

P.E.R.C. NO. 85-88

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF SPRINGFIELD,

Public Employer-Petitioner,

-and-

Docket No. CU-84-1

LOCAL 76, NEW JERSEY P.B.A.,

Public Employee Representative.

SYNOPSIS

The Public Employment Relations Commission clarifies a negotiations unit to exclude the positions of sergeant, lieutenant and captain from a negotiations unit which had consisted of all Township of Springfield police officers excluding the Chief and represented by Local 76, New Jersey P.B.A. The Commission holds that the excluded positions are "supervisory" and the captain's position is "confidential" within the meaning of the Act and therefore may not be included in the existing unit. The Commission further finds that a pre-1968 relationship between the parties was not sufficient to warrant a continuation of the existing unit.

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Public Employee Representative.

Appearances:

For the Public Employer-Petitioner, Stephen M.  
Koppekin, Esquire

For the Public Employee Representative, Loccke &  
Correia, Esqs. (Lawrence Henderson, of Counsel)

DECISION AND ORDER

On July 1, 1983, the Township of Springfield ("Township") filed a Clarification of Unit Petition with the Public Employment Relations Commission. The Township seeks to have the positions of sergeant, lieutenant, and captain removed from a negotiations unit of all its police officers excluding the chief. Local 76, New Jersey P.B.A. ("PBA") represents that unit.

On April 30, 1984, the Director of Representation issued a Notice of Hearing. On May 21 and 30, 1984, Commission Hearing Officer Richard C. Gwin conducted a hearing. The parties examined witnesses and introduced exhibits. The parties waived oral argument, but filed post-hearing briefs.

On November 19, 1984, the Hearing Officer issued a report and recommended decision. H.O. No. 85-7, 10 NJPER \_\_\_\_ (Para \_\_\_\_ 1984). He recommended that sergeants, lieutenants, and the captain

be removed from the PBA's unit. He specifically found that these superior officers were supervisors within the meaning of N.J.S.A. 34:13A-5.3 and that the Township and the P.B.A. did not have a pre-Act negotiations relationship significant enough to permit the continued inclusion of these officers with non-supervisory patrol officers. He also found that the captain was a confidential employee based on his participation on behalf of the Township in collective negotiations.

On December 3, 1984, the P.B.A. filed exceptions. It contends that the Hearing Officer erred in concluding that there was no pre-Act negotiations relationship between the Township and the P.B.A. and in concluding that the superior officers were supervisors within the meaning of N.J.S.A. 34:13-5.3.

We have reviewed the record. The Hearing Officer's findings of fact (pp. 2-8) are accurate, and we adopt and incorporate them here.

This is another case requiring us to decide whether superior police officers should remain in a negotiations unit with patrol officers. What was said in South Plainfield Borough, D.R. No. 78-18, 3 NJPER 349 (D.R. 1977) remains germane to such disputes:

...except in very small departments where any conflict of interest between superior officers and rank and file personnel is de minimis in nature, the quasi-military structure of police departments virtually compels that superior officers and patrolmen be placed in separate units. This is so inasmuch as the exercise of significant authority in a chain of command operation produces an inherent conflict of interest within the New Jersey Supreme Court's definition of that concept in Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971).

The existence of an inherent conflict of interest in these circumstances must lead to a determination that separates superior officers from rank and file notwithstanding a previous history of collective negotiations in a combined unit. Moreover, the finding of such conflict is not contingent upon a finding that the superior officers are supervisors within the meaning of N.J.S.A. 34:13A-5.3.

In the Union County matter, supra, the Commission stated the above most cogently:

It is readily observable that the military-like approach to organization and administration and the nature of the service provided (which presumably accounts for that approach) set municipal police and fire departments apart from other governmental services. Normally there exist traditions of discipline regimentation and ritual, and conspicuous reliance on a chain of command all of which tend to accentuate and reinforce the presence of superior-subordinate relationships to a degree not expected to be found in other governmental units and which exist quite apart from the exercise of specific, formal authorities vested at various levels of the organization. When the Commission is asked to draw the boundaries of common interest in this class of cases, it cannot ignore this background as it examines for evidence of whether or not a superior exercises any significant authority over a rank and file subordinate which would or could create a conflict of interest between the two. In our view, where these considerations are real rather than merely apparent, it would be difficult indeed to conclude, in contested cases, that a community of interest exists between the lowest ranking subordinate and his superior, absent exceptional circumstances. We do not intend that this observation extend to those cases where the points of division are so few and so insignificant as to be termed de minimis, such as might not unreasonably be expected to exist in a small police or fire department. We are persuaded, however, after almost four years experience with this statute that unless a de minimis situation is clearly established, the distinction between superior officers and the rank and file should be recognized in unit determination by not including the two groups in

the same unit....Accordingly, in cases involving police department units, superior officers will normally be severed from rank and file personnel unless it is shown that there is an exceptional circumstance dictating a different result. Examples of such are the following: (1) A department in which there is a very small force, where superior officers perform virtually the same duties as patrolmen, and where any community of interest is de minimis in nature; (2) Where it is determined that superior officers are supervisors, the existence of established practice, prior agreement or special circumstances dictate the continued inclusion of superior officers in a unit of rank and file personnel. (footnotes omitted)

See also Township of Bloomfield, P.E.R.C. No. 84-86, 10 NJPER 117 (Par 15060 1984) aff'd Docket No. A-2850-8353 (App. Div. January 8 1985).

Neither exception applies here. First, the superior officers do not perform the same duties as patrol officers. To the contrary, as found by the Hearing Officer, the sergeant, lieutenant and captain positions are "supervisory" within the meaning of the Act. The record amply supports the Hearing Officer's findings that these officers possess disciplinary authority and are key figures in the department's hiring process. Secondly, we are satisfied that the "established practice" exception is not applicable. This exception requires a finding that prior to the establishment of the Act in 1968 there was:

An organization regularly speaking on behalf of a reasonably well-defined group of employees seeking improvement of employee conditions and resolution of differences through dialogue (now called negotiations) with an employer who engaged in the process with an intent to reach agreement.

In a further consideration of the West Paterson matter, P.E.R.C. No. 79 (1973), the Commission also stated that the term prior

agreement referred to an executed agreement  
pre-dating the 1968 Act.  
[South Plainfield, supra at 350, n.2]

The record before us is insufficient to make such a finding. There was no pattern of exchanged written proposals, the topics discussed between the parties were limited, there was no grievance procedure and there was no written contract. Therefore, we are satisfied that the pre-1968 activities did not amount to an "established practice" which would permit the continued inclusion of superior officers in a negotiations unit with patrol officers.

We are also satisfied that the captain is a "confidential" employee within the meaning of the Act. N.J.S.A. 34:13A-3(g) provides:

'Confidential employees' of a public employer means employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

The captain has been a member of the Township's negotiations committee for four years and has taken part in the formulation of Township negotiations proposals. Accordingly, the captain's participation in the negotiations process in behalf of the Township makes his membership in any negotiations unit inappropriate.

Finally, we note that the Hearing Officer's report issued November 19, 1984, recommended that the sergeants and lieutenants remain in the unit until the expiration of the parties' current agreement. We disagree. In In re Clearview Regional H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977) it was stated:

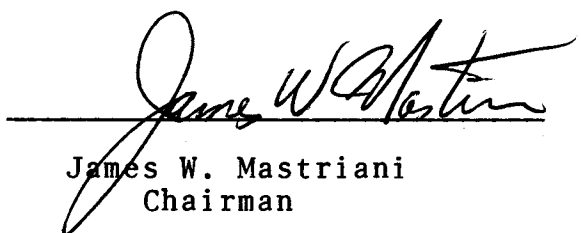
...where the clarification of unit question is raised before the Commission prior to the execution of the parties' most recent contract, or where the dispute is reserved and referred to the Commission in the parties' negotiations agreement or other joint written agreement, the clarification of unit determination shall be effective immediately.  
[Id. at 252]

The instant petition was filed July 1, 1983. The agreement, in effect at that time, expired December 31, 1983. Accordingly, this clarification should have immediate effect.

ORDER

The negotiations unit which Local 76, New Jersey P.B.A. represents is clarified to exclude the Township's sergeants, lieutenants and captain.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Butch, Hipp, Newbaker, Suskin and Wenzler voted in favor of this decision. None opposed. Commissioner Graves was not present.

DATED: Trenton, New Jersey  
February 25, 1985  
ISSUED: February 26, 1985

1/ Since the captain was found to be a confidential employee, he was excluded immediately. In re Clearview Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 252 (1977).

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

In the Matter of

TOWNSHIP OF SPRINGFIELD,

Public Employer,

- and -

Docket No. CU-84-1

LOCAL 76, BRANCH OF NEW  
JERSEY STATE P.B.A.,

Petitioner.

SYNOPSIS

A Commission Hearing Officer recommends a collective negotiations unit consisting of police patrolmen, sergeants, lieutenants and a captain be clarified to remove all titles above the rank of patrolman. The Hearing Officer concludes that the disciplinary authority exercised by sergeants and lieutenants in a chain of command operation supports a finding both of supervisory status and of a conflict of interest between the titles and patrolmen. The captain is found to be a supervisory employee based on his roles in hiring and discipline, and a confidential employee based on his participation on behalf of the Township in collective negotiations. The Hearing Officer also concludes that the record does not support a finding that the captain is a managerial executive within the meaning of the Act.

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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Petitioner.

Appearances:

For the Public Employer  
Loccke & Correia, Esqs.  
(Lawrence Henderson, of Counsel)

For the Petitioner  
Stephen M. Koppekin, of Counsel

HEARING OFFICER'S  
REPORT AND RECOMMENDATION

On July 1, 1983, the Township of Springfield ("Township") filed a Clarification of Unit Petition with the Public Employment Relations Commission ("Commission") seeking the removal of sergeants, lieutenants and the captain from PBA Local 76 ("Local 76" or "the Local"). The Local represents a collective negotiations unit consisting of the titles in dispute and patrolmen.

The Township claims that the titles are supervisory and that the captain is both a managerial executive and confidential employee within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Township also asserts that the titles poses a conflict of interest with patrolmen.

Local 76 contends that the titles do not meet the standards established for the statutory exclusions; that any conflict of interest is de minimis; and that an established practice exists which should apply as an exception to the removal of the titles from the unit, if they are found to be supervisory.

By Notice of Hearing dated April 30, 1984, the undersigned was designated Hearing Officer. <sup>1/</sup> A hearing was conducted on May 21 and 30, 1984. The parties were given the opportunity to examine and cross-examine witnesses, introduce exhibits and argue orally. Both parties filed post-hearing briefs, the last of which was received on August 1, 1984.

#### FINDINGS OF FACT

1. The Township is a public employer within the meaning of the Act, is subject to its provisions, and is the employer of employees holding the titles in dispute.
2. Local 76 is an employee representative within the meaning of the Act, is subject to its provisions, and represents the employees holding the titles in dispute.
3. The Township operates under a committee form of government. Five committee members are elected and they, in turn, select a mayor and appoint one committee member to serve as police commissioner.

<sup>1/</sup> On January 6, 1984, the Administrator of Representation Proceedings advised the parties of the results of an administrative investigation and invited them to submit additional documentation or to supplement their statements of position. Receiving neither additional documentation nor supplemented positional statements, the administrator issued a decision on January 24, 1984. On February 6, 1984, the Local filed a request for review. The Local's request was granted.

The police commissioner acts as liaison between the department and the committee. (T1, pp. 7-8). <sup>2/</sup>

4. The Township's police department consists of approximately 39 employees including a chief, a captain, five lieutenants, five sergeants, two detectives, two plainclothes officers and twenty-three patrolmen. (T1, p. 6). There are two divisions in the department: investigation and patrol. The investigation division includes a lieutenant, a sergeant and two officers, who report directly to the Chief. The balance of the department is in the patrol division where the chain of command requires patrolmen to report to sergeants, sergeants to lieutenants, lieutenants to the captain and the captain to the chief. (T1, pp. 9, 10, 41).

5. Local 76 represents a collective negotiations unit consisting of all ranks of the Township's police officers with the exception of the Chief. This unit composition pre-dates 1968. (T1, pp. 78, 117-119).

6. The first written collective negotiations agreement between the Township and the Local was executed in 1972. (T1, p. 7). It contained the parties' first grievance procedure. (T1, p. 22).

7. Several witnesses testified about how terms and conditions of employment for Local 76 members were established prior to 1968. Meetings were held annually. They were attended by representatives of both the Local and the Township. Township witnesses characterized the Township's posture at the meetings as one of "take-it-or-leave-it." According to Township witnesses, the Local typically

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<sup>2/</sup> The transcript of the first day of hearing shall be designated as "T1". The transcript of the second day of hearing as "T2".

presented a list of proposals and the Township took the proposals under advisement and subsequently informed the Local of what it would receive. Local 76 witnesses described the meetings as having less head butting than present-day negotiations, but involving give-and-take. <sup>3/</sup> (Tl, pp. 3-9, 15, 24, 55, 114-117; R-4).

3/ Captain Calabrese, Local 76 President in 1969 and 1970, testified as follows about the Local's meetings with the Township those two years:

"We would have a PBA meeting and everyone would get their input in, what they felt we should get for a raise insofar as other benefits. We would then contact the Township Committee and set up a meeting with them. The Township Committee would meet with us. We present our proposals to them, they would tell us what we were going to get and that was the end of it."  
(Tl, pp. 17, 18).

Calabrese was a member of the Local's negotiations team from 1963 to 1980.

Patrolman Roessner, an employee of the Department for over 25 years described negotiations prior to 1968 as follows:

- A. Well, once a year the PBA would contact the Township Committee by way of the Chief and we would arrange a meeting. They would arrange a meeting and we would meet with them.
- Q. And what was the response of the Township?
- A. Well, we would submit some proposals to them and they would submit counter proposals after three, four, maybe five meetings. We would come to some sort of an agreement.
- Q. And what was the result of your reaching an agreement?
- A. Well, it was the working contract for the following year.
- Q. Was the written contract signed?
- A. Nothing up till the early seventies, I believe.

8. Captain Calabrese is the commanding officer of the patrol division. He is second in command of the entire department, below the chief. The captain is responsible, to a large degree, for the daily operation of the department. He is involved in manpower and shift assignment, subject to contractual requirements. He oversees vacation scheduling and compensatory time. He drives a department vehicle and occasionally makes arrests and issues traffic summonses. He responds to back-up calls during emergencies. (Tl, pp. 10, 25, 48-54).

The Captain has been involved in the department's hiring process since 1980. He, with two lieutenants and a sergeant, conducts interviews. Applicants take both a physical and written exam. Questions are then asked by the Captain and his interviewing team and they rate the applicant's responses on a 100 point scale. When the interviews are completed, the officers tally the scores and evaluate the applicants. A recommendation is made by the team, in the Captain's name, and submitted to the Chief. The Chief has followed the recommendation each of the four or five times that a position has been filled since 1980. (Tl, pp. 36, 37).

The Captain has been asked on one occasion to submit a recommendation concerning the promotion of a sergeant. Candidates for promotion take a written exam and receive an oral evaluation from the New Jersey Chiefs of Police Association. Seniority is also factored into promotional exam scores. The top three scores are placed on a promotional list. While the Captain was solicited for the promotion of one sergeant, the Chief usually makes the decision. (Tl, pp. 38, 39).

The Captain has delegated to lieutenants and sergeants the responsibility of imposing certain forms of discipline on patrolmen. This discipline usually takes the form of assignment to a corner tour or the refusal of requests to switch shifts. If a lieutenant or sergeant has a question on how to handle the discipline of a patrolman he will typically seek the advice of the Captain. (T1, pp, 11, 33, 40).

The Captain holds staff meetings, though apparently not on a regular basis, attended by sergeants and lieutenants. (T1, p. 10).

The Captain is also a member of the Township's collective negotiations team. He assists the Township in the evaluation and formulation of collective negotiations proposals. He has assisted the Township in its negotiations with Local 76 since 1980, when he assumed the title. (T1, pp. 31, 32).

The Captain does not participate in the formulation of the department's budget nor is he involved in the preparation of an annual report. His recommendations concerning the purchase of department equipment are usually vetoed by the Chief. (T1, p. 57).

9. Lieutenants and sergeants perform many of the same duties. Patrolmen report in prior to their shifts and receive their daily assignments from either a lieutenant or a sergeant. Both sergeants and lieutenants work the desk. They also work on road duty overseeing patrolmen assigned to cars. If both a sergeant and a lieutenant are assigned to the same shift, they typically alternate working four hours at the desk and four hours on the road. Both

sergeants and lieutenants attend the Captain's staff meetings. Both also impose discipline on patrolmen, as described in paragraph 8, and both participate with the Captain in interviewing job applicants. (T1, pp. 10-12, 22, 25, 26, 58, 93, 94, 109; T2, pp. 25-30).

Although sergeants and lieutenants share many of the same duties, it is clear that the higher rank carries with it additional responsibilities. Lieutenant Hietala, for example, is the officer in charge of the investigation division. Other lieutenants are placed in charge of platoons, where, by chain of command, sergeants report directly to them.

Lieutenants have also participated more vigorously than sergeants in the discipline of patrolmen. <sup>4/</sup> The record contains examples of two different lieutenants recommending the suspension of patrolmen. The recommendations were followed both times. (T1, pp. 771, 112; T2, p. 26).

Lieutenants were also involved in the evaluation of police officers when the Captain attempted to implement a formal evaluation procedure in 1980.

Lieutenant Hietala was asked by the Township Committee for his recommendation on department rule changes. This came at a time when the lieutenant was a member of the Local's negotiations team

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<sup>4/</sup> On one occasion a patrolman received a written reprimand and 30 days of corner duty from a sergeant. When the matter was brought to the attention of the Captain, he informed the sergeant that the reprimand should have been verbal and encouraged him to adopt a less formal approach to discipline. When Mr. Calabrese became Captain in 1980, he apparently made a decision to limit his participation in the discipline of rank and file personnel and delegated much of the responsibility to sergeants and lieutenants.

and resulted in his request to be replaced as a negotiator. Finally, prior to Captain Calabrese's appointment, a lieutenant was responsible for scheduling. (T1, pp. 35, 57, 111; T2, p. 40).

10. Captain Calabrese testified that, since he became Captain in 1980, several grievances have been filed by patrolmen involving superior officers (between 10 and 20). (T1, p. 35). Only three grievances were documented, however. They all concerned an action taken by the Captain (the issues were back pay days and compensatory time) and all were filed in 1983. (T1, pp. 41, 42; P-2).

#### ANALYSIS

The undersigned concludes that sergeants, lieutenants and the Captain should be removed from the collective negotiations unit represented by Local 76.

The Director of Representation summarized the Commission's standards of reviewing the unit composition of police officers in In re Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349. Generally, superior officers should be separated from units including rank and file personnel due to the conflict of interest created by the authority exercised in a chain of command operation. Exceptions may be found in very small departments where any conflict of interest is de minimis or where it is determined that superior officers are supervisors and the existence of established practice, prior agreement or special circumstances dictates the continuation of a combined unit. <sup>5/</sup> (See also In re City of Elizabeth, P.E.R.C. No. 71 (1972);

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<sup>5/</sup> The Director of Representation described the Commission's standards as follows:

"Generally, ...except in very small departments where any community of interest between superior officers and rank and file personnel is de

(Continues)



In re City of Union City, P.E.R.C. No. 70 (1982); and City of Camden, P.E.R.C. No. 52 (1971)).

The relevant statutory language is found in N.J.S.A. 34:13A-5.3 and N.J.S.A. 34:13A-6(d):

Nor, except where established practice, prior agreement or special circumstances dictate to the contrary shall any supervisor having the power to hire, discharge, discipline or effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership. N.J.S.A. 34:13A-5.3.

The division shall decide in each instance which unit of employees is appropriate for collective negotiations, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes both supervisors and nonsupervisors. N.J.S.A. 34:13A-6(d).

5/ (Continuation)

minimis in nature, the quasi-military structure of police departments virtually compels that superior officers and patrolmen be placed in separate units. This is so inasmuch as the exercise of significant authority in a chain of command operation produces an inherent conflict of interest within the New Jersey Supreme Court's definition in Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971). The existence of an inherent conflict of interest in these circumstances must lead to a determination that separates superior officers from rank and file notwithstanding a previous history of collective negotiations in a combined unit. Moreover, the finding of such conflict is not contingent upon a finding that the superior officers are supervisors within the meaning of the N.J.S.A. 34:13A-5.3.

Consistent with subsection 5.3, the Commission has defined a statutory supervisor as one having the authority to hire, discharge, discipline or effectively recommend the same. In re Cherry Hill Twp. Dept. of Public Works, P.E.R.C. No. 30 (1970).

The prerequisites for finding an "established practice" are explained by the Commission in In re West Paterson, P.E.R.C. No. 77 (1973). Generally, it must be demonstrated that prior to the passage of Chapter 303 (in 1968) an employee organization spoke on behalf of a reasonably well-defined group of employees seeking improvement of employee conditions and resolution of differences through negotiation with an employer who engaged in the process with an intent to reach agreement.

The question to be asked when determining the existence of a conflict of interest is set forth by the Supreme Court in Wilton, supra:

To what extent does the reasonable and good faith performance of the obligations a superior owes to his employer have capacity, actual or potential, to create a conflict of interest with other supervisors [or with his subordinates] 6/ whose work he is obliged to oversee and evaluate for his employer.

In applying the above cited standards, the undersigned concludes that sergeants, lieutenants and the captain are supervisors within the meaning of the Act; that the titles possess a conflict of interest with patrolmen; and that an established practice does not exist which would dictate the preservation of a combined unit.

In applying the Commission's definition of a statutory supervisor to a case involving police personnel, it is essential not

6/ In re City of Camden, P.E.R.C. No. 42, p. 4 (1971).

to lose sight of the concerns expressed in South Plainfield, Camden, Elizabeth, and Union City, supra, which emphasize the effects of a chain of command operation.

The record reveals that both sergeants and lieutenants exercise disciplinary authority. That authority is exercised on a regular basis. A distinction exists concerning the degree of discipline that individuals occupying the titles may invoke. Lieutenants have effectively recommended the suspension of patrolmen. This is a clear indication of supervisory status. <sup>7/</sup> Sergeants apparently do not recommend suspensions. They do, however, possess a clearly defined role in the department's disciplinary process. They have the power to order a patrolman to work a tour of duty that is recognized as a form of discipline. They also have the power to refuse a patrolman's request to change his shift -- again, a recognized form of discipline. This authority is exercised on a regular basis and has not been challenged. In Union City, supra, the Commission stated that:

"It is readily observable that the military-like approach to organization and administration and the nature of the service provided set municipal police and fire departments apart from other governmental services. Normally there exist traditions of discipline, regimentation and ritual, and conspicuous reliance on a chain of command, all of which tend to accentuate and reinforce the presence of superior-subordinate relationships to a degree not expected to be found in other governmental units and which exist quite apart from the exercise of specific, formal authorities rested at the various levels of the organization."

<sup>7/</sup> Borough of Avalon, P.E.R.C. No. 84-108, 10 NJPER 207 (¶ 15102 1984) adopting H.O. No. 84-11, 10 NJPER 149 (¶ 15079 1984).

The language borrowed from Union City, supra, addressed the issue of the conflict that existed there between the interests of superior and rank and file officers. It is cited here to add perspective to the disciplinary authority possessed by Springfield Township police sergeants. Like the superior officers in Union City, sergeants in Springfield Township, by virtue of the military-like regimentation of the department, find themselves in a superior-subordinate relationship to patrolmen. Unlike the superior officers in Union City, however, the sergeants in Springfield do possess a limited, though clearly defined, authority to discipline. <sup>8/</sup>

Both sergeants and lieutenants oversee the day-to-day activities of their rank and file subordinates. They supervise field activities and take steps to ensure the efficient performance of patrolmen. In addition, they are vested with the authority to discipline. The significance of the disciplinary function of the titles is bolstered by the superior-subordinate relationship.

The undersigned concludes that the authority exercised by lieutenants and sergeants compels a finding both that the titles are supervisory and that they possess a conflict of interest with patrolmen. [See In re Teaneck, E.D. No. 73 (1971); Ridgewood Bd/Ed and Ridgewood Ed/Assn, D.R. No. 80-33, 6 NJPER 209 (¶ 11102 1980), In re Paramus Bd/Ed, D.R. No. 82-7, 7 NJPER 556 (¶ 12247 1981)]. .

The Captain's supervisory status is also demonstrated by his role in the disciplinary process. While he has delegated much of the

<sup>8/</sup> In Union City, supra, superior officers merely submitted written reports of incidents which may or may not have resulted in the discipline of a police officer. The Commission decided, however, that superior officers should be excluded from a unit of rank and file officers based on the conflict of interest that existed between the groups.

responsibility of imposing lesser forms of discipline to his subordinates, he is the source of guidance when questions arise. His role in the hiring process is also suggestive of supervisory status. He selects an interviewing team and recommendations to the chief are submitted in his name. Those recommendations have always been followed. (See finding of fact No. 8).

The Captain also possesses a conflict of interest with patrolmen, demonstrated by the duties attendant to his position in running the department; his participation on the Township's negotiation's team; and his involvement in grievances filed by the unit.

Accordingly, the undersigned concludes that all of the titles in dispute are supervisory and all possess a conflict of interest with patrolmen.

Given that the titles are supervisory, does an established practice exist which dictates their continued inclusion in the unit? The undersigned concludes that a finding of an established practice is not supported by the record. A clear and convincing showing is required to substantiate the claim. The mere labeling of an event as "negotiations" or of a document as a "demand" or "proposal" is insufficient. It must be demonstrated on the record that a consistent and exclusive bilateral negotiations relationship existed, evidenced by an exchange of negotiations proposals on substantive terms and conditions of employment such as salary, method of payment, grievance machinery, and other economic and fringe items. It must also be shown that both parties entered the give-and-take relationship with an intent to consummate an agreement. [Cf. In re Teaneck, E.D. No. 73, pp. 7-8 (1971)].

The record does reveal a longstanding relationship between the parties. However, there is no indication on the record of a

pattern of exchanged written proposals. The topics discussed appear to be limited. There is no indication that a grievance procedure was discussed prior to 1972 or that the Local processed grievances on behalf of its members. The testimony of Local 76 witnesses reveals that the meetings were somewhat informal. Thus, while the undersigned recognizes that the relationship amounted to something more than a "take-it-or-leave-it" from the Township, it is clear that it did not rise to the level of established practice. [See In re Township of Millburn, P.E.R.C. No. 85-18, 10 NJPER 530 (¶ 15242 1984).

The remaining issues concern the captain: his claimed managerial and confidential status.

A confidential employee is defined in N.J.S.A. 34:13A-3(g):

[An employee] whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make [his] membership in any appropriate negotiating unit incompatible with [his] official duties.

A finding of confidential status may be based on an employee's access and exposure to confidential information relating to the collective negotiations process. State of New Jersey and State Troopers NCO Assn., D.R. No. 84-9 \_\_\_\_\_ NJPER \_\_\_\_\_ (¶ \_\_\_\_\_ 1984).

The record clearly demonstrates that the captain is a confidential employee. He has participated on the Township's negotiations team for four years. As a member of the team he has assisted in the evaluation and formulation of collective negotiations proposals. He not only has access and exposure to confidential labor relations material, he assists the Township in developing those materials. The undersigned concludes that the Captain's responsibilities in the

process makes his membership in the Local incompatible with his duties.

Managerial Executive is defined at N.J.S.A. 34:13A-3(f):

"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...

Like the National Labor Relations Board, the Commission has adopted a narrow construction of the term. In In re Borough of Montvale, P.E.R.C. No. 81-56, 6 NJPER, 507 (¶ 11259 1980), the Commission provided the following definition concerning the fomulation and implementation of policy:

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 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 and independent judgement sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes. 6 NJPER at 508, 509.

The Commission examines the following when a managerial executive issue arises: (1) the specific functions and responsibilities of the employee; (2) his relative position in the employer's organizational hierarchy; and (3) the extent of discretion accorded to the individual in his employment. Borough of Montvale, supra.

Captain Calabrese is second in command in the department, below only the Chief. He is largely responsible for the daily operation of the department. He possesses a significant role in the hiring process. He holds staff meetings to discuss ways of improving the department. He made a decision to delegate the responsibility of imposing certain forms of discipline to his subordinates. He attempted to implement an evaluation procedure and when he did not receive the cooperation he felt necessary from the Chief, he decided to discontinue the procedure. He works with the Township in developing its negotiations position with the unit. His discretion, however, is limited to some extent by the Chief (in the area of equipment purchases, for example).

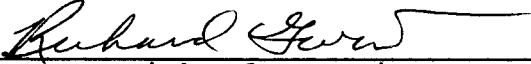
While the record indicates that Captain Calabrese does possess a significant amount of authority and does exercise independent judgment, it does not conclusively demonstrate that he has broadly affected Departmental purposes or the effectuation of those purposes. In light of the narrow construction adopted by the Commission, the undersigned concludes that the record does not support a finding of managerial status.

#### CONCLUSION AND RECOMMENDATION

The undersigned concludes that the titles in dispute are supervisory, that they possess a conflict of interest with patrolmen, and that an established practice dictating the continuation of the existing unit structure does not exist. The undersigned also concludes that the Captain is a confidential employee within the meaning of the Act. Finally, the undersigned concludes that the record does not support a finding that the captain is a managerial executive.



Accordingly, the undersigned recommends that the titles be removed from the collective negotiations unit represented by Local 76. Sergeants and Lieutenants should remain in the unit until the expiration of the current collective negotiations agreement between the Local and the Township. The Captain should be removed from the unit immediately. 9/

  
Richard C. Gwin  
Hearing Officer

DATED: November 19, 1984  
Trenton, New Jersey

9/ In re Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977).