

D.R. NO. 2004-7

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

In the Matter of

CITY OF BURLINGTON,

Public Employer,

-and-

Docket No. CU-2002-044

SUPERIOR OFFICERS ASSOCIATION OF
BURLINGTON CITY F.O.P. #63,

Petitioner.

SYNOPSIS

The Director of Representation clarifies the superior officers unit in the City of Burlington to include the police captain. The Director found that the captain was not in a supervisory conflict of interest with other superior officers and, therefore, his placement in the unit was appropriate.

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Appearances:

For the Public Employer,
Dorf & Dorf, attorneys
(Gerald L. Dorf, of counsel)

For the Petitioner,
Edmund F. Giordano, Sr. Staff Representative

DECISION

On January 29, 2002, the Public Employment Relations Commission certified Burlington City Police Superior Officers Association, affiliated with FOP New Jersey Labor Council, Inc.(SOA) as the majority representative of:

All regularly employed supervisory police officers employed by the City of Burlington, defined as sergeants and lieutenants.

In that representation matter, the parties disagreed about whether the police captain position should be part of the unit. It was agreed that the captain could vote subject to challenge ballot and that the title's unit status could be decided pursuant

to the appropriate Commission procedures after the election. Accordingly, on June 4, 2002, the SOA filed this Clarification of Unit Petition with the Commission seeking to add the captain to its superior officers unit. The City opposes the petition. It contends that under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), the captain, who acts as chief in the chief's absence, should be excluded from the unit because he supervises other SOA unit members; thus, including the captain in the same unit as his subordinates would create a conflict of interest.

Pursuant to N.J.A.C. 19:11-2.2 and 2.6, we have conducted an administrative investigation into the petition. By letter of October 3, 2003, we notified the City and the SOA of our tentative findings and conclusions in this matter and invited their responses. Neither party responded. I find the following facts.

Prior to the Commission's certification of the SOA unit on January 29, 2002, the City's police force was represented by FOP Lodge No. 63 in a wall-to-wall collective negotiations unit. That unit included: "all police officers," including, cadets, patrolmen, detectives, sergeants and lieutenants. The captain was not part of the historic, mixed unit. While Joe Conrey had been a lieutenant in the broad-based unit, a desk audit by the New Jersey Department of Personnel (DOP) resulted in his

position's reclassification to captain. Conrey was promoted to captain on October 24, 1996. The City and SOA are in negotiations for a first agreement.

According to the DOP job specification, the captain's job duties consist of directing the work of subordinates engaged in providing protection for persons, safeguarding property, assuring observance of the laws, and apprehending lawbreakers. The captain assigns and directs the work of subordinates; deploys personnel; oversees the police station; disciplines subordinates for neglect of duty; reviews arrest books, the police blotter, rounds books and property books; reviews evidence and marks it; supervises the preparation of reports related to evidence; safeguards prisoners; and inspects equipment.

According to the City's police department table of organization, the chief is the head of the department and reports to the public safety director. The captain reports directly to the chief and supervises the remainder of the department. The department is divided into three divisions: patrol, criminal investigations, and administration. The captain supervises approximately 72 employees, including clerical/secretarial employees, patrol officers, detectives, sergeants, lieutenants, crossing guards, and reserves (Table of Organization submitted January 15, 2003). Three lieutenants and the detective sergeant report directly to the captain.

The chief is responsible for the day-to-day operations of the police department. Financial matters and policies are handled by the business administrator/director of public safety (director). The director has ultimate authority with respect to disciplinary determinations. All discipline must be approved by the director and even the police chief's authority to discipline is limited by the director's approval authority. There were three recent disciplinary actions taken in the department; in each case, the chief brought the charges and the public safety director gave final approval. Captain Conrey had no role in these disciplines. Conrey has substituted for the police chief on a regular basis; however, no examples of disciplinary action initiated or recommended by Conrey against any sergeant or lieutenant were given. No specific examples of Conrey's having played any role in the hiring, promoting or termination of any sergeant or lieutenant were provided. Conrey's position is not identified as a step in the grievance procedure of the rank-and-file police unit. There is a relatively new performance evaluation procedure in the department, but to date, the procedure has not been implemented, and there is no evidence that evaluations will be used in personnel decisions such as, promotions, salary increases, etc. There is no evidence that Conrey will have a role in the evaluation process.

ANALYSIS

Tp. of North Brunswick, D.R. No. 78-4, 3 NJPER 260 (1977) holds that the filing of a Petition for Clarification of Unit is an appropriate vehicle for resolving disputed unit placements after an election in which such issues were preserved by the challenged ballot procedure. Accordingly, the instant Petition for Clarification of Unit is appropriate to determine the unit placement of the disputed captain. See also, Borough of Leonia, P.E.R.C. No. 86-143, 12 NJPER 523 (¶17195 1986) (dispute over employee's unit status may properly be decided after the election through the filing of a clarification of unit petition). Even assuming the captain had been excluded from the previous wall-to-wall police unit, the newly certified SOA is not bound by the unit structure established by the previous representative.

Supervisors have the right to negotiate collectively as long as they are not placed into new units with non-supervisory employees. There is a presumed community of interest among levels of superior officers in police units. See Tp. of Teaneck, P.E.R.C. No. 88-20, 13 NJPER 721, 722 (¶18270 1987). However, our New Jersey Supreme Court has determined that where a ". . . conflict of interest exists among supervisors with respect to their duties and obligations to the employer in relation to each other," then a unit which includes all supervisors is not appropriate. West Orange Bd. of Ed. v. Wilton, 57 N.J. 404, 427

(1971). In Union City, P.E.R.C. No. 70, NJPER Supp. 295, 297 (¶70 1972), the Commission observed that the para-military organization with its strict observance of the chain of command characteristic of most municipal police departments sets them apart from other governmental services. When we are asked to draw the unit parameters in these cases, we must consider whether an actual or potential conflict of interest exists. However, the Commission also observed that,

where these [conflicts of interest] are real rather than merely apparent, it would be difficult indeed to conclude, in contested cases, that a community of interest exists between the lowest ranking subordinate and his superior, absent exceptional circumstances. **We do not intend that this observation extend to those cases where the points of division are so few and so insignificant as to be termed de minimis,** [emphasis added. Id. at 297.]

Determination of supervisory conflict of interest requires more than a job description or bald assertion that an employee has authority to hire, discharge, discipline, assign, evaluate, or promote other employees. The Commission requires evidence that the authority is regularly exercised. In Somerset Cty. Guidance Center, D.R. No. 77-4, 2 NJPER 358, 360 (1976), we held that unless the authority claimed is actually exercised with some regularity by the employee in question, the mere claim of possession of the authority is a sterile attribute unable to support the actual finding of such authority. Here, the official job description describes Conrey as having the authority to

discipline sergeants and lieutenants, but the City has not formally or informally given him that authority. Thus, it appears that there is not even a de minimis conflict of interest between Conrey and members of the SOA. In recent examples of disciplinary action, Conrey played no role. He does not have the authority to respond to grievances for the City. Finally, there is no evidence that he has evaluated the performance of SOA unit members, or that any such evaluations would affect their terms or conditions of employment.

The City's argument that we should accord great deference to the duties outlined and relied upon by the DOP in making its determination to reclassify Conrey's former lieutenant position to captain is not persuasive. The focus of a job classification study is to properly classify the duties assignable to a particular position into an appropriate title. The actual performance of all listed duties is not required. That determination may have been based on potential performance of job duties; whereas our determination must be based on actual performance of duties which would demonstrate an impermissible conflict of interest between the performance of his duties and his membership in a particular collective negotiations unit. It is well established that the Commission will look beyond the title or job description to ascertain the nature of the authority the employee actually exercises. Evidence that the authority is

exercised with some degree of regularity is required. Somerset; Teaneck.

While Conrey has substituted for the chief on a regular basis, the assumption of that responsibility has not actually placed him in a significant conflict of interest since it does not appear that he has been granted nor has he exercised the requisite authority over discipline, hiring, or evaluations of SOA unit employees indicative of a conflict of interest. I conclude that Captain Conrey has never disciplined, discharged, or recommended such actions be taken against any SOA unit employee. I also find that he has not participated in nor effectively recommended the hiring or promoting of any SOA employee, nor is there evidence here that his evaluations have or would be used for those purposes.

Finally, public policy favors broad-based negotiations units and units of all superior officers have often been approved. See, e.g., State and Prof. Ass'n and N.J. Dept. of Ed., 64 N.J. 231 (1974); Town of West New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1988); Woodbridge Tp., D.R. No. 96-19, 22 NJPER 216 (¶27116 1996) (unit of police sergeants, lieutenants and captains approved); South Plainfield Bor., D.R. No. 78-18, 3 NJPER 349 (1977). In this case, not adding the captain could leave open the possible formation of another narrow unit should an additional captain be employed in the future. It would also deny

representation to the captain which is contrary to the Act's policy of affording representation to all those who desire it.^{1/} See Teaneck (proposed separate unit of city's three unrepresented police captains was not appropriate for collective negotiations, inasmuch as captains shared community of interest with sergeants and lieutenants in existing supervisory unit. Fragmentation of captains in separate unit was not warranted).

Applying the above standards here, I find that Captain Conrey is not in a supervisory conflict of interest with SOA unit employees because he has not regularly exercised supervisory authority over them.^{2/} Accordingly, I order that the superior officers unit be clarified to include the police captain.

Accord, Montville Tp., P.E.R.C. No. 87-140, 13 NJPER (¶18178 1987) (Township's police captains' input into personnel decisions was minimal; captains were properly included in superior officers' unit where their evaluative functions with respect to lieutenants and sergeants did not rise to substantial level of actual or potential conflict of interest). I find that the

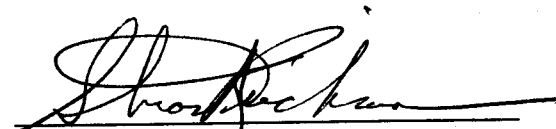
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- ^{1/} Without deciding the issue, I note that no evidence in this record suggests that the captain would be found to be either a managerial executive or confidential employee and thus ineligible to be included in any collective negotiations unit.
- ^{2/} If circumstances change and the captain's duties place him in a conflict of interest with the other superior officers, either party may file an appropriate clarification of unit petition.

captain should be added to the SOA unit, effective immediately. Clearview Regional H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 252 (1977) (where the clarification of unit question is raised before the Commission prior to the execution of the parties' most recent collective agreement, the clarification of unit determination shall be effective immediately).

ORDER

The SOA unit in the City of Burlington is clarified to include the police captain.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Stuart Reichman
Director

DATED: November 7, 2003
Trenton, New Jersey