

P.E.R.C. NO. 2000-6

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT,

Public Employer,

-and-

Docket No. CU-H-97-10

PBA Local 304,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission dismisses a clarification of unit petition filed by PBA Local 304 seeking to add an investigator and a senior investigator to its collective negotiations unit of police officers employed by New Jersey Transit. The Commission finds, under the circumstances, a clarification of unit petition is untimely and not the appropriate mechanism for adding the titles to the PBA's unit.

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

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Petitioner.

Appearances:

For the Public Employer, John J. Farmer, Jr., Attorney General (David S. Griffiths, Deputy Attorney General)

For the Petitioner, Klausner, Hunter & Rosenberg, attorneys (Stephen B. Hunter, of counsel)

DECISION

On September 20, 1996 and February 5, 1997, PBA Local 304 filed a clarification of unit petition and an amended petition seeking to add Investigator Russell Crawford and Senior Investigator Robert LaForte to its collective negotiations unit of police officers employed by New Jersey Transit.

On August 26, 1997, a Notice of Hearing issued. On February 27, April 14, and May 27, 1998, Hearing Officer Wendy L. Young conducted a hearing on the threshold procedural issue of whether a clarification of unit petition is the appropriate mechanism to add these two employees to the PBA unit.

The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On April 15, 1999, the Hearing Officer recommended dismissing the petition. H.O. No. 99-1, 25 NJPER 251 (¶30106 1999). She found that although the investigators may share a community of interest with negotiations unit personnel, may share similar duties and responsibilities, and may perform unit work, a unit clarification petition is not the appropriate mechanism to add either investigators and senior investigators as a group, or Investigator Crawford and Senior Investigator LaForte individually, to the PBA unit. She found that the titles have existed for years and circumstances have not changed recently. However, the Hearing Officer added that the PBA may file a representation petition seeking to add these employees to its police unit.

On May 12, 1999, the PBA filed exceptions. The PBA recited its own Statement of Facts, but did not specify any finding of fact to which exception is taken. N.J.A.C. 19:11-7.3. The PBA argues that the petition was timely filed shortly after investigators were first regularly assigned to detect, apprehend and arrest criminals and otherwise regularly perform critical police officer functions. The PBA also argues that the existence of several other employees in investigator titles is irrelevant because those employees do not perform the same generic police duties.

On June 4, 1999, the employer filed an answering brief urging adoption of the Hearing Officer's recommendation. It argues that the PBA has not shown that the assigned duties and

functions of Investigators LaForte and Crawford had changed significantly.

We have reviewed the record. We incorporate the Hearing Officer's undisputed findings of fact (H.O. at 2-19).

The Commission's representation proceedings are designed to resolve disputes concerning the representational status of public employees. Disputes can be divided into two categories. In the first type of proceeding, employees choose a majority representative through a representation election. Negotiations units are often described in general terms and sometimes disputes remain as to whether a particular title or person is represented in the unit. The second type of proceeding is unit clarification. The purpose of a clarification of unit petition is to resolve questions concerning the scope of a collective negotiations unit within the framework of the Act or as set forth in the unit definition in a Commission certification or the parties' recognition agreement. Normally, it is inappropriate to use a clarification of unit petition to enlarge or diminish the scope of a negotiations unit for reasons other than the above. Typically, a clarification is sought as to whether a particular title is contemplated within the scope of the unit definition. Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977). If a clarification of unit petition is not appropriate or timely, employees may be added to an existing unit through the filing of a representation petition. See N.J.A.C. 19:11-1.1.

Although the NJ Transit Police Department was formed in 1992, the PBA has had a collective bargaining relationship with NJ Transit since 1983, when the State took over Conrail. Sometime in 1984 or 1985, the titles of investigator and senior investigator were created in the NJT Rail Operations Police Department. Investigators were police officers, but were not represented by the PBA. By 1989, the PBA had filed at least two grievances challenging the exclusion of the investigator titles from its unit.

Shortly after the creation of the NJ Transit Police Department, the Bus Operations Security Department was merged into the police department. In September 1993, LaForte and Crawford, who had been bus security representatives, became police officers and were given, respectively, senior investigator and investigator titles. In September 1993, the PBA filed a grievance asserting that LaForte and Crawford held positions within its police unit. That grievance is pending.

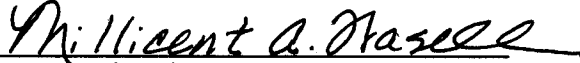
Under these circumstances, a clarification of unit petition is untimely and therefore not the appropriate mechanism for adding the investigator and senior investigator titles to the PBA's unit. See Rutgers, the State Univ., D.R. No. 84-19, 10 NJPER 284 (¶15140 1984) (clarification of unit petition must be filed before execution of second contract). These titles have existed for many years and the PBA has, more than once, sought to include them in its unit. A November 1996 memorandum assigning

LaForte and Crawford new duties did not materially change the duties of investigators or senior investigators sufficient to warrant consideration of a clarification of unit petition. The PBA may pursue its grievance or file a representation petition.

ORDER

The petition is dismissed.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato and Ricci voted in favor of this decision. Commissioner Madonna abstained from consideration. Commissioner Boose was not present.

DATED: July 29, 1999
Trenton, New Jersey
ISSUED: July 30, 1999

H.O. NO. 99-1

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

In the Matter of

NEW JERSEY TRANSIT,

Public Employer,

-and-

Docket No. CU-H-97-10

PBA Local 304,

Petitioner.

SYNOPSIS

A Hearing Officer recommends that the Commission dismiss the unit clarification petition filed by PBA Local 304. The Hearing Officer finds that on the threshold procedural issue of whether a clarification of unit petition is appropriate to add two previously unrepresented investigators to the existing PBA police unit, the petition is inappropriate. There is no showing of changed circumstances since the execution of its most recent collective negotiations agreement.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommendations, any exception 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.

H.O. NO. 99-1

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

In the Matter of

NEW JERSEY TRANSIT,

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Docket No. CU-H-97-10

PBA Local 304,

Petitioner.

Appearances:

For the Public Employer
Peter Verniero, Attorney General
(David S. Griffiths, Deputy Attorney General)

For the Petitioner
Klausner, Hunter & Rosenberg, attorneys
(Stephen B. Hunter, of counsel)

HEARING OFFICER'S RECOMMENDED
REPORT AND DECISION

On September 20, 1996 and February 5, 1997, PBA Local 304 filed a clarification of unit petition and an amended petition with the Public Employment Relations Commission seeking to add employees Investigator Russell Crawford and Senior Investigator Robert LaForte to its collective negotiations unit of New Jersey Transit police officers.^{1/}

On August 26, 1997, a Notice of Hearing issued. I ordered that the hearing be bifurcated and ordered Local 304 to

^{1/} The original petition sought to add five titles in addition to the investigator titles.

proceed first on the threshold procedural issue of whether a clarification of unit petition is appropriate to add these two unrepresented employees, Investigator Russell Crawford and Senior Investigator Robert LaForte,^{2/} to the existing PBA police unit. If I find that the clarification of unit petition is appropriate, the parties will then address the issue of whether the two positions may appropriately be clarified into the unit represented by Local 304.

Hearings concerning the procedural appropriateness of the clarification of unit petition were conducted on February 27, April 14, and May 27, 1998.^{3/} The parties presented documents, examined witnesses and filed post-hearing briefs by August 26, 1998. Based upon the entire record, I find as follows:

FINDINGS OF FACT

1. New Jersey Transit is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. and is the employer of the employees involved herein.

^{2/} There are other individuals in the title of investigator and senior investigator, but petitioner is only seeking to add these two individuals to the existing unit.

^{3/} The transcripts of each successive hearing day shall be referred to as "1T", "2T" and so forth. The Commission exhibits shall be referred to as "C-". The parties' joint exhibits shall be referred to as "J-", the Employer's exhibits as "ER-", and the Petitioner's exhibits as "P-".

2. Local 304 is the majority representative for all police officers below the rank of sergeant employed by New Jersey Transit (NJT).

3. Local 304 and NJT are parties to a collective negotiations agreement effective from July 1, 1992 through June 30, 1996. This contract was executed on October 30, 1995 (J-1).

Article I, entitled Recognition and Scope, describes the unit as "all police officers below the rank of captain." The term police officers is defined as including lieutenants, sergeants, patrolmen and detectives. Sergeants and lieutenants are no longer represented by Local 304 as the result of an election and voluntary recognition in September 1996. FOP Lodge 67 is the current majority representative for lieutenants and sergeants employed by NJT Police Department. Investigators and senior investigators are not represented.

New Jersey Transit Prior to 1992 Merger

4. In 1976 Conrail was formed as a result of the merger of several railroads and was responsible for operating railroad passenger service in the State of New Jersey. The merger resulted in the consolidation of police departments from the individual railroads into one Conrail police department (1T66, 2T5).

5. In 1983 the State took over Conrail and the operation became known as New Jersey Transit Rail Operations which was an operating subsidiary of New Jersey Transit (1T66-1T68, 2T5-2T6). NJT Rail Operations encompassed a police department consisting

of 36 sworn police officers (1T97). At the time of the 1983 State take over, NJT Bus Operations was a separate subsidiary of NJT (1T68).

6. Since the 1983 State take-over of Conrail and the creation of NJT Rail Operations, detectives employed by NJT Rail Operations have had State-wide jurisdiction to arrest and apprehend suspects (2T79-2T80).

7. Sometime in 1984 or 1985, the titles of investigator and senior investigator were created in NJT Rail Operations Police Department (1T67, 1T102-1T104, 1T106-1T107). The titles were created when five individuals who were employed by NJT to provide security at the 1160 Raymond Boulevard building in Newark were brought into the NJT Police Department by their supervisor Joseph Slawsky when he was hired as police chief to replace Werner Ropers. These five individuals were given the titles of investigator and senior investigator (1T102-1T104). Investigators were sworn police officers with State-wide jurisdiction, but were not represented by Local 304 (1T35-1T36, 1T102-1T107, 2T85-2T86).

Local 304 filed a grievance when the investigator title was created in the NJT Rail Operations Police Department, but did not pursue the grievance at that time. In 1988 or 1989, Local 304 initiated a new grievance challenging the exclusion of the investigator and senior investigator titles from Local 304's unit. Local 304 lost the grievance because it was not filed on time (1T100-1T108).

8. Between 1991 and 1993, detectives employed by the NJT Rail Operations Police Department were responsible for the detection, apprehension and arrest of individuals, conducting criminal investigations and doing background checks for new employees (2T29-2T31). Between 1991 and 1993, investigators would also do background checks, investigate criminal matters and engage in the detection, apprehension and arrest of individuals (2T31-2T32).^{4/} In 1991, conducting background checks was done primarily by detectives. Sometime between 1991 and 1993, when there were significant new hires, investigators were also assigned to do that job (2T30-2T31).

^{4/} There was inconsistent witness testimony as to when investigators began to do background checks on police applicants. Napolitano testified that at least since 1994 the investigators were doing background investigations (1T119). However, John Ricciardi, who has held the title senior investigator since November 1996, who was a sergeant assigned to the Detective Bureau in July 1991, and was in charge of the detectives assigned to the Anti-Crime Unit, testified differently from Napolitano (2T8-2T11, 2T31-2T32). However, since Detective John Napolitano's testimony was inconsistent on this point (1T46-1T47, 1T113-1T114, 1T119) and since Ricciardi's assignment encompassed responsibility for overseeing background investigations (1T117), I credit the testimony of Ricciardi as to the time frame of when investigators began to conduct background checks.

9. On April 1, 1992, NJT Police and Bus Operations Security Departments were consolidated under the NJT Police Department (1T18, 1T98-1T99, 2T57-2T58, P-2).^{5/}

10. At the time of the 1992 merger, the NJT Bus Security Department employed 12 individuals holding the title of security representative including Robert LaForte and Russell Crawford (1T21-1T23, 3T8-3T9, 3T19). Security representatives were responsible for the protection and security of properties, assets, personnel and riders of NJT Bus Operations which included the responsibility to:

Conduct[s] security inspection surveys of Company properties for adherence to established procedures.

Investigate[s] reported acts of theft, vandalism or criminal acts against Company assets, property, personnel or the public ridership.

Search[es] and/or interview[s] witnesses or suspects, take[s] statements and when required, appear[s] in any court proceedings as a company representative either as a witness or complainant.

Cooperate[s] and follow[s]-up with all law enforcement agencies, whenever possible in the investigation of offenses committed against Company property, personnel or public ridership.

Foster[s] and maintain[s] liaison[sic] with all law enforcement agencies and other companies on matter[sic] of mutual concern and/or interest.

^{5/} By statute, the legislature established the NJT Police Department effective March 16, 1992. Labor relations for the new consolidated entity came under the jurisdiction of the New Jersey Employer-Employee Relations Act. N.J.S.A. 34:13A-1 et seq.

Perform[s] surveillance, patrol or guard duty of Company facilities and P[sic]roperties (e.g.) garages, buildings, ticket offices, depots, subway properties, office buildings and is on the alert for any breach or weakness in security or acts of vandalism (P-1).

Security representatives were required to possess high school diplomas and two to three years experience in security or related fields (P-1, 1T73-1T74, 2T52-2T54, 2T57). However, security representatives were not sworn police officers (2T52-2T54). They had the authority to swear out and sign complaints arising out of their investigations but any arrests generated by the complaints were made by sworn law enforcement personnel in conjunction with local authorities (1T74, 2T55-2T56, 3T9-3T10). Security representatives could detain suspects and interview witnesses and/or suspects and work with local authorities regarding follow-up investigations (2T56-2T57).

Security representatives did not have the authority to carry guns or to detect, apprehend or arrest criminals (1T23-1T26, 2T51-2T52, 2T54-2T56, 2T58-2T59, 3T8, 3T20).

After the 1992 Merger

11. Shortly after the merger in April 1992, their title changed to field compliance representative, but the duties and responsibilities of the 12 security representatives remained the same (1T24-1T25, 1T27-1T28, 2T58-2T59). In July 1992, these 12 individuals were given the opportunity to become sworn police officers with the NJT Police Department (P-3, 1T27-1T28, 1T80).

Background investigations were conducted on all 12 individuals (1T27). Only 5 of the 12 field compliance representatives were selected to attend the police academy and were sworn in as NJT police officers in August 1993 (1T28-1T29, 1T80-1T82).^{6/} These five newly sworn police officers became members of Local 304 (1T61, 1T82). The seven field compliance representatives, including Crawford and LaForte, who were not selected to become sworn police officers remained in their field compliance representative positions (1T32, 1T81).

12. In September 1993, LaForte and Crawford were sent to the Attorney General's ten-week training course and sworn in as police officers. At the end of the course, LaForte was given the title of senior investigator and Crawford was given the title of investigator. Both were assigned to the Field Compliance Unit (FCU) of the NJT Police Department (1T33-1T34, 2T22, 2T62-2T63, 3T10, 3T23-3T24).

In September 1993, Local 304 filed a grievance seeking to have LaForte and Crawford as senior investigator and investigator

^{6/} There was testimony to the effect that the 5 individuals were forced to resign their positions as field compliance representatives prior to becoming employed as police officers and as a result lost their seniority rights (1T28-1T29, 1T80-1T82). The State denies these allegations and disputes the relevancy of this testimony on the threshold issue of the appropriateness of the clarification of unit petition to add Investigator Crawford and Senior Investigator LaForte to the existing unit represented by Local 304 (1T81-1T86). I agree and find that the question of the resignation is not relevant.

included in the unit represented by Local 304. However, the outcome of the grievance is unknown (1T60-1T64, 1T90-1T94).

13. At the time that LaForte and Crawford were sworn in as police officers and given the titles of senior investigator and investigator, there were five individuals in the NJT Police Department already holding these titles (1T44-1T46, 1T109).^{7/} These five investigators, who were also sworn police officers, were authorized to carry weapons and to make arrests (1T108-1T109).

14. Between April 1993 and January 1996, detectives engaged in detection, apprehension and arrest of individuals as well as conducting criminal investigations. They also engaged in conducting background investigations of new hires (2T47-2T48).

During this time, investigators also engaged in detection, apprehension and arrest of individuals as well as conducting criminal investigations and doing background checks of police applicants (1T108-1T109, 1T113-1T114, 2T31-2T32, 2T47-2T48).

Organization of NJT Police Department

15. In July 1991, the Detective Division of the NJT Rail Operations Police Department consisted of the Anti-Crime Unit and the Detective Bureau (2T8-2T9, 2T15). The Special Investigations Unit (SIU) was a separate unit consisting of a chief investigator, a senior investigator and three or four investigators and was

^{7/} These individuals were Senior Investigator Richard Buckeris and Investigators Janet Nevill, Ed Wilkowski, Richard Goldstein and Joe Hartman (1T101-1T102). As of the time of the hearing, Buckeris had died and Hartman retired (1T107).

charged with conducting internal investigations, investigations relating to revenue matters, check investigations and anything else that needed special handling (2T10).

16. After the 1992 merger of NJT Bus and Rail Operations, the FCU^{8/} was added to the NJT Police Department. A new unit entitled Field Operations was created which consisted of Patrol, Field Compliance and the Detective Bureau.

In March 1993, the NJT Police Department was reorganized. The Chief of Police was at the top of the organizational structure with three units reporting directly to him; Support Services Bureau, Internal Affairs and Field Operations (ER-7).

Support Services headed by a director of administration consisted of police officers and police superiors together with civilian clerical support staff and was charged with handling certain administrative functions (2T16-2T17).

Internal Affairs was headed by an inspector and staffed by investigators charged with conducting investigations of police personnel (2T17-2T18).

Field Operations was headed by a deputy chief and consisted of three sub-units: Penn Station, Patrol and Investigation (ER-7, 2T18).

^{8/} FCU was formerly NJT Bus Security (2T14). Those individuals who had been security representatives with NJT Bus Security became field compliance representatives with the FCU (2T15).

Penn Station was headed by a captain and staffed by 5 superior officers and 19 police officers together with a clerical employee. Patrol was headed by a captain and staffed by 7 superior officers and 26 police officers as well as 4 train patrol police officers. The Investigations Unit, headed by a chief confidential investigator, encompassed a Detective Bureau, which included an Anti-Crime Unit and which was responsible for doing background investigations as well as fatal and serious accident investigations and theft investigations (2T32-2T33); SIU consisting of a senior investigator and two investigators which was charged with conducting investigations of internal matters needing special attention (2T29, 2T32); and the FCU which consisted of a supervisor field compliance representative and five field compliance representatives (2T19-2T20, 2T22).

After LaForte and Crawford were sworn in and appointed as senior investigator and investigator, they were assigned to the FCU (2T21-2T22). This was the first time that the FCU was staffed with investigators (2T20). FCU was responsible for bus related matters, both criminal and preventive, covering a North and South unit (2T32, 2T34).

17. In January 1996, there was another reorganization of the NJT Police Department (ER-4). Mary Rabadeau is the new chief of police (COP), a position formerly held by Werner Ropers.

Under this reorganization, Internal Affairs is still a separate unit reporting directly to the COP. Also reporting

directly to the COP are three additional bureaus: Administrative Services and Support Bureau, Field Operations Bureau and Investigations Bureau.

The Administrative Bureau is structurally the same as in the March 1993 reorganization.

The Field Operations Bureau is headed by a deputy chief as in the 1993 table of organization, but it now consists of three commands, Penn Station, Broad Street and Atlantic City. Each is staffed by police officers, police superiors and clericals.

The Investigations Bureau, formerly contained within the Field Operations Bureau in the March 1993 organizational chart under the chief confidential investigator (2T40-2T46, ER-4, ER-7), is now headed by a deputy chief. It consists of a Revenue Enforcement Unit staffed by a confidential investigator and two investigators; a FCU South headed by a senior investigator (LaForte) and staffed by two field compliance representatives; a FCU North headed by a senior representative and staffed by one investigator (Crawford) and four field compliance representatives; a Detective Unit headed by a commander and staffed by a detective sergeant, a detective and one police officer; and a unit consisting of a loss prevention specialist (ER-4).^{2/}

^{2/} Senior Investigator John Ricciardi testified that the Anti-Crime Unit was also contained within the Investigations Bureau in January 1996 (2T46). However, the table of organization for January 1996 (ER-4) depicts the Anti-Crime Unit contained within the Field Operations Bureau. It is not necessary for me to resolve this discrepancy since I do not find this point relevant on the question of the appropriateness of the clarification of unit petition.

Although there was a change in personnel and titles in the January 1996 reorganization, the Investigations Bureau still consists of the same units and continues to be responsible for Field Compliance, Detective, Special Investigations and Anti-Crime (2T45-2T46). Also, between the 1993 reorganization and the January 1996 reorganization the duties and responsibilities of detectives and investigators did not change, namely, both detectives and investigators still engaged in detection, apprehension and arrest of individuals as well as conducting criminal investigations and background checks (2T47-2T48).

18. In April 1996, there was another reorganization. Internal Affairs was moved within the Investigations Bureau, and Special Investigations Unit (SIU) replaced Revenue Enforcement. SIU is headed by a senior confidential investigator (Nevill) and staffed by two investigators. A fourth command was added to Field Operations and is headed by a captain and consisting of a sergeant, six rail patrol police officers and traffic police officers (ER-5).

19. In November 1996, there was an administrative memorandum issued detailing organizational changes in the Investigations Bureau which is now headed by an inspector (ER-6). The memorandum reflects that the Investigations Bureau consists of a Detective Unit, an Anti-Crime Unit, a Special Investigations Unit, an Internal Affairs Unit, a Field Inspections/Investigations Unit North (FIIU North) and a Field Inspections/Investigations Unit South (FIIU South) (ER-6).

In particular, SIU is divided into two sub-units, one primarily responsible for conducting sensitive employee related investigations and for investigating revenue matters. This sub-unit is headed by a senior investigator (Nevill) with an investigator (Wilkowski) and loss prevention specialist reporting to her. The second sub-unit is responsible for coordinating and conducting police applicant background investigations, on-board bus criminal incidents and fraudulent check investigations. This sub-unit is headed by a senior investigator (Ricciardi) with an investigator (Crawford) reporting to him. Both sub-units are authorized to conduct joint investigations, if necessary, and to assign background checks to any qualified member of the Investigation Bureau (ER-6).

Internal Affairs is headed by a senior investigator who reports directly to an inspector.

FII North is supervised by a senior representative field compliance (Michael Fearn) and staffed by four field compliance representatives. FII South is supervised by Senior Investigator LaForte and staffed by one field compliance representative. Both FII Units were to support the Mobile Enforcement Unit (MEU)^{10/} (ER-6, 3T29-3T30).

^{10/} The Anti-Crime Unit also supports both FII Units as well as MEU (ER-6).

20. In 1997, a task force was formed to patrol the Newark City subway system because of a number of robberies which had occurred. The task force consisted of members of the Anti-Crime Unit, the Detective Bureau and SIU. Among the investigators assigned to the task force was Crawford and Wilkowski together with Senior Investigator Goldstein (P-6, 1T59, 1T94-1T95).^{11/}

Employment History of Russell Crawford

21. Russell Crawford has held the title of senior investigator since September 1993 and is currently assigned to SIU South (3T18, 3T23-3T24).

From 1981-87 Crawford was employed by the City of Atlantic City as a security officer (3T7). In 1987 New Jersey Transit Bus Operations took over the operations of a terminal in Atlantic City and Crawford became a security officer employed by the NJT Bus Operations responsible for investigating thefts, assisting ticket agents with problems involving passengers or in the coffee shop, detaining suspects and calling for assistance from local police authorities. However, he had no police powers to detect, apprehend or arrest (3T8).

From 1988 to 1992 Crawford held the title of security representative and was assigned to the northern division of the

^{11/} Responsibility for patrolling the subway system was originally given to the NJT Bus Security Operation (P-1, 1T9, 3T16-3T17).

NJT Bus Operations (3T8-3T9). He was assigned an additional duty to conduct bus inspections. However, he still did not have arrest authority (3T9-3T10).

In 1992, as a result of the bus/rail merger, his title was redesignated from security representative to field compliance representative (3T15). Subsequently in September 1993,^{12/} Crawford was sworn in as a police officer, sent to the police academy for training and was given the title of investigator assigned to FCU. He was the only investigator assigned to FCU (3T10-3T12).

As an investigator assigned to FCU, Crawford's duties were to investigate crimes occurring on busses. He had the authority to detect, apprehend and arrest and carry a weapon (3T11).^{13/}

^{12/} Crawford testified that he was sworn in as a police officer in October 1993. However, testimony of other witnesses was consistent that Crawford and LaForte were sworn in as police officers in September 1993 (1T33-1T34, 2T22, 2T62-2T63, 3T23-3T24). I do not find this discrepancy relevant on the issue before me. Therefore, it is not necessary for me to determine whether the swearing in was in September or October of 1993.

^{13/} Napolitano testified that he was present during a conversation between Chief Ropers and LaForte and Crawford in the latter part of 1994. He testified that Ropers instructed LaForte and Crawford not to conduct any criminal investigations or to get involved in any arrest (1T46-1T47, 1T123-1T125). However, this testimony was uncorroborated. The testimony of LaForte, Crawford and Ricciardi was consistent that LaForte and Crawford were conducting criminal investigations as investigators and that they had the authority to exercise all police powers including arrests and to carry weapons (2T48-2T49, 2T61, 3T11, 3T15, 3T24). Therefore, I find the testimony of LaForte, Crawford and Ricciardi more reliable on this point.

In 1995, while he was assigned to FCU, Crawford effectuated an arrest which involved a criminal sexual contact (3T11-3T12).

In November 1996, Crawford was assigned to SIU where his duties consisted mainly of conducting background investigations and investigations of bad check cases. At the time he was assigned to SIU, there were three other investigators although his immediate supervisor was Senior Investigator Ricciardi (ER-6, 3T12-3T13, 3T16). Crawford's duties and responsibilities as an investigator assigned to SIU are the same as the other investigators assigned to SIU (3T18).

Employment History of Robert LaForte

22. Robert LaForte has held the title of senior investigator since September 1993 and is currently assigned to SIU South (3T18).

In 1983, LaForte was hired by NJT Bus Operations as a security representative. Like Crawford, his duties included internal and external bus investigations, answering complaints from bus operators having problems with passengers, inspecting facilities for security problems and investigating revenue matters (3T19-3T20). LaForte also did not have police powers to detect, apprehend and arrest, although during this time period he did effectuate a citizen's arrest and signed complaints. He did not have the authority to carry weapons (3T10).

In 1988, LaForte was promoted to senior security representative and transferred to the southern division of NJT Bus

Operations (3T20). He assumed responsibility for all internal and external investigations of bus facilities and terminals and for investigating revenue matters. He supervised 13 security officers (2 sergeants and 11 security officers) (3T21).^{14/} LaForte still had no police powers to detect, apprehend or arrest (3T21).

After the 1992 merger of bus and rail operations, LaForte's title changed to senior field compliance representative (3T22). His duties changed to the extent that he no longer supervised the security representatives who subsequently became police officers. He supervised two field compliance representatives who took over the responsibilities to ride the busses, to make inspections of facilities and to conduct investigations (3T22-3T23).

In September 1993, LaForte was sworn in as a police officer and given the title of senior investigator. His duties remained the same as they were when he held the title of senior field compliance representative except that he began carrying a weapon and had the authority to detect, apprehend and arrest, although he has never been involved in effectuating an arrest as a senior investigator (3T24, 3T27). As a senior investigator he remained assigned to the FCU South under the command of the Administrative Bureau (3T25). Sometime in 1994, FCU South came under the command of the Investigations Division. However,

^{14/} The duty to ride busses for compliance checks was subcontracted (3T21).

LaForte's duties remained the same except to the extent that he performed partial background investigations to assist the northern division (3T25-3T26, 3T30).

The November 1996 reorganization did not effect a change in his duties and responsibilities except that he was supervising one fewer employee (3T27).

On one occasion in July 1997, LaForte conducted a fatality investigation. In 1998, he was assisted by the Mobile Enforcement Unit (MEU) with a criminal investigation he was conducting. The MEU is staffed by NJT police officers. LaForte would support the MEU as he would support any other unit in the NJT police department (3T28-3T30).

ANALYSIS

The threshold issue is whether the unit clarification petition is appropriate under the circumstances. I find that it is not. In Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977), the then Director outlined the appropriate uses of unit clarification petitions:

[CU petitions are] designed to resolve questions concerning the exact composition of an existing unit of employees for which the exclusive representative has already been selected. ...However a unit is described, disputes occasionally arise between the parties to the collective negotiations relationship as to whether a particular title or person is represented in the unit. Disputes may arise during contractual negotiations or during the administration of the parties' agreement. In such cases, the Commission provides a clarification of unit procedure by which questions concerning the composition of a unit may be resolved. See N.J.A.C. 19:11-1.5.

The purpose of a clarification of unit petition is to resolve questions concerning the scope of a collective negotiations unit within the framework of the provisions of the Act, the unit definition contained in a Commission certification, or as set forth in the parties' recognition agreement. Normally, it is inappropriate to utilize a clarification of unit petition to enlarge or to diminish the scope of the negotiations unit for reasons other than the above. [t]he matter relates primarily to identification....

Occasionally a change in circumstances has occurred which alters an employee's job function....Alternatively, a new title may have been created...[or] the employer may have created a new operation or opened a new facility [which would make] a clarification of unit proceeding appropriate. Id. at 251.

Where the parties mutually agree to exclude positions from the unit, neither party may seek the position's reentry into the unit through a unit clarification petition unless there is a change in circumstances. Warren Tp., D.R. No. 82-10, 7 NJPER 529 (¶12233 1981). Further, where the union has, for a period of time, omitted a position from the unit, the union will be found to have waived its right to seek unit inclusion through the clarification of unit processes, unless there is a change in circumstances. Wayne Bd. of Ed., D.R. No. 80-6, 5 NJPER 422 (¶10221 1979), aff'd P.E.R.C. No. 80-94, 6 NJPER 54 (¶11029 1980); Rutgers University, D.R. No. 84-19, 10 NJPER 284 (¶15140 1984). In Wayne, the Director stated:

In those cases where it is found that there has been an agreement to exclude or evidence of a waiver on the part of the majority representative it will result in the conclusion that this petition raises a question concerning representation. If it is found with regard to any classification that a question concerning representation exists, that portion of the clarification petition relating to such classification will be dismissed. Id. at 423.

Finally, in Rutgers, supra, the Director found that, even where a change in circumstance is shown, the execution of the parties' next successor contract after the change in circumstance acts as a waiver of the right to seek clarification of unit. The union bears the burden of searching out potential members. Id. at 285.

The titles of investigator and senior investigator have existed for at least 12 years prior to the filing of this petition. The first time that Local 304 could have sought to represent the investigator and senior investigator titles was in 1984/85 when the titles were created in the NJT Rail Operations Police Department and held by sworn police officers. Even though Local 304 filed a grievance at that time, that grievance was abandoned. Local 304 did not preserve its rights to add the new title at that time by filing a clarification of unit petition with the appropriate agency.

Local 304 also did not seek to add these titles when NJT Police and Bus operations Security Departments merged in 1992.^{15/} At the very latest, Local 304 did not file a clarification of unit petition when LaForte and Crawford were sworn in as police officers in September 1993 and given the titles in question. Having executed its current collective negotiations agreement on October 30, 1995, Local 304 is now precluded from adding Investigator Crawford and

^{15/} N.J.S.A. 27:25-14 gives the Commission jurisdiction over bus operations employees, but not rail.

Senior Investigator LaForte to its unit through a clarification of unit petition absent a showing of changed circumstances since the execution of its contract.

Local 304 asserts that its petition is timely and appropriately seeks to include Senior Investigator LaForte and Investigator Crawford because their duties changed after 1995 such that they are now performing police work^{16/} -- i.e., performing background checks and conducting criminal investigations which result in arrests without the assistance of local authorities. Local 304 contends that this police work is unit work and that LaForte and Crawford should now be included in its unit. Therefore, Local 304 reasons that the present petition only became timely in regard to LaForte and Crawford, not when they were sworn in as police officers in 1993 and given the titles of senior investigator and investigator, but when they regularly performed police related functions. Local 304 asserts that this only occurred after the

^{16/} Local 304 propounds a hypothetical wherein a non-supervisory custodian gradually assumes the duties and responsibilities of a retired custodial foreman who is represented in a supervisory unit. It asserts that in the hypothetical that a clarification of unit petition seeking to add the custodian to the supervisory unit only becomes timely when the custodian assumes supervisory responsibilities such as evaluating and disciplining other custodians.

If I were to accept Local 304's argument, it would follow that an individual sworn as a police officer may not be included in a police unit until he or she effectuates an arrest or otherwise exercises police authority. "Under our settled law, the key factor in determining whether employees are 'police' within the meaning of section 5.3 is whether they have the statutory power of arrest." Mercer Cty., P.E.R.C. No. 88-85, 14 NJPER 244 (¶19090 1988) at 245. Warren Cty., P.E.R.C. No. 86-111, 12 NJPER 357 (¶17134 1986). Gloucester Cty. v. PERC, 107 N.J. Super. 150 (App. Div. 1969), aff'd 55 N.J. 333 (1970) adopted this approach.

issuance of the November 1996 administrative memorandum which assigned Crawford to SIU where he was to perform background checks and conduct criminal investigations resulting in arrests and which assigned LaForte to FII South.

NJT disagrees and counters that LaForte and Crawford occupy pre-existing, non-unit titles and that their duties and responsibilities have not extended beyond those previously performed by others who have occupied those titles, namely performing background checks and conducting criminal investigations.

I agree. The police work which Local 304 alleges Crawford and LaForte were regularly performing only after the November 1996 memorandum, namely background checks, criminal investigations and arrests, was work historically performed by investigators and/or senior investigators at least since 1991 if not since the inception of the titles in 1985.

Investigators/senior investigators were always sworn police officers possessing the authority to detect, apprehend and arrest as well as carry weapons. They performed background checks and conducted criminal investigations as well as carried weapons. The fact that unit personnel represented by Local 304 are sworn police officers possessing the same police powers and sharing similar duties and responsibilities is not dispositive.

Moreover, the facts do not support Local 304's contention that it was only after the issuance of the November 1996 memorandum that Crawford and LaForte regularly performed police work. After the 1992 merger, Crawford was assigned to the FCU. He had the

responsibility to investigate crimes occurring on busses work which he had performed prior to the merger except that he possessed the authority to detect, apprehend and arrest as well as carry a weapon. Indeed he did effectuate an arrest in 1995 as a result of a criminal incident. In November 1996, Crawford was assigned the same duties as other investigators assigned to SIU, namely to perform background checks and to conduct criminal investigations.

Local 304 also argues that the 1997 task force formed to patrol the Newark City subway system is an example of a change in circumstance wherein Crawford was regularly performing police work of unit personnel. However, the mounting of this task force was a joint operation between SIU, the Anti-Crime Unit and the Detective Bureau. The police work performed by the task force was not uniquely Local 304 unit work but was shared by non-unit personnel. In fact, patrolling the subway system prior to the 1992 merger was the responsibility of NJT Bus Security.

Furthermore, Crawford was not the only investigator assigned to the task force. Since Local 304 only seeks to clarify Crawford into its unit and not other investigators, it is illogical to grant the petition as to Crawford based on his participation in this task force.

LaForte's duties and responsibilities after he was sworn in as a police officer and given the title of senior investigator in 1993 remained the same as when he held the title of senior field compliance representative except that he began carrying a weapon and

he had the authority to detect, apprehend and arrest. Although he has never been involved in effectuating an arrest, he has performed partial background investigations since 1994 and his responsibilities have always included criminal investigations.

Moreover, the November 1996 memorandum did not result in a change in LaForte's duties and responsibilities except to the extent that both FII Units (North and South) together with the Anti-Crime Unit are to support the MEU, and on one occasion LaForte was assisted by the MEU with a criminal investigation he was conducting and on one occasion in July 1997 he conducted a fatality investigation. Even assuming that assisting the MEU and conducting a fatality investigation is a new assignment, neither of these duties represent a significant change in LaForte's work responsibilities as a senior investigator which support the appropriateness of adding him to the Local 304 unit through a clarification of unit petition based on changed circumstances.

Finally, Local 304 contends that it is seeking to add only Investigator Crawford and Senior Investigator LaForte to its unit and not others holding the titles of investigator and senior investigator because these other individuals are either managerial executives and/or supervisory employees and not appropriately included in the Local 304 bargaining unit. I need not address this argument since it does not speak to the threshold issue of the appropriateness of the clarification of unit petition which seeks to

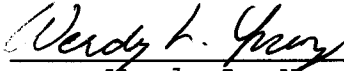
add a title which has existed for many years.^{17/}

Based on the foregoing, I do not find that the November 1996 reorganization resulted in a significant change in the duties and responsibilities of either Investigator Crawford or Senior Investigator LaForte or in the duties and responsibilities of investigators or senior investigators generally. Any change in circumstance which has been demonstrated by the evidence occurred when the 1992 merger of bus security with the NJT Police Department resulted in the NJT Police Department absorbing the responsibilities for the bus operations. After the 1992 merger, the parties entered into their first collective negotiations agreement effective from July 1, 1992 through June 30, 1996 and executed October 30, 1995. Unless Local 304 could demonstrate an additional changed circumstance, it is precluded from adding either the titles of investigator or senior investigator or two individuals holding those positions to the unit through a unit clarification petition. Bergen Pines Cty. Hosp., D.R. No. 80-20, 6 NJPER 61 (¶11034 1980).

^{17/} There is no evidence in the record to support a finding that any of the investigators or senior investigators are managerial executives except the uncorroborated testimony of Napolitano that when the titles of investigator and senior investigator were created in the department the individuals holding those titles were "management personnel." Furthermore, if Local 304 argues that some of the senior investigators are supervisors and not properly included in the Local 304 bargaining unit then it must also address whether LaForte as a senior investigator is a supervisor and not appropriately included in the unit.

Therefore, although it appears from the testimony that investigators may share a community of interest with bargaining unit personnel, may share similar duties and responsibilities and may even perform bargaining unit work, a unit clarification petition is not the appropriate mechanism to add either investigators/senior investigators as a group, or Investigator Crawford and Senior Investigator LaForte individually, to the Local 304 unit where the titles have existed for years and there has been no recent changed circumstances. However, Local 304 is not precluded from filing a representation petition seeking to represent these employees and add them to its police unit.

Accordingly, I recommend that the Commission dismiss the unit clarification petition.



Wendy L. Young
Hearing Officer

DATED: April 15, 1999
Trenton, New Jersey