

P.E.R.C. NO. 85-19

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Public Employer-Petitioner,

-and-

Docket No. CU-82-83

PROFESSIONAL FIRE OFFICERS
ASSOCIATION, LOCAL 1860, IAFF,
AFL-CIO,

Employee Representative.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission and in agreement with a Commission Hearing Officer, clarifies a unit of superior officers represented by the Professional Fire Officers Association, Local 1860, IAFF, AFL-CIO to exclude the positions of Fire Signal System Operations and Chief of Fire Signal System Maintenance and Construction. Neither party filed exceptions to the Hearing Officer's Report.

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Appearances:

For the Public Employer, John J. Teare, Corporation
Counsel (Sheree L. Johnson, Assistant Corporation
Counsel, of Counsel)

For the Employee Representative, Brian C. Doherty, Esq.

DECISION AND ORDER

On June 25, 1982, the City of Newark ("City") filed a Clarification of Unit Petition with the Public Employment Relations Commission. The City seeks to remove two titles from a unit of superior officers represented by the Professional Fire Officers Association, Local 1860, IAFF ("Association"). The City alleges that the Chief of Fire Signal System Operations and Chief of Fire System Maintenance and Construction ("Chiefs") are managerial executives within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., and that they have a conflict of interest with other Association members. The Association contends that these officers are not managerial executives and do not have a conflict of interest with other unit members.

On October 12, 1982, the Director of Representation issued a Notice of Hearing.^{1/} On September 20, 1983, Hearing Officer Mark A. Rosenbaum conducted a hearing. The parties examined witnesses and introduced documents. Both parties filed post-hearing briefs.

On April 30, 1984, the Hearing Officer issued his report and recommended decision. H.O. No. 84-14, 10 NJPER ____ (¶ ____ 1984). The Hearing Officer found that the two chiefs were managerial executives. Exceptions, if any, were due on or before May 14, 1984. Neither party filed exceptions or requested an extension of time.

Pursuant to N.J.A.C. 19:11-8.8 and N.J.S.A. 34:13A-6(f), the full Commission has transferred this case to itself and has delegated authority to me to decide this case in the absence of exceptions. I have reviewed the record. The Hearing Officer's findings of fact are accurate. I adopt and incorporate them here. Based on the findings of fact, and in the absence of exceptions, I agree with the Hearing Officer that the two officers are managerial executives who must be removed from the Association's negotiations unit.

ORDER

The unit of superior fire officers which the Professional Fire Officers Association, Local 1860, IAFF, AFL-CIO represents

^{1/} On December 15, 1982, the City requested a postponement of the matter. During the summer of 1983, the City reinstated proceedings.

is clarified to exclude the positions of Chief of Fire Signal System Operations and Chief of Fire Signal System Maintenance and Construction.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: Trenton, New Jersey
August 31, 1984

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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-and-

DOCKET NO. CU-82-83

PROFESSIONAL FIRE OFFICERS
ASSOCIATION, LOCAL 1860, IAFF, AFL-CIO,

Employee Representative.

Synopsis

A Commission Hearing Officer recommends findings that the Chief of Fire Signal System Operations and Chief of Fire Signal System Maintenance and Construction are managerial executives within the meaning of the New Jersey Employer-Employee Relations Act and thus ineligible for representation under the Act. The Hearing Officer finds that the Chiefs evince substantial independence in the conduct of day-to-day operations of their divisions and that significant deference is granted to their budgetary and policy recommendations.

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 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.

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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DOCKET NO. CU-82-83

PROFESSIONAL FIRE OFFICERS
ASSOCIATION, LOCAL 1860, IAFF, AFL-CIO,

Employee Representative.

Appearances:

For the Public Employer
John J. Teare, Corporation Counsel
(Sheree L. Johnson, Assistant Corporation Counsel
of Counsel)

For the Employee Representative
Brian C. Doherty, Esquire

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

On June 25, 1982, a Clarification of Unit Petition was filed with the Public Employment Relations Commission ("Commission") by the City of Newark ("City") seeking to remove the titles of Chief of Fire Signal System Operations and Chief of Fire Signal System Maintenance and Construction from the unit represented by the Professional Fire Officers Association, Local 1860, IAFF ("Association") which currently includes all superior officers except Fire Chief and Deputy Chiefs. The City alleges that the Chiefs are managerial executives within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), and that a conflict of interest exists between the disputed titles and the

remainder of the Association's unit, all of which compels their removal from the unit. The Association argues that the disputed titles are not managerial executives and that no conflict of interest exists which compels their exclusion from the unit.

Pursuant to a Notice of Hearing dated October 12, 1982, a hearing was held before the undersigned Hearing Officer on September 20, 1983, ^{1/} at which all parties were given opportunities to examine and cross-examine witnesses, present evidence and argue orally. Both parties filed post-hearing briefs, the last of which was received on March 14, 1983. ^{2/}

Based upon the entire record in these proceedings, the Hearing Officer finds that:

1. The City is a public employer within the meaning of the Act, is the employer of the employees who are the subject of the Petition, and is subject to the provisions of the Act.
2. The Association is an employee representative within the meaning of the Act and is subject to its provisions.
3. The City seeks a clarification of the collective negotiations unit of its superior officers represented by the Association. The parties have been unable to agree upon the continued placement of the Chief of Fire Signal System Operations and the Chief of Fire Signal System Maintenance and Construction in the unit.

1/ By letter of December 13, 1982, the City requested indefinite postponement of the proceedings, and reinstated proceedings during the summer of 1983.

2/ Delay in the filing of briefs occurred due to late receipt of transcript.

Therefore, a question concerning the composition of a collective negotiations unit exists, and the matter is appropriately before the undersigned for Report and Recommendations.

FINDINGS OF FACT

The disputed titles are located within the Fire Signal System, or Communications, Division of the Newark Fire Department. This Division has the responsibility for the construction, maintenance and operations of the Department's alarm, radio and telephone system throughout the City, both on the street and in the Department's firehouses. The Division is divided into "Operations" and "Construction and Maintenance" functions, and the disputed titles are responsible for these respective functions.

The Chief of Operations has seventeen employees in his charge and the Chief of Maintenance and Construction has fourteen subordinates (Exhibit J-4). The Chiefs are each assisted by an Assistant Chief who is also represented by the Association (T at p. 45, Exhibit J-1). The remaining employees in the Division are represented by another employee organization for the purpose of collective negotiations. The Chiefs are responsible for the effective performance of all employees in their respective charges, and informally evaluate those employees (T at pp. 74-76). The Chiefs discipline subordinates through the issuance of written reprimands and the conduct of informal hearings. Serious discipline is the responsibility of the Department Chief, who may conduct formal proceedings on charges brought by the Chiefs or anyone else in the Department

(T at pp. 13-14, 21-22 and 68). To date, charges have not been brought concerning the Chief's immediate subordinates, who are also represented by the Association. With respect to grievances by employees in their charge, the Chiefs are rarely, if ever, involved; informal discussions are held with immediate supervisors, while written grievances go directly to the Chief (T at pp. 48-49).

Like Department Deputy Chiefs, the Chiefs report directly to the Department Chief, but differ in other working conditions. The Deputy Chiefs work by shift, and may serve as Acting Chief in the absence of the Department Chief. The disputed Chiefs work five days a week between the hours of 8 am and 4 pm, and have around-the-clock responsibilities for the effective operations of their divisions (T at p. 11). The Chiefs do not serve as Acting Chief in the absence of the Department Chief.

Stanley Kossup, Chief of the Newark Fire Department, testified that, given the unique nature of the signal system function within the Department, he delegates broad discretion to the holders of the disputed titles to effect their responsibilities (T at pp. 12-20). Within their respective divisions, the Chiefs have unbridled discretion to deploy personnel, including the retention of employees beyond their assigned hours to meet emergent needs (T at pp. 25 and 71-73) and the transfer of personnel from one function to another (T at p. 12). Payment of overtime compensation for extra hours and permanent personnel transfers requires approval by the Chief of the Fire Department or his superior, Director John Caulfield, and such

approval is routine (T at pp. 12, 23 and 72). The Chiefs also establish vacation schedules within their divisions, and approve personal day requests (T at pp. 35-36 and 56).

The Chiefs are also wholly responsible for the specialized training of their personnel, without input or direction from the Department Chief or Director (T at p. 15). Albert Lasso, Chief of Signal System Operations, testified that he personally conducts regular training classes and orders special training for individuals as needed (T at pp. 72 and 79). The Chiefs themselves attend training seminars outside the Department to refine their expertise (T at pp. 52-53).

While the Chiefs do not attend the regularly scheduled meetings between the Department Chief and the Deputy Chiefs, the Chiefs do attend policy meetings with the Department Chief and Department Director that concern their areas of expertise and responsibility (T at pp. 30-32 and 66). The Department Chief also contacts the Chiefs sporadically to share ideas and solicit recommendations concerning communications. At the same, the Department Chief does not monitor the Chiefs' performances on a daily basis; instead, he leaves daily decision making to the discretion of the Chiefs (T at pp. 18-19).

Further policy input is indicated by the Chiefs' involvement in the annual budgetary process and in the purchase of equipment on an emergent basis. Like all Division heads, the Chiefs submit an annual budget request to the Department's Administrative Officer. The Department Director and Administrative Officer meet with the Chiefs to discuss the submitted requests and finalize figures for

the consideration of the City's Business Administrator, Mayor and Council. Director Caulfield testified that he has approved the requests of the Chiefs "...almost in their entirety...." (T at pp. 57-58). Chief Lasso confirmed this testimony (T at p. 84). Purchases recommended by the Chiefs which were implemented by the Department include:

1. Digitizer (computerized alarm reporting) system costing \$107,000 (T at pp. 17 and 85). This purchase came after the Chiefs travelled to Atlantic City and Philadelphia to review similar systems (T at pp. 16-17).

2. Two new consoles for transmission of communications (T at pp. 17-18 and 55).

3. Renovation of Fire Alarm Headquarters (T at pp. 62-63).

At the same time, the Director noted that capital budget items have not always received funding due to "...economic climate...." (T at pp. 57-60). For example, the Chiefs and their predecessors have long recommended conversion to a voice alarm system. Director Caulfield testified that he accepted the Chiefs' recommendation on the system, which would cost over \$2,000,000, but that the system was not ultimately budgeted. Subsequently, the Chiefs recommended a modified voice alarm system, the Director accepted the recommendation, bids were let, but ultimate funding did not ensue (T at pp. 59-60).

With respect to expenditure of budgeted funds, the Chiefs have discretion to purchase supplies as required for repair of equipment. In the absence of a prearranged purchase order, the Chiefs may

obtain replacement equipment through requests to the Department Director or the Administrative Officer, who could approve the purchase of equipment. These requests are routinely granted (T at pp. 54-56 and 92-93).

The Chiefs are also responsible for substantial contact with outside institutions affecting departmental communications. The Chiefs meet regularly with representatives of the telephone company, as well as with third parties performing various construction projects in Newark, to negotiate the locations and cost allocations of new communications lines (or the disruption or change of existing lines). The Departmental Chief and Director do not attend these meetings but accord the Chiefs "...full leeway..." on negotiations concerning day-to-day operations, while contractual commitments require review by the Director (T at pp. 54-55, 63-64 and 73-74).

ANALYSIS

I. Managerial Executive Issue

Managerial executives are defined in N.J.S.A. 34:13A-3(f), in pertinent part, as follows:

"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....

The City asserts that the Chiefs are managerial executives within the above-definition and relevant Commission case law. Cases relied upon by the City include In re Borough of Montvale, P.E.R.C.

No. 81-52, 6 NJPER 507 (¶ 11259 1980). In Montvale, supra, the Commission set forth guidelines for managerial executive status:

A person formulates policies when he develops a particular set of objectives designed to further the mission of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the method, 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 and independent judgment sufficient to affect broadly the organization's purpose of its means of effectuation of these purposes. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises.
[6 NJPER at 508-509]

The undersigned now proceeds to apply the above standards to the record in this matter. With respect to the Departmental hierarchy, each Chief reports directly to the Departmental Chief, and is in direct command of his subordinates. The Chiefs meet periodically with the Department's Chief and Director as needed, and are the Department's sole points of contact with third parties affecting departmental communications. Due to their positions in the Department's hierarchy, and the unique functions they serve, the Chiefs have a substantial role in budget formulations affecting their Division. While the Chiefs' budget recommendations have not been implemented to the last dollar, the undersigned notes that many, though not all,

of the Chiefs' recommendations were implemented at significant cost to the Department. In particular, the effectuation of the Chiefs' digitizer system recommendation, at a cost of \$107,000, evidences significant impact on departmental budget and policy. ^{3/}

As to the functions, responsibilities and extent of discretion exercised by the Chiefs, the undersigned notes preliminarily that in public employment, ultimate authority rests with elected or appointed governing bodies. Notwithstanding this legal premise, the Commission confers managerial executive status upon public employees subordinate to governing bodies when the subordinates exercise significant authority and discretion. For example, in City of Newark and Newark Superior Officers Assn. (hereafter "Newark Superiors"), D.R. No. 82-21, 7 NJPER 644 (¶ 12291 1981) request for review denied P.E.R.C. No. 82-97, 8 NJPER 298 (¶ 13131 1982), the Director of Representation found the Newark Chief of Police and Deputy Chiefs of Police to "...possess and exercise a level of authority and independent judgment sufficient to broadly affect the department's policies." (7 NJPER, at 646 emphasis supplied). Conversely, in Montvale, supra, and Borough of Lavallette and Superior Officers Association of Lavallette, D.R. No. 83-17, 8 NJPER 617 (¶ 13293 1982), the Commission and the Director of Representation found that police chiefs in those municipalities were not managerial executives, based on the lack of

^{3/} The Association argues that the Chiefs have a minimal role in the budgetary process, and point to record testimony that Chief Lasso's 1983 budget for Signal System Operations was \$26,000, including salaries. While the transcript appears to indicate the above fact at pages 82 and 83, the \$26,000 could not possibly include the annual salaries of eighteen employees. It appears that Chief Lasso's 1983 budget was \$26,000 excluding salaries.

authority and independent judgment exercised by those police chiefs in the formulation and effectuation of department policies. See also, County of Bergen (Bergen Pines County Hospital) and Council No. 5, New Jersey Civil Service Association, D.R. No. 83-8, 8 NJPER 535 (¶ 13425 1982), request for review denied, P.E.R.C. No. 83-76, 9 NJPER 47 (¶ 14022 1982), affirmed App. Div. Docket No. A-564-82-T2.

In addition to guidance from comparisons to factual patterns in the above cases before the Commission, the undersigned is particularly sensitive to comparisons between the disputed titles and the Deputy Chiefs in City of Newark and Professional Fire Officers Association, D.R. No. 82-18, 7 NJPER 640 (¶ 12288 1981) (hereafter "Newark Fire Officers"). In Newark Fire Officers, supra, the Commission's Director of Representation reviewed a clarification of unit petition involving these very same parties. Based on the level of authority and independent judgment exercised by the Deputy Chiefs, the Director found that the Department's Deputy Chiefs were managerial executives and could not be represented for the purposes of collective negotiations by the Association. In the instant matter, the City argues that the contested titles, which were not at issue in Newark Fire Officers, supra, are analagous to the Deputy Chiefs therein, are managerial executives, and should be clarified out of the unit. The Association distinguishes the contested Chiefs from the Deputy Chiefs in Newark Fire Officers, noting that unlike the Deputy Chiefs, the Chiefs do not serve on standing policy committees, do not serve as Acting Chiefs in the absence of the Department Chief, and may not approve

overtime payments.

These distinctions, while accurate, do not prove probative. While the Chiefs do not serve on standing policy committees, they do meet with the Departmental Chief and Director whenever communications policy is at issue. While the Chiefs do not serve as Acting Chiefs, this reflects their specialized expertise rather than a lower level of authority. Indeed, due to their unique expertise, the Chiefs have twenty-four hour responsibility, while the Deputy Chiefs do not and are responsible only for their shifts and overtime as needed. Regarding the approval of overtime pay, while the Chiefs cannot approve it themselves, they do order employees to work overtime, and overtime pay for those employees is routinely approved.

In all other aspects, the Chiefs appear to exercise discretion comparable to that exercised by the Deputy Chiefs. Newark Fire Officers, supra. The Chiefs have substantial control over the development of their personnel, including discretion to change shifts and assign overtime. Like the Deputy Chiefs, the Chiefs exercise total discretion in the training and retraining of personnel. The Chiefs authorize day-to-day purchases of needed equipment for repairs, while the purchase of replacement equipment requires approval by the Department Chief but is routinely granted. Significant capital expenditures, including a \$107,000 digitizer system, resulted from recommendations by the Chiefs.

-12-

Perhaps the most important area of inquiry when considering the ability of an employee to broadly affect his department's policy is the day-to-day operations of the department. Surely this was the critical factor in Montvale, where the Commission found that members of Borough Council routinely gave orders to police concerning the conduct of their duties. The Mayor and Council members in Montvale participated in and directed investigations. While this was not true in Lavallette, nonetheless the day-to-day operations of that department were controlled by the Police Committee, and the Chief and Captain were primarily responsible for typical police officer functions in crime detection and arrests. Similarly in In re Borough of Avon, P.E.R.C. No. 78-21, 3 NJPER 373 (1977), the Commission found a lifeguard captain was not a managerial executive. Notwithstanding the lifeguard captain's substantial involvement in the day-to-day operations of his department, the Hearing Examiner had found that the overwhelming portion of the captains time was spent "...on the beach patrolling and filling in for other lifeguards...." (Slip opinion at p. 21).

In the instant matter, the contrast to Montvale, Lavallette and Avon is striking. The Chiefs hold administrative positions which rarely require their presence out of the office with other communications personnel (T at pp. 81-82). Instead, the Chiefs spend the overwhelming majority of their time in the office making the kinds of day-to-day operations decisions made by elected officials in Lavallette, Montvale and Avon. The Chiefs are accurately compared to the Deputy Chiefs in Newark Fire Officers and the Deputy Chiefs in Newark Superior Officers as high ranking officials in large para-

military organizations where delegation of managerial authority to such officers is critical to effective operations. Indeed, due to their specialized expertise, and the relative lack of communications expertise held by their peers and superiors, the Chiefs appear to possess a greater degree of independence than many Deputy Chiefs. The independence granted to the Chiefs in the conduct of day-to-day operations of the Communications Division, as well as the significant deference granted to their budgetary and policy recommendations, clearly indicates that the Chiefs are managerial executives within the meaning of the Act, and thus ineligible for representation in any collective negotiations unit.

II. Conflict of Interest ^{4/}

The principles of conflict of interest were established by the New Jersey Supreme Court in Board of Education of West Orange v. Wilton, 57 NJ 404 (1971). In Wilton, the court held:

If performance of the obligations or powers delegated by the employer to a supervisory employee whose membership in the unit is sought creates an actual or potential substantial conflict between the interests of a particular supervisor and the other included employees, the community of interest required for inclusion of such supervisors is not present. 57 NJ at 425.

Recognizing the varied levels of conflict of interest which might occur in the work place, the Court in Wilton limited the concept as follows:

While a conflict of interest which is de minimis or peripheral may in certain cir-

^{4/} The undersigned proceeds to consider this issue for the Commission's consideration in the event that the Commission does not adopt the managerial executive recommendation.

cumstances be tolerable, any conflict of greater substance must be deemed opposed to public interest. 57 NJ at 425-426.

The initial Commission decisions concerning conflict of interest involved police and fire superior officers. In City of Linden, P.E.R.C. No. 52 (1971) and City of Union City, P.E.R.C. No. 70 (1972), the Commission found that certain superior officers had substantial conflicts of interest with subordinate personnel. In so ruling, the Commission in Union City, found: "[T]he duties and responsibilities of officers are such as to generate grievances among patrolmen and it may be reasonably anticipated that representation of both groups as one would be inimical both to the prosecution and resolution of any grievances." Reaching a similar conclusion in City of Elizabeth, P.E.R.C. No. 71 (1972), the Commission emphasized the nature of a conflict of interest inquiry: "Required is a complete examination of the nature of authority over subordinates, the nature and responsibility to superiors and the context within which they function." However, where this inquiry reveals a potential conflict of interest, the "reasonable foreseeability" of conflict must be measured by the history of the parties relationship. In City of Trenton and AFSCME Local 2281, D.R. No. 83-33, 9 NJPER 382 (¶ 14172 1983), the Commission's Director of Representation found that the absence of any record incident demonstrating conflict during a five year period vitiated any potential for conflict between two supervisors in the same negotiations unit. See also, In re West Paterson Board

of Education, P.E.R.C. No. 77 (1973).

In the context of the above standards, the undersigned proceeds to review the record in the instant matter. The only relevant conflict of interest in this proceeding would be conflicts between the Chiefs and their immediate subordinates, the Assistant Chiefs, since all other subordinates are in a separate negotiations unit. While the Chiefs could have a role in processing grievances filed by their respective Assistant Chiefs, or could bring charges with respect to them, the record is devoid of such events. ^{5/} Moreover, the record clearly indicates that the Chiefs do not formally evaluate the Assistant Chiefs, and have no role in the award of their salary increments (T at pp. 89-90). Accordingly, applying City of Trenton, supra, the undersigned concludes that the lengthy history of the relationship between the parties indicates that conflict of interest in this matter, if latent, is not so reasonably foreseeable as to compel the removal of the Chiefs, for that reason alone, from the negotiations unit represented by the Association. ^{6/}

^{5/} Chief Kossup could recall only one employee who was brought up on charges before him, and that employee was a member of the rank and file negotiations unit (T at pp. 46-48).


^{6/} While the Hearing Officer in Newark Fire Officers found that actual or potential conflicts of interest compelled the removal of the Deputy Chiefs from the unit represented by the Association, the undersigned notes that the Commission's Director of Representation did not review this finding in his decision. In addition Newark Fire Officers was decided prior to City of Trenton, which, in the view of the undersigned, has clarified the Commission's standards concerning potential conflicts of interest. Similarly here, should the Commission adopt the finding that the Chiefs are managerial executives, it would not reach the conflict of interest issue.

RECOMMENDATIONS

For the above stated reasons, the undersigned recommends the following findings:

1. The Chief of Fire Signal System Operations and the Chief of Fire Signal System Maintenance and Construction are managerial executives within the meaning of the Act and thus may not be represented in any negotiations unit for the purposes of collective negotiations.

2. Accordingly, the negotiations unit represented by the Association should be clarified to exclude the Chief of Fire Signal System Operations and the Chief of Fire Signal System Maintenance and Construction. 7/



Mark A. Rosenbaum
Hearing Officer

DATED: April 30, 1984
Trenton, New Jersey

7/ Should the Commission find that the Chiefs are not managerial executives, the undersigned recommends that they remain in the Association's unit, since no conflict of interest exists which would compel the exclusion of the position from the negotiations unit represented by the Association.