employee presents his complaint as the first step in the grievance procedure.

Closer to the issue is that testimony concerning the Captain's role in matters of discipline. The Hearing Officer found that responsibility for discipline reposed in the Director of the Department, that he conducted his own investigation, independent of any report and recommendation made by a Captain on firemen delinquencies, and that Captains did not make effective recommendations. The Employer excepts on two principal grounds: that a Captain's recommendation carries significant weight and that in the absence of a superior officer a Captain can discipline a fireman on his own. Both the Director and the Chief testified that a Captain's recommendation is given weight 3/ yet both state they make separate investigations to determine the merits of the case and, in turn, of the Captain's report. Such a procedure reduces the weight of a recommendation to a point where it is not effective. The "facts" of the Captain's report, as well as the recommendation, if any, are considered reliable only to the extent they agree with his superior's investigation and judgment. This is not

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2/ or acting Captain, who is a senior rank and file fireman.

3/ The Director testified that a Capatin can recommend the discipline to be invoked; he later testified that a Captain cannot so recommend.

within the meaning of "effectively recommend." Regarding the contention that a Captain, in the absence of a superior officer, can discipline, and in particular suspend, without the approval of higher authority, the testimony is cast in terms of the Captain's capability to take this action. However, the record does not demonstrate the exercise of such authority. The Chief testified that "...within many years there hasn't been a suspension in our department, we haven't had that much disciplinary problems..." A fortiori, there would be even less occasion for a Captain to exercise disciplinary authority on those occasions when no higher authority was available. Since the record does not establish even a sporadic exercise of the authority claimed and since at best it could only be exercised on a substitute basis in the absence of higher authority, the undersigned concludes that the mere claim that Captains possess this authority under these conditions is insufficient to establish them as supervisors. 4/ Accordingly, since Captains do not discipline or effectively recommend discipline, they are not supervisors and thus may be represented by Petitioner.

The Executive Director agrees with the Hearing Officer that nothing in the prior proceeding, wherein a unit of the Employer's firemen excluding superior officers was found appropriate, militates against the conclusion here that Captains are not supervisors.

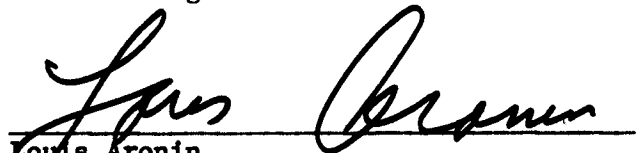
In view of that conclusion, it is not necessary to consider the issue of whether there existed established practice, prior agreement or special circumstances which would permit the Petitioner to represent supervisors as well as non supervisory employees.

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4/ Cherry Hill Township, supra.

5. The appropriate collective negotiating unit is: "All Captains employed by the Town of West Orange Fire Department, excluding firemen, office clerical, professional and craft employees, managerial executives and supervisors within the meaning of the Act."
6. The undersigned directs that a secret ballot election shall be conducted among the eligible employees in the unit found appropriate. The election shall be conducted no later than 30 days from the date set forth below. Those eligible to vote are employees in the unit above who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or temporarily laid off, including those in military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Those eligible to vote shall vote on whether or not they desire to be represented for the purpose of collective negotiations by Local 692, International Association of Fire Fighters.

  
Louis Aronin  
Executive Director

DATED: June 12, 1970  
Trenton, New Jersey

In the Matter of  
TOWN OF WEST ORANGE

Public Employer

and

Docket No. RO-19

LOCAL 692, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS

Petitioner

Hearing Officer's Report and Recommendations

Pursuant to a Notice of Hearing issued by the Public Employment Relations Commission, a hearing was held on March 16, 1970 before the undersigned Hearing Officer of the Commission to resolve questions concerning representation of public employees. The Hearing Officer has considered the entire record and finds:

1. The Town of West Orange is a Public Employer within the meaning of the Act and is subject to the provisions of the Act.
2. Local 692, International Association of Firefighters is an employee representative within the meaning of the Act.
3. The Public Employer having refused to recognize the employee representative as the exclusive representative of certain employees in the Fire Department, a question concerning the representation of employees exists and is properly before the undersigned for a Report and Recommendation to the Commission.
4. At the outset it should be noted that pursuant to a Certification of Representative issued by the Public Employment Relations Commission on June 30, 1969 in Town of West Orange and West Orange Fire Department and International Association of Firefighters, Local 692 and Firemen's Mutual Benevolent Association, Branch 28, Docket No. R-2, the International Association of Firefighters, Local 692 has been designated and selected by the majority of all firemen employed by the West Orange

Fire Department excluding all superior officers. The Hearing Officer takes official notice of a Report on Questions Concerning Representation issued by James V. Altieri, ad hoc Hearing Officer of the Commission on March 11, 1969. In his report the Hearing Officer indicates that substantial agreement was reached on all points including that the election be conducted among the firemen, excluding all superior officers. The Hearing Officer's Report was adopted by the Commission and a secret ballot election was held pursuant thereto.

A certification of representative is issued to stabilize the negotiating relationship and to place the parties in a state of certainty and finality with respect to material and pertinent questions concerning the representation of public employees. The question, therefore, is posed whether the Hearing Officer should re-litigate in a subsequent representation proceeding the status of the superior officers in the aforementioned certification.

However, it is not clear that the exclusion of the superior officers from the agreed upon unit found to be appropriate was based on their supervisory status or for some other reason unknown to the Hearing Officer. The record in the prior representation proceeding is silent on this point. Accordingly, the Hearing Officer is inclined to hear in this proceeding the questions concerning the representation of superior officers in the West Orange Fire Department.

5. Section 7 of the New Jersey Employer-Employee Relations Act, Chapter 303 L1968 provides in pertinent part:

"...except where established practice, prior agreement or special circumstances, dictate to 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..."

As the above quoted provisions of the Act clearly state, supervisors who are empowered to hire, discharge, discipline or effectively recommend such actions may not be represented in collective negotiations by an employee

organization that admits non-supervisory employees to membership. The petitioner is the certified exclusive representative of and admits to membership in the Town of West Orange non-supervisory firemen, and the parties agree that the firemen in the certified unit correspond to non-supervisory employees within the meaning of the Act. The petitioner contends, however, that the superior officers, i.e. captains, do not have the power to "hire, discharge, discipline or effectively recommend the same, and may be represented by the petitioner for collective negotiations in a separate unit. The public employer argues to the contrary.

The Hearing Officer takes notice that the public employer is governed by the Faulkner Act, Plan B form of government, NJSA 40:69A-49 et seq., which vests the power to hire, fire and discipline in the Directors of the respective Departments; and the procedure and policy which has been applied, herein is that only the Director of the Fire Department is empowered to hire, discharge, discipline or **suspend after** an independent review of the facts warranting such action.

NJSA 40:47-6 provides that no fireman shall be suspended, removed, fined or reduced except for just cause, and then only after written charges of the causes shall have been preferred and filed in the office of the officer having charge of the Department in which the complaint arises and after the charges are publicly examined by the appropriate authority. The record developed herein indicates the practice and procedure in the Town of West Orange substantially conforms with the requirements of the statute. According to the testimony of Director Mulvihill any infraction of the Rules of the Department is initially investigated by the Captain under whose jurisdiction it falls and a report is prepared in which he makes findings of fact without a recommendation as to disciplinary action. The Captain submits the



charges or report in writing to the Chief of the Department, who forwards it to the Director. The Director thereupon, conducts an independent investigation into the facts and determines based on the report and his independent investigation the nature of the disciplinary action.

Director Mulvihill testified:

MR. WINARD: "What does the captain do when he prefers charges, does he fill out a form or what?"

THE WITNESS: No. He does not fill out a form, he writes up a report and he has to write up a report stating what the act is and why and so on and the nature of.

MR. WINARD: How detailed a report is that?

THE WITNESS: It should be detailed enough to know the reason that he is bringing this man up and the nature of the offense. (Tr 54)

MR. WINARD: What do you do with it when you get it?

THE WITNESS: I get the report and I evaluate it and if the report has merit, there has to be disciplinary action and I take it.

MR. WINARD: Do you make any independent investigation into the facts once you receive this report?

THE WITNESS: I will answer, yes. I like to ascertain all the facts that are possible. If there are other facts that should be in and they are missing, I can ask about them. (Tr 55)

MR. WINARD: Did the captain recommend how many days he be suspended?

THE WITNESS: No.

MR. WINARD: He can't ever recommend the amount of suspension?

THE WITNESS: No.

MR. WINARD: Or the nature of the disciplinary action?

THE WITNESS: No.

MR. WINARD: Who makes that?

THE WITNESS: I make the final judgment.

MR. WINARD: On your own or with consultation with the Chief?

THE WITNESS: I talk it over with the Chief and make my final decision, that is mine. (Tr 60)

Thus, the weight of the evidence in the record reveals that in the instant situation, a Captain has not in fact or by law been given the authority to make a decisive recommendation regarding hire,<sup>1/</sup> discharge or discipline of employees; nor has any such authority been exercised and followed within the meaning of Section 7 of the Act. It is clear that the decision to discharge or discipline an employee is based on the independent investigation and judgment of the Director of the Department. Accordingly, a Captain has never been specifically told or encouraged to assume the authority to effectively recommend discipline and that such an exercise would be inconsistent with the entire administrative practice of this type of public employer is supported by the aforementioned testimony and the totality of the record.

The record, furthermore, reveals that the employees who are characterized as superior officers, i.e. captains, do not possess any of the key attributes of a supervisor as defined by the Act.<sup>2/</sup> The fact that they exercise command authority and otherwise are responsible for the condition, discipline and efficiency of the men does not warrant a finding that they are supervisors within the meaning of the Act. The aforementioned may constitute attributes of supervisory authority under other statutory provisions, but does not in the opinion of the Hearing Officer satisfy the criteria set forth in Section 7 of the Act.

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<sup>1/</sup> Appointments from Civil Service certification of eligibles are made by the Director in consultation with the Chief. There is no consultation with anyone in rank lower than the Chief.

<sup>2/</sup> As to an employee who shows up at work intoxicated, the action of the captain in suspending him in the absence of the Chief or Assistant Chief appears to be an emergency measure which the Captain has to be empowered to make.

Accordingly, in the judgment of the undersigned, a Captain in the West Orange Fire Department does have a right to be represented in collective negotiations by the petitioner.

6. The Hearing Officer is mindful of the fact the Commission may not be in accord with the recommendation made herein on the non-supervisory status of the Captain in the West Orange Fire Department, and so, assuming the Captain to be found to be a supervisor, the undersigned will make an alternative recommendation on the issue of whether "established practice, prior agreement, or special circumstances" justify the right of the Captain as a supervisor to be represented in collective negotiations by the petitioner which admits non-supervisory personnel to membership.

Prior to the enactment of Chapter 303, L 1968 and the Certification of the petitioner by the Commission on June 30, 1969, the Firemens Mutual Benevolent Association, Branch 28 (FMBA) on a purely voluntary basis had interceded for and spoken for its members with the representative of the public employer on matters of salary and grievances. The membership included both firemen and superior officers.

Kenneth Cooke, a former President of the FMBA from 1958-1964 testified:

"MR. WINARD: Captain Cooke, in the past when the FMBA wanted to present salary demands, what did it do when the time came for the FMBA membership to present --

THE WITNESS: They held a meeting to decide what they were going to go for and then a committee would take it to the Commissioner at the time." (Tr 93)

"THE WITNESS: Yes. We more or less went with our hat in our hands and it was cut and dried as to what they were going to give you.

MR. WINARD When you presented it to the Commissioner I presume it was presented in writing?

THE WITNESS: No, it was verbal with the Commissioner.

MR. WINARD: What did the Commissioner do?

THE WITNESS: He made --

MR. WINARD: What was your request?

THE WITNESS: He would tell us what we were going to get and then talk things out on what we weren't going to get." (Tr 93, 94)

THE WITNESS: "Actually that's the way it was, you had no recourse, you couldn't go any higher unless you went on a referendum.

MR. WINARD: To the best of your knowledge, has the FMBA ever negotiated the contract?

THE WITNESS: No, sir.

MR. WINARD To your knowledge, has there ever been a negotiation by collective negotiation and by that I mean a full-scale discussion, offers, counteroffers, proposals to any extent been conducted in West Orange with respect to pay?

THE WITNESS: Not until PERC." (Tr 95)

Established practice or prior agreement within the meaning of the Act does not mean the solicited or unsolicited submission by the employee representative of wage demands without more. There must be the give and take of negotiations including a bilateral relationship rather than an unilateral establishment of terms and conditions of employment such as that which occurred in this case. Furthermore, no agreements were reached by the parties, let alone reduced to writing and executed. See: Middlesex County College Board of Trustees and Middlesex County College Faculty Association, PERC 29, December 17, 1969. Based upon the foregoing, it is recommended the Commission reject the contention that there is an established practice which warrants the representation of captains, or any supervisor for that matter by the petitioner. Accordingly, the Hearing Officer does not deem it necessary to dispose of the argument that the "established practice" of the FMBA is conclusive on the right of the petitioner to represent the Captains in collective negotiations. There is no established practice, prior agreement or special circumstances in any event to warrant supervisors the right to be represented in collective negotiations by an employee organization which admits to membership non-supervisory personnel.

7. Based upon the foregoing in Section 5, the undersigned finds the appropriate unit to be:

"All Captains in the Town of West Orange Fire Department excluding all other employees, managerial executives, office clerical employees, policemen, professional employees, craft employees and supervisors within the meaning of the Act."

8. A secret ballot election shall be conducted as soon as possible among the employees in the unit found appropriate:

Those eligible to vote are employees set forth in Section 7 who are employed during the payroll period immediately preceding a date to be set by the Public Employment Relations Commission, including employees who did not work during that period because they were out ill, or on vacation, or temporarily laid off, including those in the military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who quit or were discharged for good cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Those eligible to vote shall vote on whether or not they desire to be represented for the purpose of collective negotiations by Local 692, International Association of Firefighters.

The majority representative shall be determined by a majority of the valid ballots cast in each unit.



Theodore A. Winard  
Hearing Officer

DATED: April 8, 1970

Trenton, New Jersey