E.D. No. 43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF ROCKAWAY
Public Employer

and Docket No. RO-160

PATROLMEN'S BENEVOLENT ASSOCIATION,
LOCAL NO. 142
Petitioner

DECISION AND DIRECTION OF ELECTION

Pursuant to a Notice of Hearing to resolve a question concerning the representation of certain employees of the Borough of Rockaway, a hearing was held before Hearing Officer Martin R. Pachman at which all parties were given the opportunity to present evidence, examine and cross-examine witnesses, to argue orally and to submit briefs. Thereafter, the Hearing Officer issued his Report and Recommendations to which exceptions were timely filed by the Borough of Rockaway, the Public Employer. The undersigned has considered the entire record, the Hearing Officer's Report and Recommendations and the Exceptions and on the facts in this case finds:

1. The Borough of Rockaway is a public employer within the meaning of the Act and is subject to its provisions.

2. Patrolmen's Benevolent Association, Local No. 142 is an employee representative within the meaning of the Act. 1/

3. The Public Employer declines to recognize Petitioner as the exclusive representative of certain employees; a question concerning the representation of public employees therefore exists and the matter is properly before the Executive Director for determination.

4. Petitioner seeks to represent and the Hearing Officer found appropriate a unit of all policemen of the Borough excluding only the Chief, meaning that the unit would include one lieutenant, two sergeants, and six patrolmen. The Employer raises several exceptions to the Hearing Officer's Report and Recommendation. First,it contends that there is no factual support for the finding that sergeants and the lieutenant are not

1/ It had been alleged that two members of this Local were not policemen and that such mixed membership of police and non-police in the same organization was in violation of the law, N.J.S.A. 34:13A-5.3. Pursuant to the Hearing Officer's recommendation, Petitioner has by affidavit of one of its officers notified the Commission that the two members in question have resigned.

supervisors. Specifically it excepts to the Hearing Officer's reliance on the testimony of certain witnesses rather than on two documents which the Employer considers controlling, i.e., the Police Department Manual and the Borough's Personnel Ordinance. It is clear from a reading of his Report that the Hearing Officer did not ignore these documents; he obviously analyzed and considered them in conjunction with testimony and found testimony which was more conclusive than the documents. The process of weighing and evaluating the evidence is clearly within the province of the Hearing Officer and our review of the record and his Report reveals no error on his part. Contrary to the Employer we found substantial record support for and agree with the Hearing Officer's findings and conclusion that neither the sergeants nor the lieutenant are supervisors within the meaning of the Act in that none exercises the authority to hire, fire, discipline or effectively recommend such action.

The Employer's second exception is to the Hearing Officer's failure to find that a substantial conflict of interest exists between the superior officers and the patrolmen. Citing the Supreme Court decision in Board of Education of the Town of West Orange v. Elizabeth Wilton, et al, 57 N.J. 404 (1971), the Employer argues that maintenance of discipline in the department requires recognition that the conflcit between the two groups is substantial and not de minimis. It is evident from the record that within this 10 man police department the Chief is the predominating influence and force for the maintenance of discipline and that the inclusion within one negotiating unit of the ranks below Chief would not diminish or compromise departmental discipline. We agree with the Hearing Officer's analysis and his conclusion that the record fails to reveal the existence of a substantial conflict of interest, and that it is appropriate to include the ranks of sergeant and lieutenant in a unit with patrolmen.

5. Accordingly, it is found that an appropriate unit for collective negotiations is "All patrolmen, sergeants and lieutenants employed by the Borough of Rockaway, but excluding the Chief, all supervisors within the meaning of the Act, managerial executives, craft, professional and office clerical employees."

6. It is directed that an election in the unit described above be held within thirty (30) days of the date of this decision. Those eligible to vote shall be those who were employed in the unit above during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or temporarily laid off, including those in military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are those who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Those eligible to vote shall vote on whether or not they wish to be represented for the purpose of collective negotiations by the Patrolmen's Benevolent Association, Local 142.

The majority representative shall be determined by a majority of the valid votes cast.

The election directed herein shall be conducted in accordance with the provisions of the Commission's Rules and Regulations and Statement of Procedure.

BY ORDER OF THE EXECUTIVE DIRECTOR

Maurice J. Nelligan, Jr.
Executive Director

DATED: November 10, 1972
Trenton, New Jersey

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF ROCKAWAY
Public Employer

and

Docket No. RO-160

P.B.A. LOCAL NO. 142
Petitioner

APPEARANCES:

Borough of Rockaway
By John A. Wyckoff, Esquire

P.B.A. Local 142
By Walter C. Morris, Esquire

HEARING OFFICER'S REPORT AND RECOMMENDATION

A petition for certification of employee representative was filed with the Public Employment Relations Commission by the P.B.A., Local 142 (hereinafter Petitioner) on June 10, 1970. Pursuant to a Notice of Hearing dated September 1, 1970 and an Order Rescheduling Hearing dated September 18, 1970 a hearing was held before the undersigned Hearing Officer on October 6, 1970 in Newark, New Jersey at which all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Subsequently, briefs were filed by both parties. Upon the entire record in this proceeding the Hearing Officer finds:

1. The Borough of Rockaway is a Public Employer within the meaning of the Act and is subject to the provisions thereof.
2. The P.B.A. Local 142 requested recognition in a unit consisting of all members of the Rockaway Police Department, but the Borough declines to recognize the superior officers, i.e., the sergeants and lieutenant, in a unit with patrolmen. Further, the Borough argues that due to both the limited membership rights of superiors within P.B.A. Local 142, and the fact that two members of the organization are not policemen, the P.B.A. is not a proper employee representative within the meaning of the Act. Accordingly, there is a question concerning the representation of the sergeants and lieutenants, and the question is appropriately before the Hearing Officer for Report and Recommendation.

STATEMENT OF FACTS

The Borough of Rockaway Police Department consists of six patrolmen, two sergeants, one lieutenant and the Chief. (Tr. p. 13) The Petitioner, seeks to represent all policemen with the department except the Chief. Within its membership, P.B.A. Local 142 includes also the Denville Police Department, and two men who, although police officers at the time of their induction, no longer are employed by either the Rockaway or Denville police departments. These two individuals now are employed by the County Prosecutor, and the County Youth Center. (Tr. p. 14)

The Rockaway Police Department operates on a 24 hour rotating shift basis. In each day there are three eight hour shifts which are manned by sergeants and patrolmen. (Tr. p. 81 and 112) There is no requirement that a sergeant be either present for, or in charge of each shift. Further, testimony indicates that the "desk" is covered only during the day, and then normally by either the Chief or the Lieutenant, both of whom have offices in headquarters. (Tr. p. 81 and 114) At other times dispatching is handled through a neighboring community. (Tr. p. 82) The patrolmen and sergeants carry out the same duties interchangeably, that is, both groups occasionally pull desk duty, handle traffic details and school crossings, investigate accidents, and patrol in the two marked police cars. (Tr. p. 141, 155, 164) Additionally, fringe benefits are the same for the sergeants, lieutenants and patrolmen in terms of holidays, sick leave, medical insurance and vacation. (Tr. p. 157, 168) There is also testimony that the sergeants do some administrative work on their shifts. (Tr. p. 111, 164)

The detective lieutenant works in plain clothes, drives an unmarked car and is charged with responsibility for all investigations within the department. (Tr. p. 114, 97, 142) The lieutenant generally works the day shift, but may be called upon to work other shifts, and also to join the men on patrol. (Tr. p. 81, 141) He also shares the fringe package outlined above. (Tr. p. 114, 157, 168)

In addition to the testimony regarding the operation of the department, a number of documents were introduced and explored. Among them were the Police Manual of the Borough, which sets out the duties and responsibilities of various ranks, (PE-1), a Borough Personnel Ordinance which outlines the personnel policy for all borough employees (PE-5), some correspondence between the P.B.A., their attorney and the Borough, (P-1, P-2) and various Township and salary ordinances (PE-3, PE-4).

ISSUES PRESENTED TO THE HEARING OFFICER

1. Are the sergeants and lieutenant supervisors within the meaning of the Act, and therefore prohibited from placement within a unit of patrolmen?

2. Are the sergeants and lieutenant in such conflict with the patrolmen as to prevent their inclusion within the same negotiating unit as proscribed by Board of Education of the Town of West Orange v. Wilton et. al., 57 N.J. 404 (1971)?

3. What effect on the above conclusions, if any, has the alleged "negotiations" which took place in December of 1969?

4. Is P.B.A. Local 142 a proper employee representative within the meaning of the Act in light of the limited membership rights of "superior officers" and the membership of two men who are no longer employees of the Police Department?

DISCUSSION

Section 7 of the Act provides that supervisors having the power to hire, discharge, discipline or to effectively recommend same do not have the right to be represented by an organization which admits non-supervisory personnel to membership, and Section 8 prohibits the placement of these two groups in a single unit.

In the Borough of Rockaway Police Department all violations of the manual or infractions of the rules are reported to the Chief. This may be done by any rank with regard to any other rank. (Tr. p. 88) He then assigns the lieutenant to investigate the matter and make a factual report to him. (Tr. p. 50, 58, 62, 91) The Chief makes an independent evaluation of the report and decides upon the discipline to be imposed. (Tr. p. 51) The Chief has authority to suspend a man for a limited time by virtue of both local and state rules, but must report any suspension to the head of the Police Committee and the Borough Administrator. (Tr. p. 51, 65) It is clear from the record that discharge can only be effected after a hearing before the Mayor and Council. (Tr. p. 61)

With regard to power of the lieutenant and the sergeants to impose discipline on the patrolmen, all witnesses asked answered the direct question as to that power in the negative, (Tr. p. 46, 59, 61, 65, 99, 166) stating that their power was limited to reporting problems to the Chief. The only two specific acts which superiors admitted having the power to do on their own were to tell a man to retype a sloppy report or to correct a man's sloppy attire. (Tr. p. 100, 167) The basis for the employer's allegation that these people are supervisors by virtue of their disciplinary power rests in two ordinances admitted into evidence. The first, the Police Manual sets out that each rank of officers, i.e., sergeants and lieutenant shall, in the absence of a superior fulfill their duties. Since one of the duties of the Chief is discipline, so the argument goes, each of these ranks have that authority in the absence of superiors. The argument, in the opinion of the

undersigned, has no merit on the same rationale as that utilized by the Executive Director in rejecting the same argument in Matter of West Orange and Local 692 I.A.F.F., E.D. No. 6, in which the Director held: Since the record does not establish even a sporadic exercise of the authority claimed and since at best it could only be exercised on a substitute basis in the absence of higher authority, the undersigned concludes that the mere claim that the captains possess this authority under these conditions is insufficient to establish them as supervisors." Also the manual states that "if more than one report is recieved of neglect of duty on the part of a patrolman under the Sergeants supervision...without proper action having been taken by the Sergeant, it may be deemed prima facie evidence that the Sergeant has neglected to perform his duty..." Public Employer urges that implicit in this section is the authority to take disciplinary action. In testimony, the sergeant testified that "appropriate action" consists of a report to the Chief. It would appear that this is in fact what the manual intends since the section describing the lieutenants duties with regard to misconduct requires that he "carefully note... and report the same in writing..."

The second document introduced to demonstrate the supervisory status of sergeants and the lieutenant was the Personnel Ordinance of December 1969 (PE-5). Perhaps the best indication of the value to be gleaned from this document can be demonstrated by the following from the record testimony of Mr. Nichols, Borough Administrator:

> Q. Now, do you know of any occasion where this--the procedures, as set forth under this ordinance have been used..since its passage?
>
> A. None that I am familiar with. (Tr. p. 38)

Further, the ordinance which is to be applicable to all Borough employees, delegates many responsibilities other than discipline to "supervisors" without defining what or who a supervisor is. It should be noted, however, that in the disciplinary section of the ordinance there is reference to suspension from duty by the supervisor. It is clear, from the testimony that in the Police Department only one man, the Chief, has the authority to suspend anyone. It is apparant that the police officers, from the Chief on down have never had the procedures set out in PE-5 applied to them, with regard to vacation schedules, leave procedures, grievance procedures or disciplinary procedures (Tr. p. 140, 186). Even Chief Dachison testified that despite PE-5 "My understanding with these men is, that if there is ever any infraction as far as any of the officers are concerned thay are to report this to me immediately...But they themselves would take no action. This would be strictly mine." (Tr. p. 45, 46) I credit this forthright and direct response, rather than the later, rather hesitant admission by the Chief that PE-5 might apply to his men. Even

under pressure by the Borough to admit that the sergeants had disciplinary power the Chief talked in terms of investigation rather than recommendation. (Tr. p. 53, 56) It is apparent to the undersigned from the testimony of the witnesses that the sergeants and lieutenant do not have disciplinary authority nor the authority to effectively recommend same. Further, it is clear from the record, and apparently undisputed by the parties that discharge may only be effected by charges being brought and a hearing held by the Mayor and Council. Therefore, no officer may discharge or effectively recommend same.

The only other area remaining for discussion is that of the role of the sergeants and lieutenant in the hiring of personnel. The hiring procedure of the Police Department is as follows: applications are taken by the Chief, applicants are investigated by the lieutenant as to background, interviewed by the sergeants and lieutenant, and given the Chiefs of Police examination. All of this information is given to the Chief of Police who makes a hiring recommendation to the Mayor and Council who in turn do the actual hiring. (Tr. p. 84) This is a new procedure having been used only once in the Borough. (Tr. p. 98) As a result of the interview of eleven men, a list of their names was given to the Chief ranking these men in order of preference. (Tr. p. 98) The Chief used this list along with the order of standing in the examination to make the recommendation to the Mayor and Council; and from the record the men were taken in the order of their standing on both the examination and interview ranks which apparently coincided. (Tr. p. 84)

From the above procedure It can be seen that the actual hiring of personnel is done by the Mayor and Council of the Borough. Therefore, what concerns this hearing officer is the question of whether the interview constitutes an effective recommendation with respect to the hiring of new personnel. The following factors enter into my consideration of this issue. First, the interview is only one of three separate parts of the hiring process. The applicants are also subjected to a background investigation and to an examination by the Chiefs of Police Association. Second, none of the eleven applicants were disqualified by the interview; they were merely ranked. Finally, all three items are utilized by the Chief in making the recommendation to the Mayor and Council. Chief Dachison testified that he determined which of the eleven men recommended, he would in turn recommend for hire to the governing body. (Tr. p. 84, 85) In the light of this, I cannot find that the role of the sergeants and lieutenant constitute an effective recommendation with regard to the hiring of personnel.

Therefore, in the opinion of the undersigned, the sergeants and lieutenant are not supervisors within the meaning of the Act.

A second question before the Hearing Officer concerns those considerations raised by the Supreme Court in its decision in the Wilton case supra. The court held therein:

> Where a substantial actual or potential conflict of interest exists among supervisors with respect to their duties and obligations to the employer in relations 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 negotiating unit within the intendment of the statute.

While the court therein was speaking to a situation in which the question was one of levels of supervisory authority, it seems that the same consideration should apply with regard to employees who although found to be non-supervisory within the meaning of the Act, nonetheless have powers which are alleged to create such conflict. The court directed that among others, the tests to be looked to include "Are the duties, authorities and actions of the employees in question vis a vis the other employees in the Association, primarily related to the management function? To what extent does the reasonable and good faith performance of the obligations an [employee] owes to his employer have capacity, actual or potential to create a conflict of interest with other [employees] whose work he is obliged to oversee and evaluate for his employer?"

In the instant case, one circumstance which must be considered in applying these tests for "actual or potential substantial conflict of interest" is the size of the police department. In a large police force wherein the Chief is far removed in both locale and authority from the day to day operation of the rank and file policemen, the existence of an actual or potential substantial conflict of interest is much greater, than in a situation such as presented in the instant case, wherein the Chief is in direct and immediate control of his department. There is no system which puts a superior officer "in charge" of each shift since many shifts consist of only two patrolmen with no superior officers on duty at all. The functions of the men are exactly the same; they patrol, handle traffic details, school crossings, and occasional desk duty. There is nothing to be found in any of this which could lead this hearing officer to a conclusion that an actual or potential substantial conflict of interest exists.

In the Wilton case one of the items looked to was the fact that Mrs. Wilton was encharged with the evaluation of other people and that this evaluation formed a basis for the granting or denial of increments. It should be mentioned in this context that Lt. Bahnatka had been asked by the Chief, who was preparing an evaluation of personnel, to prepare an independent evaluation of his own. There is nothing to indicate to what, if any, use this evaluation was put. Since it did not include the prescribed discussion with the employee being evaluated, the inference I draw is that this is not the evaluation called for in Article IX Section eleven of the Personnel Ordinance. In further distinction to the facts in Wilton, the evaluation by the lieutenant here is in addition to that of the Chief, while Miss Wilton's was apparently the sole evaluation received by the Superintendent of Schools and on which was based salary increases and tenure.

In conclusion, the undersigned, in conformity with the court in Wilton feels that "a conflict of interest which is de minimus or peripheral may in certain circumstances be tolerable." Accordingly, it is my conclusion that since there is nothing in the record to demonstrate that an actual or potential substantial conflict exists or may be reasonably expected to be anything but de minimus, that the doctrine announced in Wilton, supra, not be considered a bar to the placement in a single unit of both patrolmen and the sergeants and lieutenant in the instant case.

The next issue before the hearing officer deals with the allegation of the Association that the "negotiations" of 1969 constitute "established practice" within the meaning of the Act, and therefore an exception to the statutory ban on supervisory-non-supervisory intermingling in a single unit. While I have found that the lieutenant and sergeants are non-supervisory,

I shall treat the issue assuming arguendo that these people are found to be supervisors. Basically,the facts presented demonstrate that in 1969 the Borough passed,on first reading a salary ordinance for 1970. (PE-4) Since the men were dissatisfied with this ordinance they engaged an attorney who contacted the Administrator and requested a meeting to negotiate the "terms of the policemen's 1970 salaries ... pursuant to the provisions of the New Jersey Employer-Employee Act." (P-2) As a result of this request, the attorney, and the PBA negotiating committee consisting of the Lieutenant, two sergeants and one patrolman met with the Mayor, the Borough Administrator and 3 Councilmen on December 24th. After this and two other meetings a new ordinance was passed giving the men increased benefits.

In previous years, testimony reveals that the police department (including the Chief) approached the Chairman of the Police Committee and made their salary requests to him, and he would in turn present the police requests to the Council at their caucus. After one or two meetings with him, an answer would be recieved by the Police Department. In 1969, however, the men did not negotiate for the Chief and testimony characterized what took place at those meetings as consisting of a "give and take on both parts, in trying to arrive at an equitable solution..."

With regard to the established practice exception, petitioner must present clear evidence that employer not only dealt with him, but also that their dealings amounted to collective negotiations,and that these negotiations included both superior officers and rank and file policemen within the same unit. The essential elements for collective negotiations are the give and take of a bilateral relationship, through proposal and counter proposal directed towards consummation of a mutually acceptable agreement. While the events of 1969 appear to indicate the fulfillment of these requirements, in the opinion of the undersigned, a single event of collective negotiations does not demonstrate a sufficient history of established practice to constitute an exception to the supervisory-non-supervisory dichotomy proscribed in the Act. The underlying basis for the exception would appear to be that where a pattern of negotiations has developed which includes categories of employees who would not normally be within a single unit, and such pattern demonstrates that with regard to this specific group a unified negotiating unit works well, the Commission should not upset this pattern. I cannot find that a single instance of negotiations with both supervisors and non-supervisors demonstrates such a pattern of harmonious relationships.

The final issue before the Hearing Officer is whether or not PBA Local 142 is a proper employee representative within the meaning of the Act, in that superior officers have limited voting rights in the Association, and that two members of the group are no longer policemen.

With regard to the first argument, the hearing officer rejects the proposition that limited voting rights in an organization creates a per se status of improper representative, based upon the Commissions decision in Board of Education of the Townsip of West Milford, PERC 50. As was said therein "... standing alone this restriction on membership cannot at this time be said to constitute, necessarily an impediment to fair representation prior to the Association's opportunity to demonstrate its compliance with the statutory obligation, not withstanding this restriction."

The second argument has a good deal of merit. The Act states in Section 7 in part: "...no policeman shall have the right to join an employee organization that admits employees other than policemen to membership." While the record reveals that the two members in question were policemen at the time of their admission to membership and have since taken other positions, in the County Prosecutor's Office and in the County Youth Center, 1/ to say that therefore the organization does not admit employees other than policemen is to beg the question. Again the underlying basis for this statutory proscription is not difficult to envision; if the same organization were to represent both police and non-police employees of the employer, the loyalty owed to the employer by his law enforcement personnel would be seriously endangered if their own organization would be involved in a labor dispute. Therefore, the continued membership of ex-policemen within the organization is violative of the Act.

In the opinion of the undersigned, however, this violation is not one that is incurable. In view of the fact that the orginal admission of these two individuals was lawful, it would appear that if their membership were terminated in P.B.A. Local 142, the organization would be no longer in violation of the Act and could therefore qualify as a proper organization for representation of policemen.

RECOMMENDATIONS

Based upon all of the above, the undersigned recommends as follows:

1. That the lieutenants and sergeants not be found to be supervisors within the meaning of the Act.
2. That it be found that no actual potential or substantial conflict of interest exists sufficient to justify an exclusion of the lieutenant and sergeants from a unit of policemen.
3. That it be found that if assuming arguendo the lieutenant and sergeants are supervisors; no established practice exists which would overcome the statutory prohibition.
4. That P.B.A. Local 142 be found to constitute an appropriate employee organization within the meaning of that Act if it submits within a reasonable time an affidavit notifying this Commission of the termination of membership of the two ex-policemen now on its rolls.
5. That an election be directed in a unit of all patrolmen, sergeants and lieutenants employed by the Borough of Rockaway P.B.A., but

1/ No evidence was offered at the hearing to indicate whether or not these two men are law enforcement officers.

excluding the Chief, craft, professional and office clerical employees, and all managerial executives, non-police and supervisors within the meaning of the Act.

Martin Pachmen
Hearing Officer

DATED: October 20, 1971
Trenton, New Jersey