

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

In the Matter of

BOROUGH OF MONTVALE,

Public Employer-Petitioner,

-and-

DOCKET NO. CU-78-38

MONTVALE SUPERIOR OFFICERS
ASSOCIATION,

Employee Representative.

SYNOPSIS

The Director of Representation, after examining the statutory criteria for determining managerial executive status, finds that the Borough's police chief and captain are not managerial executives. The New Jersey Employer-Employee Relations Act defines managerial executives as persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management polices and practices. The Director, in applying this definition, determines that where there is a dispute as to managerial executive status, the Commission will examine (1) the specific functions and responsibilities of the individual; (2) the relative position of the individual in the employer's organizational hierachy; and (3) the extent of discretion accorded to that individual in his/her employment. The Director concludes from the record that Borough elected officials -- particularly the mayor and the police commissioner (a Borough council member) -- have taken a regular and extensive role in the affairs of the police department and that the role of the chief, in his assigned responsibilities, is reduced to a routine and ministerial level. Further, the chief has not been included in the development of management objectives and his decisions implementing management policies and practices have been closely scrutinized and sometimes countermanded. The Director also concludes that a conflict of interest does not exist between the chief and the captain and that the potential for a conflict of interest is de minimis.

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Appearances:

For the Public Employer-Petitioner
Gerald L. Dorf, P. A.
(Richard M. Salsberg of counsel)

For the Employee Representative
Osterweil, Wind & Loccke, attorneys
(Alfred G. Osterweil of counsel)

DECISION

On February 22, 1978, a Clarification of Unit Petition was filed with the Public Employment Relations Commission (the "Commission") by the Borough of Montvale (the "Borough") seeking a determination that the chief of police and police captain, who comprise a recognized collective negotiations unit of police superior officers, are managerial executives within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), and are not entitled to negotiations rights under the Act. The chief and the captain are

represented by the Montvale Superior Officers Association (the "Association").

Pursuant to a Notice of Hearing, a hearing was held before Commission Hearing Officer J. Sheldon Cohen on October 20, 1978, and before Dennis J. Alessi on March 15, 1979, ^{1/} at which all parties were given the opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. Both parties filed post-hearing briefs by May 7, 1979. The Hearing Officer issued his Report and Recommendations on September 21, 1979, a copy of which is attached hereto and made a part hereof. The Borough filed exceptions to the Hearing Officer's Report; the Association filed a memorandum in opposition to the exceptions filed by the Borough.

The undersigned has considered the entire record herein, including the Hearing Officer's Report and Recommendations, the transcript, the exhibits and the exceptions, and on the basis thereof finds and determines as follows:

1. The Borough of Montvale is a public employer within the meaning of the Act, is the employer of the employees who are the subject of this proceeding and is subject to the provisions of the Act.

2. The Montvale Superior Officers Association is an employee representative within the meaning of the Act and is subject to its provisions.

^{1/} Pursuant to N.J.A.C. 19:11-6.4, the Director of Representation transferred this matter to Mr. Alessi due to the unavailability of the Hearing Officer originally assigned.

3. The Borough has filed a Petition for Clarification of Unit seeking a determination that the police chief and the police captain are managerial executives under the Act.

Alternatively, the Borough contends that because the chief directly supervises the captain, an inherent conflict of interest exists when both these titles are in the same unit, and accordingly, the chief should be removed from the unit. Inasmuch as removing the chief from the superior officers unit would result in a unit comprised of one individual (the captain), the Borough contends that the unit should thus be declared inappropriate for collective negotiations.

The Association argues that neither the chief nor the captain are managerial executives but that the police department is managed by elected officials. The Association argues that no evidence was adduced which would indicate that a conflict or potential conflict of interest has arisen from having the chief and the captain in the same negotiations unit and further argues that no such conflict or potential conflict exists. Accordingly, the Association argues that the superior officers unit should remain intact.

4. The Hearing Officer concluded that neither the chief nor the captain are managerial executives within the meaning of the Act. The Hearing Officer further concluded that, inasmuch as any actual or potential conflict of interest between the chief and the captain is de minimis, the Petition should be dismissed.

The Borough has excepted to the Hearing Officer's findings of fact and conclusions of law. More specifically, the Borough excepts to the Hearing Officer's factual findings that: (1) the mayor retains final authority to mitigate discipline as determined by the chief; (2) the chief does not have discretion to determine the type of patrol cars, weapons or uniforms, which should be purchased for the department; (3) the chief does not have authority to determine when additional patrolmen should be hired; (4) the mayor, police commissioner and deputy police commissioner closely monitored many of the day-to-day operations of the department and their actions thus circumvented and undermined the chief's command authority; and (5) major policy decisions are made without the chief's input or contrary to his recommendations.

The Borough functions under a mayor-council form of government. The mayor and council are elected officials who serve on a part-time basis. Upon appointment by the mayor, council members also serve as heads and deputy heads of the various departments of the Borough. Thus, one council member is appointed police commissioner and another council member is appointed deputy police commissioner. They serve as liaison between the mayor and council and the department and as the mayor's representatives to the department. The commissioner is designated by the Borough police ordinance as the titular

head of the department and the commissioner furnishes written monthly reports concerning the department to the mayor and council.

Pursuant to the Borough police ordinance, the police chief is designated the commanding officer of the police department. The chief is subject and subordinate to the police commissioner. The chief is responsible for the efficiency, general conduct, appearances and good order of the department. The chief takes personal charge of police functions during civil disorders, keeps personnel records of the members of the department, maintains the police blotter, deploys and schedules police officers, temporarily suspends (subject to the approval of the police commissioner) department members for willful violation of law, temporarily appoints (subject to council action) special officers, grants temporary leaves of absence, and enforces or prescribes temporary suspensions not exceeding five days.

There is one captain in the Montvale Police Department. The captain reports to the chief. In the absence of the chief, the captain assumes command of the department. The remaining ranks within the department are lieutenants, sergeants and police officers. These employees are represented in a rank and file collective negotiations unit.

Functions & Responsibilities of the Chief of Police

In the instant matter, the undersigned has carefully reviewed the record evidence with respect to the factual findings

of the Hearing Officer to which exceptions have been filed.

A, Hire -- The hiring process begins with the acceptance of applications and the arrangement for physical and intellectual testing of the applicants. Thereafter, a Selection Committee, usually comprised of the police commissioner, the deputy commissioner, another council member, the chief and two PBA members, screens and eliminates certain candidates. Background investigations are then conducted on the remaining applicants. The investigation reports are forwarded by the Selection Committee to the mayor and council. The mayor and council then interview the candidates and make their selections from this screened group of applicants.

After the most recent hiring selections were made by the mayor and council, the background investigation on one of these candidates revealed certain problems which caused the chief to recommend to the mayor and council that the candidate in question be asked to resign or, alternatively, that he be terminated immediately. The mayor and council did not act upon this recommendation. Eventually, this candidate was terminated from employment when he failed several courses at the police training academy. The chief has no independent authority to hire. On those occasions when he has spoken with the police commissioner about hiring additional police personnel, he has not been successful in securing same.

Based upon the above, the record reveals that the chief's role in the hiring process is quite limited, and that his recommendations have been accorded little weight by the mayor and council. Accordingly, the undersigned rejects the Borough's exception to the Hearing Officer's finding that the chief lacks authority to determine when additional police officers will be hired.

B. Discipline -- The record indicates that during the past several years there have been very few disciplinary actions taken against police officers in Montvale. However, the chief has been almost wholly excluded from the decision-making process in the few situations where discipline has been meted-out by the Borough.

In one situation, which involved the conduct of a police investigation and the subsequent handling of a controversial murder case, the judge and the prosecutor sent various general recommendations to the mayor and council suggesting that an officer be disciplined and that certain internal departmental procedures be adopted. Thereafter, the mayor and council held a hearing, concluded that the officer was negligent in the performance of his duties and determined that discipline was warranted. The mayor and council also concluded, after considering the officer's good work record, that the discipline they initially decided upon, a 12 day suspension, should be tempered to a 6 day suspension. The mayor sent a letter to the chief telling the chief to convey

this determination to the officer. This was the extent of the chief's involvement in the disciplinary process.

Further, the prosecutor and the Borough attorney developed a set of recommended investigation and case-handling procedures for internal police department use. The mayor forwarded these to the chief, and told him to institute the newly developed procedures in the department. The chief had no input in the development of the procedures to be utilized in the police department.

In another incident, two police vehicles collided, one of which was damaged beyond repair. Before the chief had taken any action, the mayor called a meeting to inquire into the facts of this incident. The meeting was attended by the mayor, the police committee, the chief, the two officers involved in the incident and representatives of the PBA. Subsequent to the meeting, the chief was instructed to and did discipline the two officers. Subsequently, the chief was criticized by the mayor for the leniency of the discipline which the chief imposed. The chief testified that he was in disagreement with the manner in which this matter had been handled by the mayor and police committee.

The undersigned concludes from the record that while the chief has some role in the disciplinary process, that role is quite limited. The direct and extensive involvement of the mayor and council in this area has led to the virtual exclusion

of the chief from serious matters of discipline. Accordingly, the undersigned rejects the Borough's exception to the Hearing Officer's finding that the mayor retains final authority in disciplinary matters.

C. Departmental Operations

1. Scheduling -- Under the Borough police ordinance, the chief is given the responsibility for scheduling tours of duty, vacations, holidays, etc. Until recently, the captain planned the duty and vacation schedules under the direction of the chief. Given certain fixed conditions -- the number of officers in the department, the area to be patrolled, and the level of police service desired -- the chief determines the number of officers on each shift.

However, there has been a significant and regular intervention in this function by the elected Borough officials. The mayor testified that it was the responsibility of the mayor and council to insure a proper schedule. In undertaking that responsibility, the mayor, police commissioner and deputy commissioner have issued various orders and directives to the chief and the captain concerning how the schedule should be drafted, and how and when vacations could be taken. In addition, the mayor, commissioner and deputy commissioner have required advance submission of schedules to them for initial approval and for approval of alterations.

The chief, or in his absence, the senior officer on the shift, may unilaterally decide to hold over an officer into

the next shift where circumstances are appropriate in order to complete required tasks. However, in arranging for coverage when an officer calls in sick, the chief's authorization of overtime has been closely scrutinized, questioned and severely criticized. The mayor and police commissioner have issued several directives limiting the chief's ability to authorize overtime. The police commissioner at one point instructed the chief to clear all overtime with him, the mayor or the deputy commissioner prior to authorizing it. When this system proved impossible to administer, it was abandoned.

2. Personnel Assignments & Deployment -- Pursuant to the Borough police ordinance, the chief is given responsibility for personnel assignments and deployment. However, the mayor and police commissioner have taken an active role in this area: they have removed scheduling duties from the captain and given them to a lieutenant; on numerous occasions they have directed that an officer be placed at a specific location at a certain time in order to direct traffic; they have directed that traffic duty officers be removed from certain posts; they have directed that traffic regulation signs be posted at certain locations; they have ignored many recommendations of the chief regarding placement of traffic signs; they have directed that certain incidents which occurred in the Borough be investigated, and when dissatisfied with the results of initial investigations, have ordered re-investigations; they have issued directives on

how to handle certain emergency situations; they have countermanded training authorizations issued by the chief; they have ignored several recommendations of the chief regarding personnel training; and they have rejected leave of absence requests which the chief had recommended they approve.

The chief testified that he is not permitted to independently run the department, and that there is regular intervention by the mayor, police commissioner and deputy commissioner in even the everyday operation of the department. The mayor and police committee often directly contact police officers and give them orders without going through the chief. The mayor issued a directive to the department that requires the chief or, in his absence, the senior officer in charge of the shift, to immediately inform either the mayor, police commissioner or the deputy commissioner of any "unusual events" which occur in the Borough during a shift.

Clearly, the mayor and police commissioner have taken a broad and active role in departmental functions. Based upon the entire record and the above discussion the undersigned finds that the mayor, the police commissioner and the deputy commissioner have closely scrutinized the day-to-day operations of the department, have regularly intervened in numerous departmental functions and, thus, on many occasions have exercised the chief's command authority. Accordingly, the undersigned rejects the Borough's exception to the Hearing Officer's finding that the actions of

the mayor and commissioners interfered with the chief's command authority.

D. Other Responsibilities -- In the past, the chief and the police commissioner had jointly formulated the initial department budget for submission to the mayor and council. For the most recent budget, the chief was instructed to independently formulate the initial police department budget. Historically, the mayor and council revise and cut the initial submission extensively. The final budget is very different from the initial recommendation.

The chief has the authority to purchase items provided in the department budget. His "discretionary fund" is modest and he does not have complete control over that. Any purchasing decisions which will lead to relatively large expenditures of Borough funds require prior review and approval by the mayor and council. The chief has some discretion concerning the selection and purchase of equipment used by the department. However, even in this area there has been review by the mayor and council which has resulted in the restriction or preemption of the chief's discretion.

Also, with regard to equipment purchase, in 1979, the chief submitted a report detailing the poor condition of the department's vehicles. Subsequently, the chief was informed by the mayor and council that the department would receive three new vehicles, but of a different model than those which the

department was then using. The record does not indicate that the chief had any input into that decision. The chief testified that he was unhappy with the decision to change the model but he did not express his opinion to the mayor and council.

Further, the record shows that the present police uniform was selected by the police commissioner. While the chief stated that the current uniform is servicable, he was quite critical of the uniform hat and indicated that he would have selected a different hat had the decision been his to make. The chief did not, however, express his dissatisfaction with the hat to the commissioner.

The record is unclear concerning the chief's authority to select and purchase the weapons utilized by the department. ^{2/}

Based upon the foregoing, the undersigned concludes that the chief's discretion to determine whether to purchase certain equipment and the type of equipment to be purchased is quite limited. Accordingly, the undersigned rejects that portion of the Borough's exception to the Hearing Officer's finding that the chief lacks authority to determine the type of patrol cars and uniforms which should be purchased by the department. With regard to the finding that the chief does not have discretion to determine the type of weapons which should be purchased for the department, the undersigned concludes that the record is unclear

^{2/} While the record indicates that the chief has some discretion concerning the weapons utilized by the department, there are conflicting statements in the record on this issue. Because the record is uncertain, a definitive finding concerning the extent of the chief's discretion in the selection and purchase of weapons is not possible at this time.

on this issue and that no determination may be made at this time. However, the inability to reach a conclusion on this issue does not foreclose the ability of the undersigned to reach a conclusion as to the issues presented herein.

ANALYSIS

The instant matter requires an examination of the definition of "managerial executive" as contained in N.J.S.A. 34:13A-3(f). This subsection provides:

"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, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district.

The Commission has applied this definition, which was added to the Act in 1975, ^{3/} in one previous matter, In re

3/ Prior to the enactment by the Legislature of the statutory definition of managerial executive, the Commission had developed a working definition of managerial executive which was similar to the statutory definition. In In re City of Elizabeth, P.E.R.C. No. 36 (1970) the Commission stated that:

The essential characteristics of the term denote one who determines and executes policy through subordinates in order to achieve the goals of the administrative unit for which he is responsible or for which he shares responsibility. It is this final responsibility to formulate, determine and effectuate policy and not the initial preparation of a budget or of policy proposals that distinguishes the managerial executive from other staff or line positions.

In Elizabeth, the Commission determined that the Chief of Police was not a managerial executive. The Commission noted that the chief's role in the policy-making process was as a resource person; his involvement was as a subordinate who was delegated a specific task and whose recommendations were finally passed upon by the director in accordance with the director's responsibilities.

Borough of Avon, P.E.R.C. No. 78-21, 3 NJPER 353 (1977). In Avon, the managerial executive issue was asserted by the respondent as a defense to an unfair practice "a(3)" discrimination charge. The Commission, in agreement with the Hearing Examiner, determined that a lifeguard captain was not a managerial executive. The captain prepared the budget for beach operations, authorized and modified lifeguard work rules, authorized work schedule changes for lifeguards, added lifeguards to the payroll to cover emergencies, caused the mayor to reverse his rain day policy, participated in management meetings with the mayor, directed the lifeguard's work and managed the beach operation on a day-to-day basis. However, the mayor regularly changed work rules and terms and conditions of employment of the lifeguards without consulting the captain and, in fact, reversed several of the work rule decisions already made by the captain. On several occasions, the mayor rejected hiring recommendations from the lifeguard captain. The Commission, referring to the relevant experience of the National Labor Relations Board, concluded that a wider range of discretion than that possessed by the captain was necessary for a finding that the employee is a managerial executive.

Consistent with the urging of the Supreme Court that the Commission seek reference to the experience and adjudications of the NLRB and sister labor relations agencies, Lullo v. IAFF, 55 N.J. 409 (1970), Bd. of Ed. W. Orange v. Wilton, 57 N.J. 404 (1971), and In re State of N.J. & Prof. Assn. of N.J. Dept. of

Ed., 64 N.J. 231 (1974), the undersigned has reviewed the resolution of managerial executive issues before other administrative bodies.

The NLRB has developed a definition of managerial employees through numerous adjudications. Managerial employees have been defined as (1) executives who formulate, determine and effectuate management policies by expressing and making operative the decisions of their employer^{4/} or (2) those employees who have discretion in the performance of their job independent of their employer's established policy^{5/} or (3) those employees who are so integrally related to or so closely aligned with management as to place the employee in a position of potential conflict of interest between the employer on the one hand and his fellow workers on the other.^{6/}

- ^{4/} NLRB v. Bell Aerospace Co., 416 U.S. 267, 85 LRRM 2945 (1974); Illinois State Journal Register, Inc. v. NLRB, 412 F.2d 37, 71 LRRM 2668 (7th Cir. 1969); In re Palace Laundry & Dry Cleaning Corp., 75 NLRB No. 40, 21 LRRM 1039, (1947), In re Kitsap Cty. Auto. Dealers Assn., 124 NLRB 123, 44 LRRM 1560 (1959); In re General Dynamics Corp., 213 NLRB No. 124, 87 LRRM 1705 (1974); and In re Textron, Inc., 219 NLRB No. 42, 89 LRRM 1664 (1975).
- ^{5/} In re American Radiator & Standard Sanitary Corp., 119 NLRB No. 213, 41 LRRM 1416 (1958); In re Kitsap Cty. Auto Dealers Assn., supra, n. 4; In re Eastern Camera & Photo Corp., 140 NLRB No. 58, 52 LRRM 1068 (1963); In re Central Maine Power, 151 NLRB No. 4, 58 LRRM 1346 (1965); In re General Dynamics Corp., supra, n. 4; and In re Textron, Inc., supra, n. 4.
- ^{6/} In re Central Main Power Co., supra, n. 5; Illinois Journal Register, Inc., supra, n. 4; In re Textron, Inc., supra, n. 4.

Managerial status is reserved for " ... those in executive-type positions, those who are closely aligned with management as true representatives of management." ^{7/}

The Board has stated that:

The determination of "managerial" is to some extent necessarily a matter of the degree of authority exercised. ^{8/}

The Board has further stated that " ... even the authority to exercise considerable discretion does not render an employee managerial where his decision must conform to the employer's established policy." ^{9/}

The New York Public Employee Fair Employment Act (the Taylor Law) ^{10/} defines managerial employees as:

Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. (Section 201)

The New York Public Employment Relations Board, construing the meaning of "policy" and "formulate", has stated

Policy is defined in a general sense as "a definite course or method of action selected from among alternatives and in the light of

^{7/} General Dynamics, supra, n. 4, at 1715

^{8/} In re Palace Laundry, supra, n. 4; and In re Ford Motor Co., 66 NLRB 1317, 17 LRRM 394 (1946)

^{9/} In re Albert Lea Cooperative, 119 NLRB No. 96, 41 LRRM 1192 (1957); Eastern Camera, supra, n. 5, at 1069; Kitsap Cty. Auto Dealers Assn., supra, n. 4

^{10/} New York Civil Service Law, Article 14; L. 1967, c. 392, as amended; 11 PERB ¶ 2000 (1979)

given conditions to guide and determine present and future decisions". In government, policy would thus be the development of the particular objectives of a government or agency thereof in the fulfillment of its mission and the methods, means and extent of achieving such objectives.

The term "formulate" as used in the frame of reference of "managerial" would appear to include not only a person who has the authority or responsibility to select among options and to put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such a proposal into effect. It would not appear to include a person who simply drafts language for the statement of policy without meaningful participation in the decisional process, nor would it include one who simply engaged in research or the collection of data necessary for the development of a policy proposal.

In re State of New York, 5 PERB 3001, 3005 (1972)

In In re City of Elmira, 6 PERB ¶4016 (1973), PERB applied the statutory definition in finding that the City's chief of police was a managerial employee. PERB noted that under police department regulations, the city manager governed and controlled the department's affairs. However, PERB found that the chief was the effective operating head of the department and was held responsible for its governance by the city manager. PERB found that the chief organized the department in the manner best suited to serve the public interest, coordinated policy activity with other city departments and other law enforcement agencies, initiated public relations programs, issued departmental rules, was responsible for manpower deployment, issued commendations, meted out discipline, and was the second step of the grievance

procedure in the police officer labor contract. Additionally, the chief prepared estimated police department budgets for submission to the city manager who had final authority to determine the budget that was presented to the city council. The city manager sometimes consulted with the chief concerning budget matters.

The city manager stated that because of his lack of expertise in police matters, he relied on the chief's judgment and advice in determining city policy in police affairs. The chief viewed himself as a supervisor with authority to determine only matters of a technical police nature. He cited instances where the city manager or the city council took action in police matters without consulting him or directed departmental changes over his disapproval. The chief stated that he would seek the city manager's approval on any matter likely to have broad community impact.

In reaching the conclusion that the chief was a managerial, PERB's Director of Representation set forth these observations on managerial status in law enforcement agencies:

Law enforcement is one of the fundamental objectives of any government charged with insuring the public safety. The governmental body to which this task is entrusted is the police department. The police chief, as operating head of the department and the top police professional in city government, bears primary responsibility for this employer's "development of ... the methods, means and extent" of reaching this objective. The record shows that the chief "formulates" policy in both senses of the term. Thus, he is the "person

who has the authority or responsibility to select among options and to put a proposed policy into effect" with regard to a wide spectrum of matters affecting the operation of the police department, such as setting working hours, fixing the number of men on a shift (an established managerial prerogative), deciding to have police officers counsel school children on safety as part of a public relations program, and instructing police officers on the constitutional rights of citizens in a dispute with another agency of city government.

At other times, as when his counsel is sought by the city manager on law enforcement or public safety matters affecting the entire city, or when he fixes, with the city manager's approval, the number and rank of supervisors on night duty during summer months (also an established managerial prerogative) or shepherds the publication, under his and the mayor's joint sponsorship, of a pamphlet on narcotics abuse, he is the "person who participates with regularity in the essential process which results in a policy proposal and the decision to put such a proposal into effect." In this regard, I have not overlooked the fact that the chief's recommendations are not always followed, or that he is subject to the direction of his superiors even as to internal departmental matters. However, these considerations are not relevant herein. Absolute discretion or authority to act (which falls within the job description of nobody of whom I am aware) is not a prerequisite to finding that an individual formulates policy. What matters is the fact of participation at a fundamental level in the decision making process, not the participant's batting average in having his views prevail. (footnotes omitted)

6 PERB at 4027

In In re Borough of Wilkinsburg, 9 PPER 484 (1978), the Pennsylvania Public Employment Relations Board concluded that the chief of police in a department comprised of 44 officers was a managerial employee. The Board noted that the chief worked directly under a part-time mayor who was vested with complete

authority to operate the police department. The mayor met with the chief to discuss policy matters and usually adopted the chief's opinions on managerial matters; the Borough council also met with the chief on policy matters. The chief evaluated police personnel, sent employees to training courses, prepared annual budgets for submission to the Borough secretary and generally implemented, guided and directed policy matters in the department. The Board cited with concordance an earlier matter, In re Lower Allen Tp., 8 PPER 376 (1977), in which it concluded that the chief was "management's man in the police department and it would disrupt labor relations and personnel administration in the department to divide his existing allegiance to management by including him in this unit." 11/

From the above review, the undersigned observes the following:

In general, "policy" may be defined as a "definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions." Websters Seventh New Collegiate Dictionary. In a public employment context, "policy" may further be defined as the development of particular sets of objectives of a governmental entity, designed to further the mission of the agency and the methods of achieving such objectives. Those who formulate

11/ Accord, In re Borough of Collingdale, 10 PPER ¶ 10230 (1979); and In re City of Leslie, 1974 MERC 505 (MERC Case No. R74 B-65, 1974)

policy are those who select a course of action from among the alternatives and those who substantially and meaningfully participate in the essential processes which result in the selection of a course from the alternatives available. Cf. In re State of New York, supra.

Managerial executives who direct the effectuation of policy are charged with overseeing or coordinating policy effectuation by line supervisors. Most importantly, those chosen for "directing the effectuation" of policy must necessarily be empowered with a substantial measure of discretion in deciding precisely how the policy should be effectuated.

The Commission's determination of managerial status may not be based upon a cursory review of the individual's employment title. Prior to the 1975 amendment to the Act, heads and deputy heads of departments were excluded from the definition of "employees." The legislature removed this per se exclusion from the Act simultaneously with its insertion of the definition of a managerial executive. Given the premise that the ultimate organization of all employees who desire collective negotiation is a logical objective of the public policy underlying the statute, State of Prof. Assn. of N.J. Dept. of Ed., 64 N.J. 231, 253 (1974), the changes to the Act may be interpreted as manifesting a legislative policy to minimize presumptions based upon job titles and to encourage examinations into the precise performance of job

responsibilities. ^{12/} Further, where public policy favors organization, it is improper for an agency to engage in a "presumption of manageriality" which does not in actuality conform to the statutory definitional criteria. See In re Civil Service Technical Guild, Local 375, District Council 37, AFSCME, AFL-CIO, N.Y. Supreme Court, Special Term, N.Y. County, 182 N.Y.L.J. No. 69 (Oct. 9, 1979).

Nevertheless, the agency would be derelict in its responsibilities if it did not, with reasoned thoughtfulness, approach a given issue by utilizing the administrative experience and expertise gained from the day-to-day administration of the Act. The Act's original provisions reflected the well premised logic that chief full time administrative officers of a 12/ cf. NLRB v. Bell Aerospace Co., supra, n. 4,

Of course, the specific job title of the employees involved is not in itself controlling. Rather, the question whether particular employees are "managerial" must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management. [at footnote 19]

A decision of the Pennsylvania Board, In re O'Hara Tp., 10 PPER ¶ 10191 (1979), is instructive. Under a former Township manager, the duties of the police superintendent were circumscribed and closely scrutinized in that the Township manager took a regular, active role in running the police department. After a new Township manager was hired, the status and responsibilities of the superintendent were substantially changed. The responsibilities were broadened. The new Township manager stated that he knew quite little about police operations and that he expected the superintendent would assume full responsibility for the management of the department. Accordingly, the superintendent was found to be a managerial employee.

public employer's various departments are those individuals who would be engaged in high level management practice. In addition, the Commission's experience, like that of New York, indicates that in the sensitive arena of effectuating law enforcement policy, the police chief usually bears primary responsibility for the employer's development of the methods, means and extent of reaching the objective. These considerations are still worthy touchstones for the initiation of an administrative investigation. However, where a managerial executive issue exists as the result of a dispute as to who in actuality bears the primary responsibility for the employer's development of the method, means and extent of accomplishing the governmental mission, the undersigned, in accordance with the new definition contained in the Act and in accordance with the spirit of the Act as expressed by the Supreme Court, is compelled to examine:

- (1) the specific functions and responsibilities of that individual;
- (2) the relative position of that individual in the employer's organizational hierarchy; and (3) the extent of discretion accorded to that individual in his/her employment.

CONCLUSION

The Montvale Chief of Police is the highest ranking uniformed officer in the Montvale Police Department. The chief functions as the operational head of the department. The chief is directly subject and subordinate to the police commissioner,

as well as the deputy commissioner and the mayor, all of whom are part-time elected Borough officials.

The chief becomes involved, in varying capacities, with several functions which touch upon many areas of the department's operations: Hire and discipline, personnel scheduling, personnel assignments and deployment, departmental rules and procedures, departmental security, maintenance of personnel records, keeping a police blotter, responsibility for equipment and the periodic issuance of reports to the mayor and council concerning the department's operations. However, the extent of discretion accorded the chief in many of the above listed areas is limited. The limitation on the chief's discretion in the performance of these and other functions results from, and is in direct relation to, the degree of involvement in the policy and operational aspects of the department by the mayor, police commissioner, deputy commissioner and other council members. As evidenced in the record, these elected officials have taken a regular and extensive role in the affairs of the department. The role of the chief is reduced to a routine and ministerial level.

The chief's functions have not included the development of objectives designed to further the mission of the department. Neither has the chief been accorded substantial or meaningful input into the essential processes which result in the selection of a course of action from among available alternatives.

The mayor and council have formulated, and in many cases, directed the effectuation of police policy in the Borough

on myriad issues: hiring, discipline, scheduling, personnel deployment, personnel assignments, formation and approval of the budget, purchasing decisions, departmental security, conduct of investigations, regulation of interdepartmental matters, and traffic control. Because of the extensive involvement of the elected Borough officials herein, the chief has frequently been excluded from the policy decision process. Often he has not been permitted to announce and/or implement a policy pronouncement -- very often the mayor or police commissioner or deputy commissioner has issued a proclamation, written or verbal, to the appropriate officer(s). Indeed, the chief has at times been informed by rank and file police officers of action taken by the mayor and council which directly impacted the department.

The undersigned's consideration of this matter has not been to focus upon the chief's "batting average in having his views prevail." ^{13/} Rather, the undersigned has looked for the chief's "participation at a fundamental level in the decision making process," ^{14/} and has found it lacking.

While the chief has been given some discretion by the Borough, his decisions have been closely scrutinized, on occasion criticized and sometimes reversed; there has been little rubber-stamping of the chief's decisions -- clearly, the length of discretionary rope accorded the chief has been short.

13/ In re City of Elmira, supra, p. 18

14/ Id.

Accordingly, the undersigned rejects the Borough's exception to the Hearing Officer's conclusion that major policy decisions are made without the chief's input or contrary to his recommendations.

The decisions concerning managerial employees which the undersigned has reviewed herein, whether based upon the formulation or effectuation of policy, or a close alignment with management, or an integral role in the employer's labor relations processes, have all been concerned with the degree of authority exercised or the extent of discretion in job performance. It appears that, whatever the circumstance, in the context of the governmental entity concerned, a managerial employee must possess and be permitted to exercise a certain minimal level of authority sufficient to broadly affect either that governmental entity's internal regulation or its external endeavors. In the instant matter, the chief has not been accorded that level of discretion and authority.

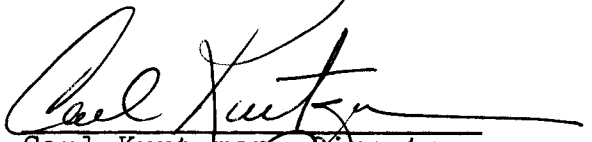
Therefore, based upon the entire record and the foregoing discussion, the undersigned determines that the chief of the Montvale Police Department is not a managerial executive within the meaning of the Act. By extension, the captain, who is the chief's subordinate, is not a managerial executive.

Lastly, the undersigned agrees with the Hearing Officer that the record does not demonstrate that a conflict of interest exists between the chief and the captain. The record establishes

that the captain has distinct areas of responsibility which rarely interact with the chief's responsibilities. Furthermore, the captain has interacted directly with the mayor, police commissioner and deputy commissioner in the performance of his duties. Those officials have from time to time given direct orders or instructions to the captain. Based on the foregoing, the undersigned concludes that no actual conflict exists and the potential for conflict is de minimis.

Accordingly, the instant Clarification of Unit Petition is hereby dismissed. 15/

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Carl Kurtzman, Director

DATED: April 3, 1980
Trenton, New Jersey

15/ Dismissal of the instant Petition does not preclude the employer from petitioning anew based upon a change in circumstances in the event that the chief's responsibilities and authorities are substantially altered.

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

In the Matter of

BOROUGH OF MONTVALE,

Public Employer-Petitioner,

-and-

Docket No. CU-78-38

MONTVALE SUPERIOR OFFICERS ASSOCIATION,

Employee Organization-Respondent.

SYNOPSIS

In a Clarification of Unit Petition a Commission Hearing Officer finds that the chief of police and the captain are not "managerial executives," as that term is defined by the Act. The Hearing Officer also finds that a unit consisting of these two titles is appropriate since any actual or potential conflict of interest between the chief and captain is de minimis. Accordingly, it is recommended that the Petition, which sought to clarify these two titles out of the unit, be dismissed in its entirety.

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 Proceedings who reviews the Report, any exceptions thereto filed by the parties and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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Employee Organization-Respondent.

Appearances:

For the Petitioner, Pachman, Aron, Till and Salsberg, Esqs.
(Richard M. Salsberg, of Counsel)

For the Respondent, Osterweil, Wind and Loccke, Esqs.
(Alfred G. Osterweil, of Counsel)

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

On February 22, 1978, a Clarification of Unit Petition was filed with the Public Employment Relations Commission by the Borough of Montvale (the "Borough") which seeks to remove the Chief of Police and Captain from a unit that includes only these two titles, represented by the Montvale Superior Officers Association (the "Association"). The Borough contends that the Chief and Captain are "managerial executives," as that term is defined by the Act ^{1/} and, in the alternative, that a unit consisting of these two titles is inappropriate due to an inherent conflict of interest. The Association contends that they are not managerial executives and, under Commission precedents, a unit including several ranks of superior officers is appropriate.

1/ The New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq.

Pursuant to a Notice of Hearing, a hearing was held before J. Sheldon Cohen, a Commission Hearing Officer, ^{2/} on October 20, 1978, and before the undersigned Hearing Officer on March 15, 1979, at which all parties were given the opportunity to examine and cross-examine witnesses, to present evidence and argue orally. Post-hearing briefs were simultaneously submitted by the Borough and the Association on May 7, 1979.

At the hearing the parties agreed to the follow stipuations.

Stipulations

1. The Borough of Montvale is a Public Employer within the meaning of the Act and is the employer of the employees herein involved.

2. On August 25, 1976, the Montvale Superior Officers Association filed a petition (Docket No. RO-77-17) with the Commission for Certification of Public Employee Representative for a unit including all police superior officers above the rank of lieutenant, including the Chief of Police (Exhibit J1). In November 1976 the Borough recognized this unit (Exhibit J2), the Petition was withdrawn in January 1977 (Exhibit J3), and negotiations commenced, which included mediation and fact finding. During these negotiations an Unfair Practice Charge was filed by the Association (Docket No. CO-77-332, June 1, 1977, Exhibit J5) alleging that the Borough had unilaterally altered existing practices by requiring that one Superior Officer remain within the confines of the Borough at all times and directing that members of the Superior Officers Association would no longer be permitted to earn additional monies by working "school details." This charge was resolved informally and withdrawn by the Association. Subsequently the Association filed for compulsory interest arbitration. Prior to arbitration the Borough filed this Clarification of Unit Petition (J4).

3. Title 40A N.J.S.A. is the relevant statute governing the Police Department of the Borough of Montvale.

4. The Montvale PBA filed an unfair practice charge with the Commission concerning the Borough's order that all patrolmen appear in uniform at court. The Commission issued a reported decision In the Matter of Borough of Montvale and Montvale PBA.

^{2/} Pursuant to N.J.A.C. 19:11-6.4 the Director of Representation has transferred the hearing of this matter to the undersigned Hearing Officer.

Findings of Fact

1. The Montvale Superior Officers Association did file a Petition for Certification as a Public Employee Representative with an adequate showing of interest and has been recognized by the Borough as the representative of the Superior Officers. Accordingly, the Association is an employee representative within the meaning of the Act and is subject to its provisions.

2. Montvale is governed under the mayor and council system with the mayor as head executive officer and the council acting as a board of directors. All of these elected officials function on a part-time basis. The mayor, who considers himself the Borough's chief law enforcement officer, annually appoints two councilmen as Commissioner and Deputy Commissioner of Police. These two commissioners also sit on the Police Committee with other councilmen. This committee reviews the monthly reports of the occurrences within the department and makes recommendations to the mayor and council. The committee oversees the department to ensure that the rules, regulations, ordinances and directives adopted by the mayor and council are adhered to.

3. The Commissioner and Deputy Commissioner are civilians who function on a part-time basis. ^{3/} Accordingly, there is no full-time civilian in charge of and responsible for public safety. The commissioners represent the interests of the mayor and council with the department, act as liaison, and provide information to the mayor and council on police matters, including traffic control and school safety. The Deputy Commissioner acts in the absence of the Commissioner (see Exhibits R1 and P2).

4. The Chief of Police is the chief executive officer of the department, but is subject and subordinate to the Commissioner and Deputy Commissioner. The

^{3/} The current Commissioner is out of town for long periods of time.

chief is responsible for ensuring that all members of the department perform their duties in accordance with the rules, regulations, directives and ordinances of the mayor and council. Being in charge of day-to-day operations he is generally responsible for the well-being, efficiency, general conduct, discipline, appearance and good order of the department (see Exhibits R1 and P2).

The captain is next in the chain of command and assumes command when the chief is absent. Generally, he assists the chief, is in charge of the special or auxiliary policy, oversees the detective bureau, conducts inspections of the men on patrol, and until recently prepared the work schedules. Although the captain is subject to the authority and discipline of the chief, he has never actually been disciplined or even criticized by the chief. No evidence was presented that the chief evaluates the captain or has the authority to respond to his grievances. Further, the chief often issues commands directly to the men, rather than through a strict chain of command. The captain does not always work the same tour of duty as the chief, and, without prior consultation with the chief, the Commissioner changed the captain's schedule and relieved him of the duty to prepare the work schedule. On occasion the captain has filed reports directly with the mayor.

6. The chief is responsible for departmental discipline and has discretionary authority, within the procedural due process requirements of Title 40A, to determine when an officer's conduct warrants discipline and the severity. However, the mayor retains final authority to mitigate discipline.

It is apparent that whenever there is a possible serious breach of discipline the mayor and council will become directly involved in the disciplinary process. In one situation, where two police cars collided (see Exhibit R32), the mayor conducted an initial meeting with the participants and ordered the chief to investigate the incident further and discipline the two officers if he found they

were negligent. The severity of discipline was left to the discretion of the chief, but he did receive comments from the mayor on whether he considered the discipline adequate (see Exhibit P3).

In another serious situation involving a Detective Donovan the mayor and council, pursuant to a grand jury presentment, conducted a hearing and ordered discipline of the detective without requesting that the chief participate in the process or submit his recommendation. The chief was simply responsible for ensuring that the disciplinary order was put into effect (see Exhibit R27).

7. In the past the Commissioner and the chief would jointly prepare a budget proposal. However, last year the chief prepared it alone. This proposal is then submitted to the Police Committee which prepares a final budget submission for the mayor and council. The original budget proposal is routinely and significantly altered through the deletion of certain items which the chief had requested and the addition of others he did not believe were necessary.

8. The chief has the authority to purchase equipment in accordance with budget allocations for line items. He must follow an established purchasing procedure and he does not have the discretion to determine the type of patrol car, weapon, or style of uniform, all of these decisions being made by the Police Commissioners or the mayor and council. The chief does have the discretion to determine when, during the budget year, it is necessary to purchase the allocated equipment. There is also a \$1500 miscellaneous fund which the chief can expend on minor items. At least once the Police Commissioner purchased equipment directly and on another occasion money was removed from a budgeted item without the knowledge of the chief. In a related matter, the mayor decided that the Borough needed a police traffic bureau vehicle and instructed the chief to pursue an application with the State for such a vehicle (see Exhibit R23).

9. In hiring the chief is a member of the Police Selection Committee, which changes from year to year but has included councilmen, other junior officers - the captain, lieutenant or a detective - and a patrolman. The committee investigates and screens applicants and then submits an eligibility list to the mayor and council who interview all those eligible and makes a final decision. The committee has placed applicants on the eligibility list despite the chief's objections. The committee does not recommend specific individuals and in 1968 the chief was not a member of this committee since his son was applying for a position (see Exhibit R45).

10. On one occasion the chief's recommendation that a probationary officer not be permanently hired was not followed (see Exhibits R6 and R7). The mayor made his own recommendation to the council and the man was finally dismissed only after he failed to pass the training course.

11. In past years the chief's recommendations concerning contract proposals for negotiations with the PBA have not been adopted. During the last negotiations his recommendations were not solicited; nor was he requested to evaluate or comment on the implications of the Borough's or PBA's proposals. In the area of labor relations he did not have the discretionary authority to have a Blue Cross/Blue Shield representative meet with his staff to explain the benefits they are provided. (See Exhibit R-12.)

In related personnel matters the mayor and council on one occasion adopted the chief's recommendation that a patrolman be granted an extended leave of absence, while in a second case his recommendation was denied (see Exhibit R39). Further, the mayor and council voted to pay a lieutenant additional monies for special services when the chief recommended that the lieutenant had not fully performed the services and should not be paid (see Exhibit R34). The chief's

responsibility was only to sign the voucher and forward it to the treasurer for payment. Finally, the chief did not have the authority to grant a patrolman's request to spend part of his uniform allowance on civilian clothes since half of the time he works as a plain-clothed investigator. The request had to be approved by the Police Committee (see Exhibit R39).

12. The chief is ultimately responsible for the scheduling of shifts and the number of men assigned to each shift based on his police judgment and manpower availability under the limitations contained in the PBA contract concerning the number of hours and days during a week a patrolman can be required to work (see Exhibit R46). His discretion in scheduling was further restricted by numerous directives from the Police Commissioner, Deputy Commissioner and the mayor. When a shift was short due to illness and the like, the chief had to obtain prior approval for overtime in order to maintain minimum manning levels. ^{4/} The mayor and commissioners were constantly questioning the chief's approval of overtime and directing him to limit it (see Exhibits R11, R37). He was also ordered to change the work schedule, in violation of the contract with the PBA, in order to limit overtime.

There was a strict limitation on the number of consecutive weeks of vacation the chief could grant a patrolman (see Exhibits R13, 40, R42). Even when the request was within this limitation it had to be approved by the commissioner (see Exhibit R36). All summer vacation schedules had to be submitted by April 1st and any alterations or additions after that date had to be approved by the mayor

^{4/} On February 15, 1979, the new Police Commissioner rescinded this order due to its lack of feasibility and granted the captain discretion to prepare schedules and handle situations of holidays and vacation time in any manner which was in the best interests of the Borough (see Exhibit R43). However, it is apparent from the chief's testimony and the letter's reference to curtailment of overtime, that the chief and captain were still required to exercise this authority within the spirit, if not the letter, of the prior policy directives.

and council (see Exhibit R14).

Any changes in the monthly work schedule, outside of an emergency, had to be submitted to the Deputy Commissioner for his approval by the 15th of the prior month (see Exhibit R14). Any special requests regarding salary, extra pay, holiday pay, or vacations had to be submitted through the chief to the mayor for final approval (see Exhibit R28). The chief was specifically directed to arrange the schedule so that patrolmen were on their days off when they had to report for National Guard duty (see Exhibit R8).

The chief's decision to send a patrolman to special training was overruled by the Deputy Commissioner due to his perception of a manpower shortage (see Exhibit R2). Finally, only the mayor and council have the authority to grant an additional holiday, which was done without soliciting the chief's recommendation as to its effect on the operations of the Police Department (see Exhibit R20).

13. The chief, being in tactical command, is responsible for the deployment of manpower. For example, he decided how many additional men should be assigned to the bicentennial celebration and whether additional men are necessary at the scene of a fire or accident. He deploys patrol cars in chasing suspects and determines when police dogs should be used. The chief also has the authority to temporarily assign a patrolman to special duty, such as assisting the Detective Bureau, when there is an increase in workload for such special units. However, when necessary, these authorities may also be exercised by the shift commander in the chief's absence.

On several occasions the mayor, without prior consultation, has ordered the chief to deploy patrolmen in a specific manner. He ordered the placement of a patrolman at a particular location and at specific times in the morning and

evening to control rush hour traffic (see Exhibit R5). Again, without consultation, the mayor ordered a traffic study and count at several intersections as a preliminary to further deployment of patrolmen for traffic control. The mayor did not adopt the chief's recommendations concerning the traffic problem at the Mercedes Benz dealership and, without soliciting the chief's advice, decided that all traffic control duties, which have previously been performed by the dealership's private policemen, would be assumed by the department (see Exhibit R3 and P5). The mayor also monitored traffic control functions and in one instance specified the manner in which the traffic was to be directed (see Exhibit P5). Further, the commissioner issued a detailed directive concerning the procedure to be followed by patrolmen in responding to fires (see Exhibit R16).

14. The chief, subject to review by the commissioners and final approval by the mayor and council, has the discretionary authority to order intradepartmental transfers. On one occasion the chief transferred a man from patrol to the Detective Bureau without prior approval, and his decision was subsequently upheld by the deputy commissioner when a grievance was filed (see Exhibit P4). On another occasion the chief requested prior approval before assigning a man to the bureau, while the the commissioner ordered O'Donovan's assignment as a detective.

15. It is apparent that the mayor and commissioners closely monitored many aspects of the department's day-to-day operations, ^{5/} and did not hesitate to direct how these operations should be performed. Often their actions circumvented and undermined the chief's command authority. For some time the mayor required a detailed weekly briefing, covering nearly all phases of the department's

^{5/} The chief's duties often require that he leave the Borough to coordinate law enforcement activities with other departments, attend chiefs' conferences, training programs and the like. However, the chief must obtain prior approval to leave the Borough for any reason (see Exhibit R4). When he is absent he must place a superior officer, not just the tour commander, in charge, the mayor having ordered that a superior officer should always be available for any emergencies (see Exhibit P5).

workings, to be prepared by the chief, personally, or in his absence, the captain. The chief was ordered to post a notice to all men that they were to report any unusual occurrences, day or night, directly to the commissioners or the mayor (see Exhibits R33, R18). The chief testified that the prior commissioner would respond to police calls and interfere with the operation. The commissioner mildly reprimanded the chief when the senior officer did not notify him about an incident which occurred on the evening shift (see Exhibit R19).

The mayor often receives complaints from citizens concerning disturbances of the peace, traffic safety and the like. Rather than direct these complaints to the chief, he has on one occasion personally observed the problem and then directed the chief on the remedial action to be taken (see Exhibit P5). In another situation the mayor concluded that the complaint warranted an investigation. He then notified the chief and simultaneously requested a patrolman on the shift to investigate (see Exhibit R38). In one incident the chief was out of the borough when the disturbance occurred. However, subsequently, the captain and detective who investigated the disturbance reported directly to the mayor. When the mayor was dissatisfied with the original report he instructed the detective on the specific manner in which the investigation was to be conducted (see Exhibits R31 and R15).

At times the mayor has become involved with even the most minute details of the department's operations, such as requesting an explanation if a patrolman visited the police headquarters in an adjacent town. By way of explanation the patrolman was performing a minor routine function (see Exhibits R24, R25).

Recommendations to the mayor and council concerning the Youth Guidance Committee and Traffic Control Bureau have been made by junior officers in charge of these operations, with the chief functioning only as a conduit for transmitting these recommendations through the chain of command (see Exhibits R35, R21).

The commissioner changed the tour schedules of the lieutenant and captain contrary to the chief's wishes. Finally, the commissioner, without notifying the chief or requiring his attendance, conducted a meeting with the patrolmen concerning scheduling problems and, as a result of this meeting, decided to transfer scheduling from the captain to the lieutenant. The chief was simply notified of this decision. The previous commissioner had his own desk at headquarters and would discuss problems directly with the men.

16. It is apparent that major policy decisions are made without the chief's input or contrary to his recommendations. The mayor decided what the department's policy should be concerning relations with the media (see Exhibit R22). The mayor and council did not accept the chief's recommendations concerning traffic control, lights and signs, but adopted an ordinance which it considered to be the most effective method for dealing with these problems (see Exhibit R14). On occasions the governing body has ordered the installation and removal of traffic lights and signs without consulting the chief.

In response to a grand jury presentment the mayor and council, without the chief's participation, conducted a hearing and made certain findings of fact and conclusions concerning the security of physical evidence, files and documents at headquarters. A memorandum was then prepared and submitted to the chief outlining the council's policy directives. Within the guidelines of this directive the chief was to promulgate a set of rules and regulations on security (see Exhibit R17).

The chief was also directed to prepare a general code of rules and regulations. This proposal was a compilation of codes from other police departments, the State Training Commission and the chief's own recommendations. It was formally adopted in 1976 but never implemented due to redundancies and conflicts with pro-

visions of the PBA contract (see Exhibit R26). It appears that no further action has been taken on this matter.

The police commissioner, in response to a judge's request and without consulting the chief, ordered the evening shift increased to three men so that an officer could be assigned to night court. This directive also ordered other patrolmen to wear uniforms when called to appear in court (see Exhibits R9, R10).

17. The mayor and council accepted the chief's recommendation that promotions to sergeant were overdue and he was responsible for scheduling the promotional tests. However the mayor and council decided how many promotions were necessary, the criteria to be used, and who to promote. The chief does not have the authority to decide when additional patrolmen should be hired; nor the number of officers, sergeants or detectives. His complaints that the department is short patrolmen have been ignored.

18. Concerning the department's facilities, the chief had no input into the initial building of the headquarters and his request for a holding cell was not granted. The chief exercised his discretion to remedy this situation by having the road department install chains. The police commissioner then decided to remodel the building to improve security and engaged a contractor. Several of the chief's suggestions on the remodeling were adopted. In the chief's opinion the current firing range is unsafe, yet his long-standing request for a proper range has been ignored.

Statement of Law

Initially, §5.3 of the Act stated that the organizational rights granted to public employees did not extend to "managerial executives," but this term was not defined. Further, §3 stated that the definition of employee did not include heads and deputy heads of departments and agencies. The Commission concluded that these sections evinced a legislative intent to exclude certain positions which are managerial in nature from the rights and protections granted to public employees. Due to the absence of an explicit statutory definition, the Commission utilized

the definition commonly accepted in labor relations. A managerial executive was defined as one who: "determines and executes policy through subordinates in order to achieve the goals of the administrative unit for which he is responsible or for which he shares responsibility." ^{6/}

In 1974 the Act was amended by deleting the provision relating to heads and deputy heads of departments and agencies and inserting this definition: "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, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district." ^{7/}

While it is true that the definition utilized in the early Commission decision is significantly similar, there are some differences resulting from the lack of explicit statutory guidance. For example, under these decisions it appears that formulation of policy, not just effectuation, is essential; ^{8/} while under the statutory definition authority limited to effectuating policy decisions of others is sufficient. Moreover, this issue was considered in the context of determining whether an individual was in fact, if not in title, the head or deputy head of a department, automatically excluded under the original Act even if he did not perform managerial functions. The intermingling of these two issues has led to some confusion over the factors to be considered in determining managerial status. For example, in In re Township of Hanover, infra, the deputy chief was excluded due to his status as a deputy department head, not as a managerial executive. The

^{6/} In re City of Elizabeth, P.E.R.C. No. 36 (1970); In re Township of Hanover, E.D. No. 41 (1971).

^{7/} N.J.S.A. 34:13A-3(f).

^{8/} See cases cited in footnote number 6.

two titles are not necessarily interchangeable. As discussed infra, the factors relied on in Hanover do not meet the standards under the statutory definition of managerial executive.

There is also some inconsistency in the early Commission decision. In re City of Elizabeth, supra, and In re Township of Hanover, supra, state that it is the final responsibility to formulate, determine and effectuate policy and not the initial preparation of a budget or policy proposals that distinguishes a managerial executive from other staff or line positions. However, in In re County of Union, P.E.R.C. No. 48 (1970), it was found that the County Treasurer had the final responsibility for presenting a budget to the freeholders for their approval. The Assistant County Treasurer prepared a proposed departmental budget which included related matters of recommending promotions and job title changes. This budget proposal was a completed product which the Treasurer, in reliance on the Assistant's expertise, adopted with only minor changes. Thus, something less than final responsibility was considered, admittedly along with other factors, sufficient to find managerial status.

Based on the foregoing discussions the Hearing Officer concludes, contrary to the Commission's holding in In re Borough of Avon, P.E.R.C. No. 78-21, 3 NJPER 373 (1977), ^{9/} that the pre-1974 decisions are not controlling precedents, although they are helpful, to some extent, in delineating the factors to be considered.

Subsequent to 1974 Borough of Avon is the only Commission decision which dealt with the question of managerial executive in any great detail. In this decision the Commission relied heavily on National Labor Relations Board precedents, in addition to its own. The Board has defined managerial executives as "those who formulate, determine and effectuate an employer's policies." ^{10/} Since this defini-

^{9/} The Commission, without comment, adopted the Hearing Examiner's conclusion that the pre-1974 decisions established a working definition of managerial executive which is substantially similar to the statutory definition adopted by the 1974 amendments.

^{10/} American Federation of Labor, 120 NLRB 969, 973, 42 LRRM 1075 (1958).

tion is significantly similar to that contained in the Act, the Board's decisions do provide a substantial degree of guidance. However, application of these standards must be modified, to some extent, in consideration of the differences in structure and operation between government and private enterprise. Within this limitation the Hearing Officer will rely heavily on the Board's decisions. ^{11/}

Before addressing the specifics of the definition certain general principles should be noted. It has been suggested that a managerial executive is defined generally as a person who is identified with management's interests. ^{12/} However all supervisory personnel are identified with management since they are held responsible for ensuring efficient and effective operation of the enterprise. An additional element is necessary to separate managerial executives from upper-echelon supervisors. Accordingly, a managerial executive is one whose primary duty is directing and controlling the affairs of government, and for this reason is identified with management. This managing function consists of formulating or effectuating policy.

Initially the word "policy" ^{13/} must be defined. The relevant definition is "any governing principle, plan, or course of action." ^{14/} Thus a managerial

^{11/} The Commission, in Borough of Avon, specifically approved the use of NLRB precedents in this regard.

^{12/} It appears from the Petitioner's brief that there is some confusion over the Supreme Court's decision in Board of Education of West Orange v. Wilton, 57 N.J. 404, 416 (1971), which utilized similar language. The Court held that a high-ranking supervisor - Director of Elementary Education - could not be included in a unit with lower-level supervisors if the Director exercised supervisory authority over them. The case was remanded to the Commission for consideration of whether the Director had "such an intimate relationship with the management and policy-making function as to indicate actual or potential substantial conflict of interest" with these other employees. Thus the case involved a question of community of interest. The Court did not find that the Director was a managerial executive but only that if such a conflict of interest existed she could not be in the same unit. Accordingly, Wilton did not establish "an intimate relationship with the management and policy-making functions" as a standard for determining managerial status. As discussed above, something more is required.

^{13/} Since the Act does not define the word "policy," its ordinary and well-understood meaning is to be used. Sands v. Bd. of Examiners of Electric Contractors, 90 N.J. Super. 82, affirmed 54 N.J. 484 (1969); Lehmann v. Kanane, 88 N.J. Super. 262 (1965).

^{14/} Webster's New World Dictionary at page 1131.

executive is identified with management's interests since he formulates or effectuates decisions on how the governmental enterprise is to be internally organized or structured, the manner in which it will operate, the types of public services it will provide or, where mandated, the level or method of providing these services.

Since the legislative intent of the Act is to grant public employees the right to self-organization and collective negotiations as a means for ensuring labor peace, the Commission's policy is to strictly construe those provisions which exclude certain categories of employees. Therefore, unless it is clearly shown that an individual exercises managerial authority, the Act's definition of employee will be accorded its broadest possible application to enable the Commission to discharge its statutory responsibilities and permit the fullest accomplishment of the legislative intent. ^{15/} However, while the amendments to the Act are, admittedly, clear indications that the Legislature intended exclusion to be strictly limited, ^{16/} interpretation of the definition must not be so restricted as to undermine its effectiveness. ^{17/}

The first portion of the Act defines a managerial executive as one who formulates management policies and practices. In the past the Commission has interpreted this provision as applying only to those who have the final decision-making authority. ^{18/} However, the Hearing Officer finds that this standard is not a proper analysis of the legislative intent and fails to properly consider the Act in the context of the management structure and mode of operations of

^{15/} In re Borough of Avon, supra at page 21 of the Hearing Examiner's Recommended Report and Decision.

^{16/} The definition limits managerial status to "superintendents and assistant superintendents of school districts. In deleting the provision automatically excluding all heads and deputy heads of departments, the Legislature clearly recognized that in some situations even these functions are not managerial. Employees holding their positions by appointment are also not automatically excluded unless they are members of boards and commissions.

^{17/} The Act must be interpreted in such a manner as to give effect to the intent of the Legislature. Clifton v. Zweir, 36 N.J. 309 (1962).

^{18/} In re City of Elizabeth, supra; In re Township of Hanover, supra; In re Borough of Avon, supra.

governmental entitles. ^{19/}

Despite the growth of bureaucracy, a substantial portion of final decision-making authority still resides with elected officials in order to provide for public accountability. The remainder of this authority is usually held by appointed members of boards and commissions which are necessary for effective, centralized management. However, the Act already specifically excludes these two categories of officials from the definition of "employee." ^{20/} To avoid a redundancy, ^{21/} the definition of managerial executive must apply to a broader category of officials.

A person "formulates" policy when he devises or contrives a plan or governing principles for dealing with a problem. ^{22/} Accordingly, in the bureaucratic structure a managerial executive is ultimately responsible, through coordinating the activities of subordinates, for compiling or composing a complete policy scheme ^{23/} and then submitting this scheme to those officials with final authority who adopt it. This function must be a significant aspect of the individual's work,

^{19/} The Commission's mandate is to interpret the Act in a manner which, in its expert opinion, will foster effective labor management relations by adequately protecting the interests of both public employers and employees. In this regard the Commission must consider the contextual setting - *i.e.* the nature of government - to which the Act will be applied. Pfitzinger v. Board of Trustees of Public Employment Retirement System, 62 N.J. Super. 589 (1960).

^{20/} N.J.S.A. 34:13A-3(d). In determining legislative intent the Act must be considered as a whole and each provision must be interpreted in *pari materia* with other related provisions. Petition of Sheffield Farms Co., 22 N.J. 548 (1956), Republican Committee of Garwood v. Mayor and Council of Borough of Garwood, 140 N.J. Super. 594 (1976).

^{21/} The Act must be interpreted as to give effect and meaning to each provision. State v. Corgdon, 76 N.J. Super. 493 (1962), Mentus v. Town of Irvington, 79 N.J. Super. 465 (1963).

^{22/} Considering the context in which it is used, the Hearing Officer finds this to be the common, well-understood meaning of the word "formulate."

^{23/} For example, a managerial in a police or fire department would be ultimately responsible for the composition of a complete policy scheme on increasing or decreasing and/or reallocating manpower and equipment based on a correlation of: statistics from the research department on geographical changes in demands for services and the types of services demanded; data from the personnel department on manpower availability and supervisor/employee ratios; and information from the maintenance department on equipment status and availability.

which he routinely performs. ^{24/} Naturally, policy proposals on this level would be most general in nature - i.e. relating to the entire governmental entity. Those in authority must, in the vast majority of cases, routinely adopt these proposals with little or no modification, relying on the individual's knowledge of the bureaucracy under his control and understanding of the employer's best interests. In this situation ultimate responsibility for composition of the proposal to be submitted is, for all practical purposes, the functional equivalent of final authority to decide policy. Final approval by elected or appointed officials becomes merely a ministerial act, necessitated by our form of government. In addition, it is reasonable to assume that an individual performing such a function would normally occupy a position on the organizational chart which is directly below that of elected or appointed officials and would report directly to them. This assumption is further supported by the fact that complete policy schemes normally are not compiled at a lower level and would be subject to modification as they pass through layers of bureaucracy. However it must be emphasized that title and position are not determining factors, but only indications. The true test is whether the individual actually performs this managerial function. ^{25/}

A distinction must be made with the situation where officials have initially devised a policy proposal only in principle and utilize the expert knowledge of a subordinate to advise them on how to fill in the specific details; or where

^{24/} On occasion all supervisory personnel may, after canvassing their subordinates, compose policy proposals based on their expert knowledge and familiarity with the unit they supervise. However, even if these occasional proposals are adopted, the supervisor is not elevated to the level of a managerial who is routinely concerned with overall policy formulation. By analogy, under the National Labor Relations Act supervisors are excluded from the rights granted to employees, and the NLRB has held that the occasional exercise of supervisory authority by an employee does not elevate that person to the level of a supervisor. Eastern Camera & Photo Corp., 140 NLRB 569, 56 LRRM 1068 (1963); Barr Rubber Products Company, 118 NLRB 1428, 40 LRRM 1389.

^{25/} It is highly probable that in certain cases, particularly with smaller governmental entities, all aspects of decision making are retained by elected officials and appointed members of boards and commissions. The Legislature, obviously in consideration of such circumstances, deleted the provisions automatically excluding all heads and deputy heads of departments.

the expert is asked to comment on and evaluate the feasibility of a proposal. This individual's role in policy making is advisory and subordinate in that he provides aid and assistance, as a resource person, thereby enabling officials to make an intelligent, informed decision. Admittedly, the research, data and expert knowledge provided are an integral aspect of the total governmental decision-making process. However, it cannot be said that this expert has any form of ultimate responsibility or final authority to compose or decide on a complete policy scheme.

Other situations which must be distinguished are where officials request the submission of several policy schemes and then, after evaluating the pros and cons of each, decide which one to adopt; or where they reject proposed plans that run counter to preestablished governing principles. Since the individual in question does not have ultimate responsibility for deciding which proposal is to be submitted and they are not routinely adopted, his authority is not the functional equivalent of final authority to decide policy.

An example of these two circumstances is In re Borough of Avon, supra, where the captain of the lifeguards compiled a proposed code of rules and regulations to govern the conduct of his staff. The mayor altered some of the rules without consulting the captain, independently evaluated them through consultation with others, rejected those which were not in accordance with his policies, and in certain instances relied on his own expertise in deciding how the lifeguards should function. In City of Elizabeth, supra, the deputy chief, after evaluating the captain's budget requests, composed a complete budget recommendation for the chief. However, the decision does not consider the determining factor of whether the recommendation was submitted, substantially intact, and routinely adopted by those having final decision-making authority.

To summarize the first portion of the definition, a managerial executive has the final decision-making authority on plans or governing principles for dealing

with problems; or, as a significant aspect of his function, is ultimately responsible, through coordinating the activities of subordinates, for compiling or composing a complete policy scheme, relating to the entire governmental entity, and then submitting this scheme to those officials with final authority who, in reliance on his knowledge of the bureaucracy and understanding of the employer's best interests, routinely adopt the proposal as a mere ministerial act necessitated by our form of government.

The next portion of the definition states that a managerial is one who is charged with the responsibility of directing the effectuation of such management policies and practices. If interpreted literally this language would apply to all supervisory personnel. ^{26/} The very essence of a supervisor's function is to make operative the operational decisions of management by overseeing rank and file employees to ensure their compliance. Supervisors are also required to implement management decisions regarding the utilization and administration of personnel, and enforce rules and procedures regulating employee conduct. Accordingly, he is in charge of and responsible for the day-to-day operations of the unit under his supervision. Due to the inherent generality of policy decisions, a supervisor must possess some degree of discretionary authority to determine, consistent with established guidelines, the manner in which a policy will be implemented or substantively applied to specific factual situations which arise daily. All supervisors, in this sense, effectuate policy decisions.

A high-level supervisor - in some instances possibly a department head - will have a wide range of responsibility and, consequently, a considerable degree of discretionary authority as the chief executive of an entire governmental entity. Even though he may function with a minimum of immediate or direct supervision, he is not a managerial executive if his discretionary authority to administer the

^{26/} In construing the Act primary regard must be given to its fundamental purpose, where a literal reading will lead to a result not in accord with this purpose, the spirit of the law controls the letter. Floral Park Tenants Association v. Project Holding Inc., 152 N.J. Super. 582 (1978).

department must be exercised in conformity with preestablished policy guidelines. ^{27/}

For example, a high-level supervisor may determine: ^{28/}

(1) work schedules, shift assignments, and alterations of both in accordance with his interpretation of relevant contractual provisions and preestablished personnel policies;

(2) what types of maintenance are necessary to ensure that equipment conforms with established operational standards;

(3) in accordance with standards for selection and allocation restrictions, the specific make or model of equipment which will most efficiently serve the unit's needs;

(4) in his discretion when a member of the public has satisfied the eligibility standards for his agency's assistance;

(5) under a code of rules and regulations, when an employee's conduct warrants formal disciplinary proceedings;

(6) based on applicable criteria, when an employee is entitled to compensatory time, sick leave, or any of the various forms of personal leave or fringe benefits;

(7) what arrangements should be made, normally with other agencies, to ensure that personnel receive mandated training.

Further:

(1) where contingency plans have been formulated by others for emergency situations, the individual has discretionary authority to declare when such an

^{27/} American Federation of Labor, 120 NLRB 969, 42 LRRM 1075 (1958); I.L.G.W.U. v. NLRB, 57 LRRM 2540 (1964); Albert Lea Cooperative, 119 NLRB 817, 41 LRRM 1192, Eastern Camera & Photo Corp., supra.

^{28/} Due to the dearth of controlling precedents and the current confusion as to the applicable standards, the Hearing Officer is constrained to cite numerous specific examples.

emergency has occurred and is responsible for implementing the plan;

(2) where a decision has been made to provide an additional or special service, he determines how manpower in his unit will be deployed to cover this new work while completing existing assignments;

(3) where policy directives have been issued concerning the security of the operation and safety of its employees, he has the discretion to decide when the situation calls for their implementation;

(4) where certain criteria have been established for justifying over-time the individual has the authority to determine when these criteria have been met. ^{29/}

A department head may perform all of these functions, yet he is not a managerial. ^{30/} His discretionary authority is limited, by specific standards and guidelines, to routine application of a predetermined policy to particular situations. In some cases, once the supervisor has analyzed the factual setting, application of a predetermined procedure or plan automatically follows. While there is discretion, there is no opportunity for independent judgment or initiative. The individual's main concern is to ensure that he is in conformity with general policy directives as he deals with various situations. ^{31/}

Something more than is necessary to distinguish a managerial executive from a high-level supervisor. The distinguishing factor is the quantum of discre-

^{29/} Based on these examples it is apparent that the deputy chief in In re Township of Hanover, *supra*, may have been a deputy department head, but was not a managerial executive.

^{30/} It is obvious that here the deputy department head is likewise not a managerial.

^{31/} Bell Aerospace Co., 219 NLRB No. 42, 89 LRRM 1664 (1975); Flintkote Co., 217 NLRB No. 85, 89 LRRM 1295 (1975); Chrysler Corp., 192 NLRB 1208 (1971); American Radiator and Standard Sanitary Corp., 119 NLRB 1715 (1958); Kitsap County Automobile Dealers Assn., 124 NLRB No. 123, 44 LRRM 1560 (1959); Eastern Camera and Photo Corp., *supra*; ILGWU v. NLRB, *supra*; Iowa Industrial Hydraulics, Inc., 169 NLRB No. 27, 67 LRRM 1246 (1968).

tion exercised by the individual in relation to preexisting policy guidelines. It must amount to independent judgment to determine the "policy" of effectuation itself. That is, a managerial must have the final authority, unhindered by established guidelines, to select which of the various options available is, in his judgment, the most effective and economical course of action for fulfilling substantive policy decisions, in light of the agency's interests and goals. ^{32/} He must possess the individual initiative to alter or deviate from established methods when, in his determination, they do not effectively foster the objectives of the agency. ^{33/} Such independent judgment also exists where a policy decision is made only in principle or in the broadest of terms and a managerial is given the individual initiative to decide all of the lesser policy decisions necessary to fill in the substantive details. ^{34/}

For example, if minimum manning levels have already been established, a managerial would also decide what methods or systems of personnel organization will ensure effective implementation of this policy. ^{35/} Similarly, when a decision has been made to provide a new service, a managerial then must consider whether the creation of an additional or special unit will be most efficient. He is responsible for developing, to the extent that they are not negotiable, those methods of enforcement which will effectively accomplish management's preestablished goals in employee discipline. A final example is where a city has already decided to institute a meter parking system. The next question is whether the system will be enforced by subcontracting to a private towing service or assigning the police department. If the decision is in favor of the police department, a final manage-

^{32/} Allis-Chalmers Mfg. Co., 158 NLRB No. 67, 62 LRRM 1103 (1966). Also see the cases cited in footnotes number 27 and 31.

^{33/} If prior approval is necessary for such alterations or deviations the individual is not a managerial. Where an unusual situation occurs or a problem develops which is not covered by a policy directive, an individual, to be a managerial, must have the flexibility to respond in a manner which he believes is in the best interests of the employer, without the necessity of prior approval.

^{34/} This type of authority is to be clearly distinguished from the situation where a high-level supervisor is used as a resource person to merely advise on such matters.

^{35/} Manning levels and personnel organization, as opposed to shift assignments, are not mandatorily negotiable.

ment concern is what method of patrol - car, motorcycle or motorbike - is the most economical and effective means of enforcement. After the type of vehicle has been selected, a high-level supervisor might then have the discretionary authority to select the particular make or model based on criteria of economy and efficiency. A managerial would also have the authority to alter or deviate from these decisions if they subsequently proved ineffective.

The Assistant County Treasurer in County of Union, supra, was a managerial executive because he possessed the authority to independently judge what amount of county funds were available for investment as surplus capital, where the funds should be placed to ensure a maximum profit with minimum risk and the duration of the investment in view of his projection as to the County's future need for operating funds. He would not have been a managerial if all these decisions were made by others and he was granted only the discretionary authority to establish the mechanics for transferring the funds.

The following are other supportive factors which have to be considered in determining managerial status.

(1) The function which the individual performs in the grievance procedure. There is a greater likelihood of managerial status where he is the last step in the procedure prior to arbitration and has the authority to settle grievances outside of established personnel policy when he believes it is in the best interests of labor relations.

(2) The individual is a managerial if he has final decision-making authority on a budget or ultimate responsibility for the compilation and submission of the adopted budget, as opposed to being a resource person or merely preparing an initial, advisory proposal.

(3) The extent to which an individual substitutes for an admittedly managerial executive is another consideration. However, he would have to fill in for the managerial on a regular basis and would have to possess the same quantum

of authority, not just "minding the store."

(4) While the authority to hire, fire and discipline are factors normally associated with supervisors, they have also been considered relevant on the issue of managerial status. An individual is probably a managerial if he makes the final decision in these matters after recommendations by supervisors, has the final authority to determine the criteria to be applied, or ultimate responsibility for the compilation and submission of adopted criteria, and possesses the independence to deviate from such criteria when he believes it is necessary.

(5) The extent to which the individual is involved in labor relations. While mere knowledge of the employer's labor policies or contract proposals does not classify the employee as a managerial, he may be a confidential. ^{36/} However, the key managerial issue is whether he determines labor policy or contract proposals and represents the employer as a negotiator. He is not a managerial if at negotiating sessions he simply provides information on the working conditions of the employees under his supervision, or advises as to the feasibility of proposals, thereby enabling the negotiators to prepare more realistic proposals and properly evaluate the union's proposals.

(6) An individual's mere presence at managerial meetings is not determinative. Rather, the question is what function he performs at these meetings. ^{37/}

(7) Another factor is whether the individual, as a managerial, exercises independent judgment in personnel administration, including such matters as granting extensions of maternity and sick leave when these benefits have been exhausted, and determining whether, in the interests of good labor relations, an employee should

^{36/} This individual may be excluded from the unit based on a conflict of interest.

^{37/} A conflict of interest, possibly justifying exclusion from the unit, arises if labor relations problems are discussed at these meetings.

be granted a benefit even though he is not technically eligible.

(8) The fact that an individual is the employer's representative with the public is not a consideration which supports the finding of managerial status.

(9) The extent to which the position in question has previously been considered aligned with management or included in a unit of employees with a negotiations history is a further factor, although the Hearing Officer questions the weight that it should be given.

(10) The authority of an individual to purchase on behalf of the employer or commit his credit does not in all circumstances automatically confer managerial status. These functions must be performed on a regular basis, not just sporadically or in emergencies; it has to involve more than relatively small amounts and the individual must not be strictly limited by established criteria or guidelines.

(11) A final standard is whether the interests of the individual are identified more with the employees, and his inclusion in the union would not be inconsistent with the purposes of its establishment. This includes consideration of the extent to which he is subject to the same rules, regulations and discipline as other employees, receives the same benefits and relatively the same salary and is granted those increases which the union negotiates, performs some of the same work in addition to supervisory functions, and has common interests in terms of mutual working conditions and work problems.^{38/}

Conclusions of Law

Whether certain titles are managerial is a question which must be decided based on the particular facts of each situation.^{39/} It is apparent that final

^{38/} Most of these additional factors have been gleaned from the NLRB and Commission decisions previously cited.

^{39/} Introduced into evidence as Exhibit P1 is a proposed Senate bill which would exclude chiefs of municipal police departments from the definition of managerial executive. The Hearing Officer does not consider this bill as an indication of any legislative intent that police chiefs, as a class, are currently included in the definition of managerial executive.

decision-making authority is retained by the mayor and council and the commissioner and deputy commissioner. The chief's opinions on policy matters are routinely ignored and often he is not even consulted. In hiring, the chief has only concurrent authority with other members of the committee to screen out applicants. He does not make recommendations on individuals and the mayor and council make the final decision after an independent evaluation of all applicants on the eligibility list (see Finding of Fact No. 9). The chief's contract proposals for negotiations with the PBA were not adopted and during the last negotiations he was not consulted at all. Similarly, his opinions on personnel matters are often not followed (see Finding of Fact No. 11).

The mayor and council have adopted ordinances regarding traffic control problems without soliciting the chief's opinion. He did not participate in any aspects of the hearings on police security, had no input in the promotional process itself or in the decision to assign a third patrolman to night court and require the wearing of uniforms by other patrolmen when appearing in court (see Findings of Fact No. 16 and 17).

The chief was not involved in the initial planning of the police headquarters or the subsequent decision to remodel the building to improve security. However, being knowledgeable in police matters, he did recommend certain changes during the remodeling which were accepted (see Finding of Fact No. 18).

The chief has final authority, to some extent, in the tactical command of day-to-day police operations, such as chasing suspects, controlling disturbances, answering fire alarms and directing traffic. However, this type of authority does not, in most instances, reach the level of "policy decision-making," as that term has been defined herein.^{40/} It normally involves discretionary application of routine procedures

40/ Similarly, the chief has the authority to make temporary intradepartmental assignments to the special squads when they have an increase in workload. However, such actions cannot be considered "policy decisions." Rather, it constitutes the use of discretionary authority to ensure efficient deployment of manpower within the established organizational structure. Further, it is apparent that all permanent transfers, not initiated by the commissioner, are subject to his prior or subsequent review and final approval by the mayor and council.

and methods previously established as being acceptable police practices in a particular situation. Moreover, it is apparent that this authority is closely monitored by the mayor and commissioners. When the chief does not exercise tactical command consistent with their judgments of the best manner in which police services can be provided, they do not hesitate to strictly limit and, at times, completely vitiate his authority. These officials on a regular basis have become directly involved in almost every aspect of day-to-day operations by issuing directives and orders concerning the assignment of men, the initiation of investigations, and the manner in which routine police functions are to be performed (see Findings of Fact No. 13 and 15).

Only in the preparation of a code of rules and regulations was the chief given authority to compose or compile a complete policy scheme for submission to those with final decision-making authority. Although the proposed code was formally adopted, it was never actually implemented because the mayor and council were not satisfied with it. Accordingly, the chief's responsibility in this regard was not the functional equivalent of final decision-making authority. Further, this singular exercise of an arguably managerial function does not render an individual a managerial executive.

It is apparent that the chief's authority to implement policy decisions is strictly limited by numerous directives and guidelines. For example, his authority to schedule shifts, overtime, and vacations is closely regulated (see Finding of Fact No. 12). In the promulgation of a code of rules and regulations on police security the chief's authority was circumscribed by a detailed memorandum which the mayor and council prepared as a result of a hearing that the chief did not participate in (see Finding of Fact No. 16). Further, it is apparent, from the numerous exhibits submitted by the Respondent, that the chief has no authority to deviate from established procedures and was reprimanded whenever a deviation

was perceived by the mayor or the commissioners. The chief's job description emphasizes that he is responsible for ensuring that all members of the department perform their duties in accordance with the rules, regulations, directives and ordinances of the mayor and council (see Finding of Fact No. 4 and Exhibit P2). Accordingly, the chief's main concern is to ensure that he is ⁱⁿ conformity with general policy directives as he deals with various situations.

In routine situations the chief has the discretionary authority to determine when discipline is warranted, and the severity, subject to final approval by the mayor. Again this function is associated with a high-level supervisor and does not constitute "policy making." In serious disciplinary matters the mayor becomes directly involved in the process; while in one situation the mayor and council assumed complete control without even consulting the chief.

The chief only prepares an initial budget proposal which is not routinely adopted by the mayor and council without substantial modification. The chief's ability to expend monies is strictly limited by budget allocations, except for the relatively small amount in the miscellaneous account. As discussed, supra, at p. 24, no. 2, and p. 26, no. 10, these functions are not managerial.

The captain generally assists the chief in performing the above-discussed functions. It should also be noted that the captain performs many of the same functions as the deputy chief in In re Township of Hanover, supra, which the Hearing Officer found do not meet the statutory standards for a managerial.

The Commission has consistently held that, due to the paramilitary structure of police departments, an inherent conflict of interest exists between superior officers and rank and file patrolmen, which justifies the removal of officers from patrolmen units. ^{41/} However, the Commission has approved units including all ranks of superior officers, from captain to sergeant. ^{42/} While the chief is nominally the captains' superior officer, it is apparent from Finding of Fact No. 5

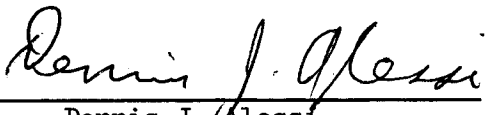
^{41/} In re Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977); In re City of Paterson, D.R. No. 79-38, 5 NJPER 255 (para. 10145, 1979).

^{42/} In re Borough of Fair Lawn, D.R. No. 79-30, 5 NJPER 165 (para. 10091, 1979); In re Hudson County Bd. of Chosen Freeholders, D.R. No. 78-46, 4 NJPER 232 (para. 4115, 1978).

and the commissioner's exercise of direct control of the captain (see Finding of Fact No. 15), that the chief does not possess significant command authority over the captain to create an inherent conflict of interest. From the totality of the evidence presented and the small size of the police force, it is apparent that the department, in many aspects, does not operate under a strict chain of command structure. Any actual or potential conflict of interest between the chief and captain is, therefore, de minimis. ^{43/}

Recommendation

Accordingly, for the reasons set forth above the Hearing Officer finds that the chief of police and the captain are not managerial executives, as that term is defined by the Act. The Hearing Officer also finds that a unit including these two titles is appropriate since any actual or potential conflict of interest between the chief and captain is de minimis. The Hearing Officer, therefore, recommends that the clarification of unit petition be dismissed in its entirety.



Dennis J. Alessi
Hearing Officer

DATED: September 21, 1979
Trenton, New Jersey

^{43/} Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971); In re Borough of South Plainfield, supra.