

P.E.R.C. NO. 87-140

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MONTVILLE,

Public Employer-
Petitioner,

-and-

Docket No. CU-86-54

MONTVILLE TOWNSHIP SUPERIOR
OFFICERS ASSOCIATION,

Employee Representative.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission in the absence of exceptions, dismisses a clarification of unit petition filed by the Township of Montville. The Township sought to remove captains from a collective negotiations unit consisting of captains, lieutenants and sergeants and represented by the Montville Township Superior Officers' Association contending that captains are managerial executives and that a conflict of interest exists between them and the other unit members. A Commission Hearing Officer recommended that the petition be dismissed because captains are not managerial executives and there was no substantial conflict of interest. The Chairman, in the absence of exceptions, agrees with these conclusions.

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Employee Representative

Appearances:

For the Public Employer-Petitioner, Pachman & Glickman,
P.A. (Steven S. Glickman, of counsel)

For the Employee Organization, Loccke & Correia, P.A.
(Manuel A. Correia, of counsel)

DECISION AND ORDER

On March 24, 1986, the Township of Montville ("Township") filed a Petition for Clarification of Unit. It seeks to remove captains from a collective negotiations unit consisting of captains, lieutenants and sergeants and represented by the Montville Township Superior Officers Association ("Association"). The Township contends that captains are "managerial executives" within the meaning of the Act and therefore may not be represented for collective negotiations purposes. In the alternative, it contends that an impermissible conflict of interest exists between the captains and the other unit members which warrants the captains'

removal. The Association contends the captains should remain in the unit.

On May 15, 1986, Hearing Officer Lorraine H. Tesauro conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

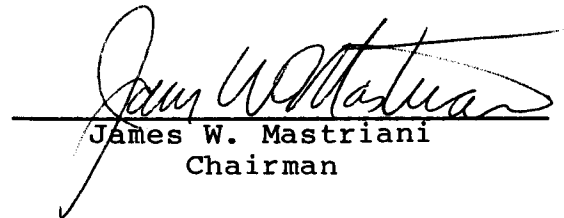
On April 9, 1987, the Hearing Officer issued her report recommending that the petition be dismissed. H.O. No. 87-13, 13 NJPER ___ (¶ 1987). She found that the captains were not managerial executives and there was not a substantial conflict of interest between the captains and other negotiations unit members.

The Hearing Officer served her report on the parties and informed them that exceptions were due on or before April 23, 1987. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Officer's findings of fact (2-8) are accurate. I adopt and incorporate them here. Under all the circumstances of this case, and acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I also adopt her recommendation that the petition be dismissed.

ORDER

The Petition for Clarification of Unit is dismissed.


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
May 18, 1987
ISSUED: May 19, 1987

H.O. NO. 87-13

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

In the Matter of

TOWNSHIP OF MONTVILLE,

Public Employer-Petitioner,

-and-

Docket No. CU-86-54

MONTVILLE TOWNSHIP SUPERIOR
OFFICERS ASSOCIATION,

Employee Representative.

SYNOPSIS

A Hearing Officer recommends that the Public Employment Relations Commission find the Captains of Police, employed by the Township of Montville, are not managerial executives within the meaning of the Act. The Hearing Officer found that the Captains do not possess the authority to formulate and effectuate department policy nor control personnel decisions.

The Hearing Officer further recommends that the Commission find that the conflict of interest issue addressed by the parties is de minimus.

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.

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For the Employee Representative
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(Manuel A. Correia of counsel)

HEARING OFFICER'S
REPORT AND RECOMMENDATIONS

On March 24, 1986, the Township of Montville ("Township") filed a Clarification of Unit Petition with the Public Employment Relations Commission ("Commission") seeking to remove the title of Captain from a collective negotiations unit comprised of Captains, Lieutenants and Sergeants, represented by the Montville Township Superior Officer's Association ("Association"). The Township seeks to exclude the title from the unit on the basis of managerial status. Alternatively, the Township argues that a conflict of

interest exists between the Captains and the other superior officer titles in the negotiations unit which dictates the removal of the Captains.

The Association argued that the title of Captain should remain in the negotiations unit. It maintained that while the Captains may be supervisors in rank to the other titles in the unit, they are not managerial executives and, accordingly, would be entitled under the Act to pursue negotiations rights as a separate and distinct collective negotiations unit.

A hearing was held on this matter on May 15, 1986. ^{1/} The parties filed post hearing briefs, the last of which was received on July 23, 1986. Based upon the entire record I make the following:

FINDINGS OF FACT

1. The Township of Montville is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1.1 et seq. ("Act") and is subject to its provisions. The Township is the employer of the employees who are the subject of this Petition.

2. The Montville Township Superior Officers Association is an employee representative within the meaning of the Act and is subject to its provisions.^{2/} The Township recognized the

^{1/} Transcript pages shall be indicated by T1, etc.

^{2/} In communications with the parties, neither could ascertain the exact date of recognition.

Association as the exclusive representative of the Superior Officers Unit, which is composed of four Sergeants, five Lieutenants, and two Captains (T91). The Chief of Police is excluded from the unit. The chain of command for the police department is as follows (T91):

1. Chief (1)
2. Captains (2)
3. Lieutenants (5)
4. Sergeants (4)
5. Patrolmen (18)

3. The Police Department Rules and Regulations, (Exhibit J-5) specifically "Duties of the Captain of Police", Article B, Pg. 6 of J-5; and "Duties of Lieutenants and Sergeants", Article C, Pg. 8 of J-5 provided in pertinent part that:

ARTICLE B :

"Captains in the Police Department shall rank next below the Chief of the Department and it shall be their duty to carry out the orders and instructions of the Chief of the Department with regard to their respective commands;

B-2 a Captain shall be second in command ... during the absence of the Chief ... the designated Captain shall assume the duties of the Chief ... and during such period he shall exercise the same powers, perform the same duties and be subject to the same rules and regulations as the Chief ...";

ARTICLE C:

C-1 Lieutenants and Sergeants are charged with the prevention of crime in the arrest of offenders ...;

C-5 Lieutenants and Sergeants shall note every case of misconduct or neglected duty of subordinates and make a report of the same ...;

C-17 the Lieutenants and Sergeants shall perform duties as order by the Chief of Police."

4. The Captains are responsible for establishing work schedules, including shift changes and reassignments, under the Chief's approval. Lieutenants and Sergeants are not involved in the shift change or reassignments (T22). Sergeants make recommendations to the Lieutenants in the instances of discipline only. Lieutenants makes performance evaluation recommendations to the Captains regarding the Sergeants and the Captains make final recommendations to the Chief on those received evaluations. The Captains are given the authority to grant verbal or written reprimands (T28).

5. The job description of the Police Captain, Exhibit J-1C, provides in pertinent part:

DEFINITION:

"Under supervision of the Chief or Deputy Chief of Police, has charge of subordinates engaged in activities intended to provide assistance and protection for persons, safe guard property, assure observance of the laws and apprehend law breakers; does related work as required.

EXAMPLES OF WORK:

Assigns subordinates to their posts and supervises them in the prevention of crime, the protection of life and property and the enforcement of laws.

Disciplines subordinates for neglect of duty.

Assigns subordinates to duty at public gatherings.

Has charge of police station.

Prepares reports, and keeps records.

When not needed at the headquarters office, patrols area to observe subordinates on duty and to assist in the police activities.

Inspects police equipment, materials, and supplies.

Supervises the establishment and maintenance of needed records and files.

The duties of Lieutenants and Sergeants are somewhat different (T15). The Lieutenants as positioned on the organizational chart, (Exhibit J-6),^{3/} are under the command of a Captain and are assigned as desk officers. Each Lieutenant has a Sergeant under his command.

6. The Captains have the authority to make temporary transfers of personnel and initiate discipline regarding any subordinate members of the negotiations unit including Sergeants and Lieutenants (T84-86), to call in additional personnel when there are manpower shortages, and deploy personnel in particular situations (T81-83).

7. The Captains contribute to the promotion and evaluation process conducted by the Chief by providing the Chief with performance evaluations and recommendations on each lower ranking officer. These recommendations are usually "followed 90% of the time" (T89). The superior officers are required to fill out evaluation forms (Exhibit J-4). The immediately higher rank completes the form, e.g., Sergeant for Patrolman, Lieutenant for Sergeant, Captain for Lieutenant, and the Chief for the entire squad. The evaluation forms are classified as performance

3/ Table of Organization for the Police Department.

evaluation reports and they are submitted to the Captains and then to the Chief. Civil Service administers the testing for promotions.

8. Chief Gormley testified that he seeks the Captains input, "50-60% of the time and considers their recommendations 90% of the time" (T88). However, such determinations are issued in the Chief's name and the Chief reviews and retains the right to approve same. The Chief also testified that he does not seek recommendations from the Sergeants or Lieutenants [unless] it pertains to bureau business" (T92).

9. The Police Chief's job description Article A, page 2, Exhibit J-5 provides in pertinent part:

- a. The Chief of Police shall be responsible to the Township Administrator and in his absence, to the Chairman of the Township Committee.
- b. The Chief of Police shall enforce in the Township of Montville the laws of the State, the Ordinances of the Township, and the rules and regulations and the orders of the Police Department as provided herein.
- c. The Chief of Police shall issue to the Police Department or any member or members thereof such orders as may be sent him by the Township Committee or Township Administrator and keep a copy of file in his office.
- d. Have power to issue orders to his Department not inconsistent with law and within the areas of his responsibilities.
- e. Have power to suspend, subject to approval of the Township Administrator, any member of the Police Department for willful violation or disregard of the law, ordinance, rule, regulation or order; and he shall report promptly such suspension to the Township Administrator "provided that in all such cases the officer shall have the right to demand written charges and a hearing before the

Township Committee to determine such charges in accordance with the provisions of N.J.S.A. 40A:14-147."

- f. Report to the Township Administrator in writing any special service of any member of the Police Department which may be deemed meritorious and worthy of special mention.
- g. Frequently inspect the condition, personal appearance and equipment of subordinate officers and men, requiring them to be attired in accordance with regulations.
- h. Cause a record to be kept of each member of the department on duty during each day.
- i. Keep himself informed of and to study all advances made in his profession; assist and instruct his men to obtain the knowledge necessary to carry on the work of the Department with greatest efficiency; and cause his superior officers to conduct Police School for patrolmen and probationary officers that they may be instructed in the rules and regulations of the Department, the ordinances of the Township and the laws of the State.
- j. In case of emergency the Chief of Police is authorized to and shall deputize the required number of people to cope with the situation.
- k. The Chief of Police's office shall maintain general and personnel files of the Department, maintain records of expenditures and prepare Department reports for the Township Administrator.
- l. The Chief of Police shall keep a current personnel service record file on each member of the Department, entering thereon under date, place and circumstance any outstanding or commendable service, any violation or infraction of the rules and regulations of the Department and penalty imposed, if any.

10. The Police Chief sets the policy for the Township Police Department. The policies are promulgated in the Department's

Rules and Regulations (Exhibit J-5) and established by the Police Chief's orders (T79).^{4/}

11. The Chief determines policy and police procedures commensurate with those under the Rules and Regulations of the Police Department (Exhibit J-5). He delegates to the Captains areas of responsibility such as the assignment of subordinates to work posts, supervision of daily routine and assistance in the analysis and interpretation of the laws that govern the department. On cross examination Captain Parker stated that "each and every rank whether it be Sergeant, Lieutenant or Captain exercises a certain level of independent judgement" (T57).

12. The record shows that policy and rule and regulation development are under the Chief's orders. The only caveat is at a time when the Chief is on a leave of absence, or vacation, the Captain assumes the position of Acting Chief. The Acting Chief, whichever of the two are on duty, disposes of the Chief's responsibilities and activities, specifically with respect to decisions and disciplinary matters (T86-T88). The Captains, while in the Acting Chief position carry out the already established policies of the department.

^{4/} There was no mention throughout the transcript of any policy changes made in the last few years. However, reference is made (T79) to a particular instance of changing personnel, but no direct incident was relayed. The plan was implemented by the Captains, but, approved and introduced by the Chief (T81).

DISCUSSION AND ANALYSIS

The Township contends that the Captains are managerial executives within the meaning of the Act and therefore, may not be represented for purposes of collective negotiations.

Managerial executives are defined in the Act as:

Persons who formulate management policies and practices and persons who are charged with responsibility of directing the effectuation of such management policies and practices

See N.J.S.A. 34:13A-3 of the Act.

In City of Jersey City, D.R. No. 85-22, 11 NJPER 341 (¶16124 1985), the Director of Representation held that a person employed as a managerial executive does not have a right to organize, negotiate, to go to interest arbitration or to have a majority representative to negotiate on his or her behalf.

In Borough of Montvale, P.E.R.C. No.81-52, 6 NJPER 507, 508-09 (¶11259 1980), the Commission held that a managerial executive is:

...a person who formulates management policies when he develops a particular set of objectives designed to further the mission of the governmental unit and when he selects the course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Simply put, a managerial executive must possess and exercise a level of authority in an independent judgement sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes. Whether or not an employee possesses this level of authority may generally determine by focusing on the interplay of three factors: (1) the relative position of the employee in his employers hierarchy; (2) his function and

responsibilities; and (3) the extent of discretion he exercises. 6 NJPER at 508, 509.

The Commission has clearly stated that a managerial executive must be allowed to exercise substantial discretion independent of the employer's established policies and procedures to set policy governing the objectives of the governmental entity and to fashion methods of achieving such objectives.

The Township indicates that there are three standards synonymous with those cited in Montvale that must be satisfied in the instant dispute: (1) the specific functions and responsibilities of the Chief and Captains (to determine the distinction between their powers as it relates to those of Sergeants and Lieutenants); (2) the relative position of these titles in the employers organizational hierarchy; and (3) the extent of discretion accorded to the individuals in their employment.

The issues presented for determination are whether or not the Captains in the Montville Township Police Department should be excluded from the existing unit of superior officers on the basis that they are managerial executives within the meaning of the Act; and/or whether or not there exists a conflict of interest within their continued inclusion in the unit. If the Captains are determined to be managerial executives, they must be removed from the unit since such employees do not have the right to organize or be represented by an employee organization. N.J.S.A. 34:13A-5.3.

In Bloomfield Township, P.E.R.C. No. 86-104, 12 NJPER 237 (¶17098 1986) the Commission affirmed the Hearing Officer's

decision ^{5/} that compared the holdings in the Borough of Avon, P.E.R.C. No. 78-21, 3 NJPER 373 (1977), and Borough of Montvale, supra, and found in Bloomfield that managerial executives are employees primarily involved in the formulation of policy, specifically as it pertains to developing a particular set of objectives designed to further the mission of the governmental unit. The Commission found in the aforementioned decisions that individuals involved in the implementation and formulation of policy are clearly managerial executives.

However, the Captains in this particular case are not managerial executives. The record indicates that the Captains do not formulate management policies and practices, rather they submit recommendations to the Chief. The Chief must give final approval on any decision that is to be directed toward the work force. Generally, this is reserved to the exclusive province of the Chief. At best, the Captains are limited to recommending to the Chief a certain practice, theory, or particular manner of approach.

The record indicates that the Captains assist the Chief (make recommendations) in formulating and directing department policy. Although the record establishes that Captains possess an "independent judgement sufficient to effectuate their purposes," the exercise of such independent judgement does not amount to the formulation of policy in the department. The Captains' exercise of

^{5/} Bloomfield Twp., H.O. 86-3, 12 NJPER 139 (¶17053 1986)

independent judgement relates more to the degree of flexibility they have in handling routine matters which arise on a daily basis.

On the issue of policy making, Captain Parker, one of the two Captains considered in this dispute, testified that:

"the Chief establishes policy in order to make sure that the policy is put into effect I will follow up on it, or I will issue memorandum to make sure that certain things are done as per his directives, but the Chief is the policy maker for the department" (T66).

Therefore, based on the foregoing, I find that the record evidence does not support the Township's contention, that Captains are managerial executives within the meaning of the Act. In every instance the Chief makes the final decision regarding policy decisions to reject or pursue the results of the Captains recommendations.

The Captain's role in this case can be compared to the deputy chief's responsibilities in the City of Newark, P.E.R.C. NO. 86-140, 12 NJPER 513 (¶17192 1986) where the Commission found that the deputy chiefs were not managerial executives. The deputy chief's did not control policy and personnel decisions and had minimal input in those actions. Similarly, the Captains in the instant case bear the same minimal level of input.

Chief Gormley testified that as the Chief, he is given the preferential privilege of appointing whomever he prefers to perform the duties of Acting Chief in his absence. The department rules and regulations require the Chief to appoint the Captain as the next

chain of command. However, his responsibilities are limited to enforcing policy already formulated by the Chief. The Acting Chief is not empowered to create new policy nor effectuate any changes in established policy (T94). On cross-examination Chief Gormley spoke of recent vacations and conferences he attended and an upcoming leave of absence necessitating the appointment of an Acting Chief (T94). He indicated that policy dictated he appoint the Captains to perform in his absence.

There is no doubt that the Captains exercise a high level of professional judgement, coordination and supervision, and they are one step from the highest level of authority, but their ability to formulate and effectuate policies and exercise discretion is simply not self-established.^{6/}

The facts in this matter warrant a finding that the Captains do not formulate management policies and practices and that the limited discretion they exercise in the effectuation of policy does not warrant their exclusion from coverage under the Act. It is apparent that the Chief of Police, with input from the Captains, makes virtually all policy related decisions.

^{6/} An indicator is the manner in which the grievance procedures are conducted. The grievance procedure is perfunctory for the Chief. The Captains do not have the authority to issue a final binding decision. That authority remains with the Chief, but the Captains recommendations and facts provide background for the Chief's decision.

Conflict of Interest

The Township additionally argued that Captains must be excluded from the unit because they "exercise significant power and responsibility over other personnel" in the same negotiations unit. West Orange Bd. of Ed. v. Wilton, 57 N.J. 404, 425-27 (1971), ("Wilton").

The witnesses in the case at hand testified on separate occasions that "although the Chief makes the overall broad policy of the department, the Captains and Lieutenants, or other officers, make recommendations, however, neither of them have the independent judgement nor the force to make a binding decision" (T57).

The N.J. Supreme Court in "Wilton" determined that various levels of supervising personnel, even where they have interests in common, may not be automatically included in the same unit with one another; rather, the Court found that:

...where a substantial actual or potential conflict interest exists among supervisors with respect to their duties and obligations to the employer in relation to each other, the requisite community of interest among them is lacking and that a unit which undertakes to include all of them is not an appropriate unit within the intendment of the statute.^{7/}

"Wilton" holds that a community of interest between different levels of supervisors should not be found if a substantial actual or potential conflict of interest exists with respect to these supervisors' duties and obligations to the employer in relation to each other.

^{7/} 57 N.J. at 427

It further provides that a "substantial conflict or potential conflict must prevail to necessitate an exclusion from an existing unit of supervisory personnel.

The record does not establish that there is a substantial potential conflict of interest in the inclusion of Captains in the superior officers unit, nor does the record establish any substantial or potential conflict between the various levels of superior officers. The responsibilities of the individuals functioning as Captains have not resulted in a conflict of interest thus far and would not present a potential for substantial conflict of interest.

The evidence at best has established a de minimus conflict of interest between the Captains and Lieutenants simply due to the Captains' obligation to evaluate the Lieutenants. (T89;J-4). The Director of Representation found in Edison Twp. Bd. of Ed.,^{8/} that "the evidence placed in the record concerning the [Captains] evaluations responsibility could not support a finding other than that of a de minimus conflict. The mere finding of an evaluative responsibility does not, per se, give rise to the conclusion that there is a potential for substantial conflict."

In the instant case, the highest ranking officer within the superior officers unit is the Captain. Although the job duties and responsibilities of the Captains as outlined in exhibit J-5,

^{8/} Edison Twp., D.R. 82-8, 7 NJPER 560, 561 (¶12249 1981)

designate the Captains are of a higher rank than that of the Sergeants and Lieutenants, they do not inherently possess more authority in terms of management responsibilities, thereby eliminating a conflict of interest.

The case at hand may further be compared to the Boro of Fair Lawn, D.R. 70-30, 5 NJPER 165,167 (¶10091 1979) where the Director of Representation separated superior officers from the patrolmen, but left intact a unit of superior officers even though superiors had an evaluative role among themselves.

Although some conflict between officers may always be present only substantial or actual potential conflict shall warrant the severing of one group of superior officers from the existing unit of superior officers.

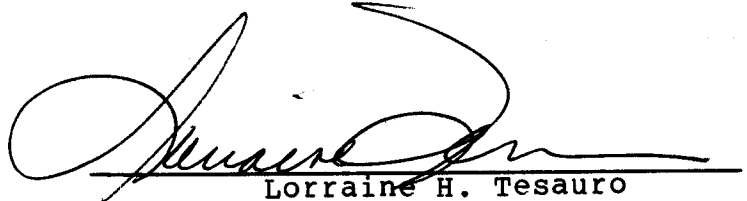
"Wilton" indicates that in order for a conflict of interest to exist, a "substantial actual or potential conflict" must be evident to categorize the individuals of that unit as being in conflict. The Captains, although given more responsibility to command the units, do not possess enough supervisory responsibilities to create a substantial conflict of interest nor do their responsibilities indicate that a substantial potential for conflict exists.

RECOMMENDATION

I recommend that the Commission find that the Captains employed by the Township of Montville Police Department are not managerial executives within the meaning of the Act. I further

recommend that the Commission find that the conflict of interest issue is at most de minimus.

Based on the entire record in this matter, I recommend that the Commission ORDER that the Township's petition for Clarification of Unit be dismissed.



Lorraine H. Tesauro
Hearing Officer

DATED: April 9, 1987
Trenton, New Jersey