

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION PROCEEDINGS

In the Matter of

ESSEX COUNTY BOARD OF CHOSEN
FREEHOLDERS,

Public Employer,

-and-

ESSEX COUNTY CORRECTIONS CENTER
SUPERIOR OFFICERS ASSOCIATION,

Docket No. RO-1035

Petitioner,

-and-

POLICEMEN'S BENEVOLENT ASSOCIATION
OF NEW JERSEY, LOCAL 157,

Intervenor.

SYNOPSIS

The Director of Representation Proceedings determines that a unit of superior officers at the Essex County Corrections Center, consisting of sergeants, lieutenants, and captains, is an appropriate unit for collective negotiations and directs a secret ballot election among the superior officers to determine whether they desire that Petitioner represent them. Affirming the findings of a Hearing Officer, the Director finds that a substantial actual and potential conflict of interest exists between the superior officers and other correction officers which warrants that superior officers and correction officers no longer be included in one unit. The Director excludes the deputy warden from the unit determined to be appropriate insofar as there is also a substantial actual and potential conflict of interest between the deputy warden and the superior officers. In view of this finding, the Director does not consider the argument raised by the County that the deputy warden is a managerial executive.

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OF NEW JERSEY, LOCAL 157,

Intervenor.

Appearances:

For the Public Employer

Goldberger, Siegel & Finn, Esqs.
(Mr. Howard A. Goldberger, of Counsel)

For the Petitioner

Lieutenant Thomas C. Thompson

For the Intervenor

Schwartz, Field & D'Alessio, Esqs.
(Mr. Michael D'Alessio, of Counsel)

DECISION AND DIRECTION OF ELECTION

Pursuant to a Notice of Hearing to resolve a question concerning the representation of certain employees of the Essex County Board of Chosen Freeholders, a hearing was held before Timothy A. Hundley on April 5, 1976, and May 10, 1976 in Newark, New Jersey. At the hearing all parties were given an opportunity to examine witnesses, present evidence, and argue orally. Petitioner filed a brief, and the Hearing Officer issued his Report and Recommendations on October 25, 1976. A copy is annexed hereto and made a part hereof. No exceptions to the Hearing Officer's Report have been filed. The undersigned has considered the entire record and

the Hearing Officer's Report and Recommendations and, on the facts in this case, finds:

1. The Essex County Board of Chosen Freeholders is a Public Employer within the meaning of the New Jersey Employer-Employee Relations Act (the "Act"), as amended, and is subject to its provisions.

2. The Essex County Corrections Center Superior Officers Association and the Patrolman's Benevolent Association of New Jersey, Local 157, are employee representatives within the meaning of the Act and are subject to its provisions.

3. The Public Employer having refused to recognize the Petitioner as the exclusive representative of certain employees, a question concerning the representation of public employees exists and the matter is appropriately before the undersigned for determination.

4. The Petitioner seeks to represent all correction officers in the titles of sergeant, lieutenant, captain and deputy warden employed by the Essex County Board of Chosen Freeholders at the County Correction Center. Intervenor is currently the recognized representative for all correction officers including the petitioned-for titles with the possible exception of deputy warden.

The Hearing Officer found that the captains, lieutenants and sergeants ("superior officers") are not supervisors within the meaning of the Act; nevertheless, he found that a substantial conflict of interest, both actual and potential exists between superior and other correction officers, thus barring their inclusion in the same negotiating unit. He further found that as to the deputy warden there exists a substantial actual and potential conflict of interest in relation to the interests of the superior officers.

It was the Hearing Officer's recommendation that an election be directed for a unit of superior officers to determine whether they desire to be represented by Petitioner for the purpose of collective negotiations. Due to the conflict of interest found between superior officers and other correction officers, it was recommended that Police-men's Benevolent Association, Local 157 be precluded from representing the superior officers.

The undersigned, pursuant to an independent review of the record, and noting the absence of any exceptions to the Hearing Officer's Report and Recommendations, adopts the findings and conclusions of the Hearing Officer that actual and potential conflicts of interest exist between superior officers and non-superior officers, on one hand, and the deputy warden, on the other, that are of such substantial nature as to warrant that superior officers not be included with these other personnel in a negotiations unit.^{1/} The Hearing Officer's conclusions are consistent with past Commission determinations with respect to the issues presented herein. Cf. In re City of Union City, P.E.R.C. No. 70.^{2/} So too, is the Hearing Officer's conclusion that P.B.A. Local 157, as representative of non-superior personnel, is precluded from representing the superior officers.^{3/}

^{1/} Such finding renders it unnecessary to determine whether the deputy warden should be excluded from a unit of superior officers on the basis of the employer's claim that the deputy warden is a managerial executive. Neither does the undersigned find it necessary to reach the issue as to whether the superior officers are statutory supervisors or whether they have been fairly represented in past negotiations.

^{2/} In City of Union City, the Commission found the Chief of Police a statutory supervisor and also excluded the Deputy Chief from the superior officer's unit on the basis that the Deputy substituted for the Chief in his absence. The finding of supervisory status would inherently presuppose a conflict of interest situation encompassing the conflict of interest determination found herein.

^{3/} See In re City of Camden, P.E.R.C. No. 52. It would appear from the record that P.B.A. Local 157 has not, in fact, requested to appear on the ballot to represent the superior officers, if such a unit were found to be appropriate.

5. Accordingly, the undersigned shall direct an election in the following unit: "All County Correction Captains, Lieutenants and Sergeants employed by the Essex County Board of Chosen Freeholders at the Essex County Correction Center but excluding the Warden, Deputy Warden, County Correction officers, non-police employees, managerial executives, confidential employees, professional employees, craft employees and all other employees."

6. The undersigned directs that a secret ballot election be conducted in the unit found appropriate. The election shall be conducted no later than thirty (30) days from the date set forth below.

Those eligible to vote are employees set forth above who were employed during the payroll period immediately preceding the date below, including employees who did not work during the 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 employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

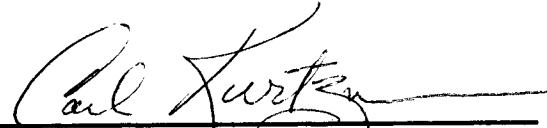
Pursuant to Rule Section 19:11-2.7 the public employer is directed to file with the undersigned an election eligibility list, consisting of an alphabetical listing of the names of all eligible voters together with their last known mailing addresses and job titles. Such list must be received no later than ten (10) days prior to the date of the election. The undersigned shall make the eligibility list immediately available to all parties to the election. Failure to comply with the foregoing shall be grounds for setting aside the election upon the

filing of proper post-election objections pursuant to the Commission's Rules.

Those eligible to vote shall vote on whether or not they desire to be represented for the purposes of collective negotiations by Essex County Corrections Center Superior Officer's Association.

The majority representative shall be determined by a majority of the valid ballots 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 DIRECTOR OR
REPRESENTATION PROCEEDINGS

A handwritten signature in cursive script, appearing to read "Carl Kurtzman", written over a horizontal line.

Carl Kurtzman, Director
Representation Proceedings

DATED: March 16, 1977
Trenton, New Jersey

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

In the Matter of

ESSEX COUNTY BOARD OF CHOSEN
FREEHOLDERS,
Public Employer,

-and-

Docket No. RO-1035

ESSEX COUNTY CORRECTIONS CENTER
SUPERIOR OFFICERS ASSOCIATION,
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-and-

POLICEMEN'S BENEVOLENT ASSOCIATION
OF NEW JERSEY, LOCAL 157,
Intervenor.

SYNOPSIS

On the basis of the evidence taken at a hearing in a representation proceeding, the Commission Hearing Officer, Timothy A. Hundley, recommends the direction of an election in a unit comprised of the superior officers (captains, lieutenants and sergeants) of the Essex County Corrections Center. The Hearing Officer finds that the superior officers do not possess the power to hire, fire or discharge, and further finds that the intervenor as the organization which had previously represented a combined unit of superior officers and correction officers had provided responsible representation to both groups. However, he does find that there is a substantial actual and potential conflict of interest between the superior officers and the correction officers which mandates that the superior officers be in a separate unit from the correction officers. He also concludes that the Deputy Warden should not be included in the superior officers' unit.

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 Director of Representation Proceedings who 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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Appearances:

For the Public Employer
Goldberger, Siegel & Finn, Esq.
By: Howard A. Goldberger, Esq.

For the Petitioner
Lieutenant Thomas C. Thompson

For the Intervenor
Michael D'Alessio, Esq.

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

A petition was filed with the Public Employment Relations Commission on May 5, 1975 by the Essex County Corrections Center Superior Officers Association (hereinafter the Petitioner) which sought to be certified as the exclusive representative for purposes of collective negotiations for all correction officers in the titles of sergeant, lieutenant, captain, and deputy warden employed by the Essex County Board of Chosen Freeholders (hereinafter the Public Employer) at the Essex County Correction Center. On July 23, 1975 the Executive Director of the Commission

granted a motion to intervene made by the Policemen's Benevolent Association of New Jersey, Local 157 (hereinafter the Intervenor).

Pursuant to a Notice of Hearing, hearings were held on April 5, 1976 and May 10, 1976, in Newark, New Jersey at which all parties were given an opportunity to examine witnesses, to present evidence, and to argue orally. A brief has been filed by the Petitioner. The Public Employer and the Intervenor did not file briefs. Upon the entire record in this proceeding, the Hearing Officer finds:

1. The Essex County Board of Chosen Freeholders is a Public Employer within the meaning of the New Jersey Employer-Employee Relations Act and is subject to its provisions.

2. The Essex County Corrections Center Superior Officers Association and the Policemen's Benevolent Association of New Jersey, Local 157, are employee representatives within the meaning of the New Jersey Employer-Employee Relations Act and are subject to its provisions.

3. On April 30, 1975 the Petitioner requested recognition and the Public Employer refused to grant such recognition. Therefore, there is a question concerning the representation of public employees and the matter is properly before the Commission.

The Essex County Corrections Center is a facility that holds unsentenced prisoners. The Corrections Center is considered a minimum security institution. The record indicates that the table of organization at the Correction Center consists of one

Warden, one Deputy Warden, seven Captains, ten Lieutenants, approximately twenty-four Sergeants, and approximately one hundred and sixty-five correction officers.^{1/}

The Warden is the overall administrator of the Correction Center and the Deputy Warden, under the Warden's direction, oversees the entire operation of the institution.^{2/} There are three shifts: 8:00 A.M. to 4:00 P.M., 4:00 P.M. to 12:00 A.M.; 12:00 A.M. to 8:00 A.M.^{3/} The Captain serves as the shift commander, the Lieutenant assigns the employees to their posts and the Sergeant inspects the wings to see that the correction officers are performing their duties properly.^{4/}

On February 17, 1970 the Commission certified New Jersey State Patrolmen's Benevolent Association Local 153 and Local 157, jointly as the exclusive representative for the purposes of collective negotiations for "all permanent correction officers, excluding temporary employees, office clericals, professional employees, craft employees, managerial executives and supervisors within the meaning of the Act." On May 15, 1971 PBA Local 153 and 157 jointly and the Public Employer reached an agreement with a termination date of December 31, 1971. The record does not specify when PBA Local 153 and PBA Local 157 separated but it is clear that a 1972 Agreement was reached

^{1/} Transcript, April 5, 1976, pg. 22-23; May 10, 1976, pg. 9-10.

^{2/} Transcript, April 5, 1976, pg. 23, 28.

^{3/} Transcript, May 10, 1976, pg. 10.

^{4/} Transcript, April 5, 1976, p. 32-33.

between PBA Local 157 (solely) and the Public Employer. The recognition clause in the 1972 Agreement states that PBA Local 157 is the exclusive representative for all Correction Officers employed at the Essex County Correction Center. PBA Local 157 and the Public Employer have negotiated two additional agreements covering the 1973 and 1974 calendar years, prior to the most recent Agreement executed by the parties. This Agreement, for the 1975 calendar year, had not been ratified by both parties at the time of the hearing. This Agreement continues to state that P.B.A. Local 157 is the exclusive representative for all Correction Officers employed at the Essex County Correction Center. The parties have stipulated that since February 17, 1970, the date of the initial Commission certification of Local 153 and 157, the titles of Captain, Lieutenant and Sergeant were in the same collective negotiations unit as Correction Officers. The parties disagree with regard to the status of the title Deputy Warden.

POSITION OF THE PARTIES

The Public Employer asserts that the instant petition should be dismissed because it represents a severance from an existing unit.^{5/} The Public Employer alleges that P.B.A. Local 157 has adequately represented Captains, Lieutenants and

^{5/} The employer cites the following to support its position: In re Board of Education of the Township of Cranford, E.D. No. 74, 1 NJPER 23 (1975); In re Jefferson Township Board of Education, P.E.R.C. No. 61 (1971) and In re Bergen County Board of Chosen Freeholders, P.E.R.C. No. 85, 1 NJPER 9 (1975).

Sergeants (referred to by the parties as superior officers) and correction officers since the passage of Chapter 303, Laws of 1968. The Public Employer contends that the Deputy Warden is a managerial executive and has never been part of a collective negotiations unit.

Petitioner alleges that Captains, Lieutenants and Sergeants (hereinafter superior officers) are supervisors within the meaning of the Act. It is further alleged that there is a conflict of interest between the superior officers and correction officers. Petitioner asserts that superior officers are not allowed to run for office in PBA Local 157 and that PBA Local 157 represents correction officers to the detriment of the superior officers. Petitioner contends that the Deputy Warden should be included in the same unit as the superior officers and has been included in the unit of all permanent correction officers since this unit's inception.

The Intervenor took no position with regard to the merits of this matter.

MAIN ISSUES

1. Are the Sergeants, Lieutenants and Captains supervisors within the meaning of the Act?
2. Is there an actual or potential conflict of interest between the correction officers and the Sergeants, Lieutenants and Captains?
3. Assuming arguendo that the Sergeants, Lieutenants and Captains are supervisors within the meaning of the Act

and/or there is an actual or potential conflict of interest between the superior officers and the correction officers, is there established practice, prior agreement or special circumstances that would permit continued inclusion?

4. Have the Sergeants, Lieutenants and Captains been represented without discrimination and without regard to employee organization membership?

5. What is the representation status of the Deputy Warden?

SUPERVISOR

N.J.S.A. 34:13A-6(d) provides in part that "...except where dictated by established practice, prior agreement or special circumstances, no unit shall be appropriate which includes (1) both supervisors and nonsupervisors..."

N.J.S.A. 34:13A-5.3 addresses the definition of supervisor by stating that "...except where established practice, prior agreement or special circumstances dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership..." (Emphasis mine).

In In re Cherry Hill Township, Department of Public Works, P.E.R.C. No. 30 (1970) the Commission elaborated on the definition of supervisor when it stated: "it is the judgment of the Commission that the Act does, in effect, define a super-

visor to be one having the authority to hire, discharge, discipline or to effectively recommend the same."^{6/}

The record reveals that the superior officers have no involvement in the hiring process.^{7/} Superior officers can initiate discharge and other disciplinary proceedings by submitting an oral or written report that includes the facts of the incident. The superior officer may include a recommendation regarding the severity of the disciplinary action. Upon receipt of the above-mentioned report there is an independent investigation of the facts by the Deputy Warden. The Warden has the authority to take any disciplinary action he deems justified subject to Civil Service procedures.^{8/}

Acting Deputy Warden Michael Frey testified that he could remember only one incident in which a superior officer recommended dismissal of an employee. This employee was dismissed but was reinstated after a Civil Service Hearing.^{9/} Two other disciplinary actions were also part of the record. Mr. Frey testified that superior officers testified against both individuals. However, Mr. Samuel Spina, Assistant Personnel Director, testified that after reviewing the personnel records of these individuals, it appeared that the superior officers had little or no impact on the dismissal of these two individuals. In addition, the Public Employer claims that one of these individuals was a temporary employee and therefore not part of the

^{6/} P.E.R.C. No. 30, pg. 4.

^{7/} Transcript, April 5, 1976, pg. 48-49.

^{8/} Transcript, April 5, 1976, pg. 28-33, pg. 49-52.

^{9/} Transcript, April 5, 1976, pg. 52.

collective negotiations unit.^{10/}

Acting Deputy Warden Frey testified that a superior officer may send an employee home for any infraction of the institution's rules that the superior officer believes is serious enough to warrant such action. A superior officer may also issue an oral or written reprimand.^{11/} However, it is the practice in the institution to have a hearing for any kind of suspension, and the decision of whether or not a written report becomes part of an individual's personnel file is made by the Warden or Deputy Warden.^{12/}

On the basis of the foregoing discussion, the undersigned finds that superior officers do not possess the power to hire, discharge, discipline. It appears that they do have the authority to recommend discharge and discipline. However, the record does not clearly establish the effectiveness of these recommendations. Therefore, the undersigned finds Sergeants, Lieutenants and Captains not to be supervisors within the meaning of the Act.

CONFLICT OF INTEREST

A second issue to be addressed is whether there exists a substantial actual or potential conflict of interest between the correction officers and the superior officers (captains, lieutenants, sergeants) that would mandate the exclusion of the superior officers from the unit of correction officers in accordance with the principles enunciated in Board of Education of

^{10/} Transcript, April 5, 1976, pg. 68-70; May 10, 1976, pg. 27-31.

^{11/} Transcript, April 5, 1976, pg. 52-54.

^{12/} Transcript, April 5, 1976, pg. 30-31.

West Orange v. Wilton, 57 N.J. 404 (1971).

The record indicates that the organization and administration of the institution parallels the military-like approach found in municipal police and fire departments.^{13/} In In re City of Union City, P.E.R.C. No. 70 (1972) the Commission found:

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,

^{13/} Transcript, April 5, 1976, pg. 29-33.

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. 14/

For the reasons cited below the undersigned finds that there exists a substantial actual and potential conflict of interest between the superior officers and the correction officers. Superior officers do assign and oversee correction officers in their work, do have the authority to initiate disciplinary proceedings against correction officers and may be called to testify against other unit members in formal disciplinary proceedings. Although it is not clear as to the effectiveness of superior officers recommendations to discharge and/or discipline, it appears that at least in one situation a superior officer has utilized his authority to recommend discipline. Furthermore, as previously outlined superior officers do have the authority to issue an oral reprimand or to send an employee home for an infraction of the institution's rules. Therefore, the undersigned concludes that the instant matter is more than a de minimis situation and there exists a substantial actual and potential conflict of interest between the superior officers and the correction officers. Based on this finding, the superior officers cannot be included in the same unit with correction officers absent established practice, prior agreement or special circumstances that would permit continued inclusion.

14/ P.E.R.C. No. 70, pg. 4.

STATUTORY EXCEPTIONS

The Commission has found that the statutory exceptions of established practice, prior agreement or special circumstances could apply to situations where there existed a substantial actual or potential conflict of interest.^{15/}

Therefore, there is a need to review whether there exists established practice, prior agreement or special circumstances.

As previously stated, on February 17, 1970 the Commission certified PBA Local 153 and 157 jointly to represent all correction officers. This relationship changed, however, as evidenced by the 1972 Agreement between PBA Local 157 and the Public Employer. This Agreement has PBA Local 157 as the exclusive representative for all correction officers employed solely at the Essex County Correction Center. Since that time PBA Local 157 has continued to represent the correction officers employed at the Essex County Correction Center.

The Commission has held that the statutory exception of established practice and prior agreement were "intended to apply solely to circumstances prior to the arrival of Chapter 303."^{16/} The Public Employer made no attempt to prove the existence of any collective negotiations relationship between the parties prior to the passage of Chapter 303. In addition, no claim is made that there exists any special circumstances in the instant matter. Therefore, the undersigned finds no

^{15/} In re City of Union City, P.E.R.C. No. 70 (1972).

^{16/} In re West Paterson Board of Education, P.E.R.C. No. 77 (1973) and P.E.R.C. No. 79 (1973).

established practice, prior agreement or special circumstances that would permit the continued inclusion of superior officers in an unit with correction officers.

FAIR REPRESENTATION

N.J.S.A. 34:13A-5.3 provides in part that "a majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership."

Petitioner's allegation that superior officers are not allowed to hold office within P.B.A. Local 157 was supported by the testimony of Deputy Warden Frey.^{17/} However, the Commission has found that such a restriction does not, per se, preclude fair representation.^{18/} The Commission has stated that "the measure of fair representation is ultimately found at the negotiating table, in the administration of the negotiated agreement and in the processing of grievances."^{19/}

Petitioner could only cite one instance where P.B.A. Local 157 allegedly did not represent a superior officer.^{20/}

^{17/} Transcript, April 5, 1976, pg. 34-35.

^{18/} See In re Board of Education of the Township of Cranford, E.D. No. 74, 1 NJPER 23 (1975); In re Board of Education of the Township of West Milford, P.E.R.C. No. 56 (1971) and In re Township of Hanover, E.D. No. 41 (1971).

^{19/} In re Board of Education of the Township of West Milford, P.E.R.C. No. 56 (1971).

^{20/} Transcript, April 5, 1976, pg. 39-40.

However, Petitioner did not elaborate on this allegation by providing documentation or other information that could support this accusation. Petitioner also claims that in disciplinary hearings involving superior officers and correction officers as adversaries, P.B.A. Local 157 always represents the corrections officers. There is no evidence, however, that P.B.A. Local 157 ever refused to represent a superior officer or even if a superior officer has ever asked for representation in these hearings.

The undersigned has examined the four agreements negotiated by PBA Local 157 between 1972 and 1975. This examination indicates that a formal grievance procedure is contained in all four agreements and there is no limitation on the rights of superior officers to file and process grievances. The record indicates that recently a grievance was submitted by a group of superior officers and that this grievance is being processed by PBA Local 157.^{21/} The uncontroverted testimony of Mr. Spina, Assistant Personnel Director, indicates that numerous benefits such as uniform allowances, holidays, vacations, physical examinations, insurance benefits, shift differentials, educational increments apply to all unit members regardless of their position.^{22/} The uncontroverted testimony of Deputy Warden Frey specifies that superior officers have been on the PBA Local 157 negotiations team and have actively participated in collective negotiations with

^{21/} Transcript, May 10, 1976, pg. 37-38.

^{22/} Transcript, May 10, 1976, pg. 25-27.

the public employer.^{23/}

Based on the above the undersigned finds that P.B.A. Local 157 has represented the interests of superior officers without discrimination and without regard to organization membership. This finding does not disturb the previous recommendation that the superior officers cannot be included in the same unit with correction officers due to the existence of a substantial actual and potential conflict of interest.

The Public Employer cited three cases to support its position that the instant petition should be dismissed. In In re Board of Education of the Township of Cranford, E.D. No. 74, 1 NJPER 23 (1975) and In re Jefferson Township Board of Education, P.E.R.C. No. 61 (1971) petitioner sought to sever certain nonprofessional employees from an existing overall unit composed of both professional and nonprofessional employees. In In re Bergen County Board of Chosen Freeholders, P.E.R.C. No. 85, 1 NJPER 9 (1975) petitioner sought to sever a group of County Police Officers from an existing county-wide unit of law enforcement officers.

The Commission in the Jefferson Township matter discussed severance petitions and found:

"The underlying question is a policy one: assuming without deciding that a community of interest exists for the unit sought, should that consideration prevail and be permitted to disturb the existing relationship in the absence of a showing that

such relationship is unstable or that the incumbent organization has not provided responsible representation. We think not. To hold otherwise would leave every unit open to re-definition simply on a showing that one sub-category of employees enjoyed a community of interest among themselves. Such a course would predictably lead to continuous agitation and uncertainty, would run counter to the statutory objective and would, for that matter, ignore that the existing relationship may also demonstrate its own community of interest." 24/

In each of the three cases cited by the Public Employer, to support its position in the instant matter, the petitioner was unable to show that the existing relationship was unstable or that the incumbent organization had not provided responsible representation. Therefore, in all three of these prior cases, the petition was dismissed. These prior decisions may be distinguished from the instant matter, however, due to the finding of a substantial actual and potential conflict of interest between the correction officers and the superior officers at the Essex County Correction Center. This conclusion mandates the severance of the superior officers from an unit of correction officers even though PBA Local 157 did provide responsible representation.

REPRESENTATION STATUS OF DEPUTY WARDEN

The past representation status of the Deputy Warden is unclear. On October 9, 1969 PBA Local 157 filed a Certification of Public Employee Representative Petition for a collective negotiating unit of all correction officers employed in

24/ P.E.R.C. No. 61, p. 4.

the Essex County Penitentiary, North Caldwell, New Jersey.^{25/}
The Public Employer in response to an October 10, 1969 letter from the Commission requesting "an alphabetized list of employees described in the petition" sent to the Commission a list that included the title of Deputy Warden. This list did not include the title of Warden.^{26/} However, on January 30, 1970 the Public Employer provided another list, a list of eligible voters, that did not include either the Deputy Warden or Warden.^{27/} A representation election was held February 6, 1970 but no record exists that would indicate whether or not the Deputy Warden voted. The undersigned takes administrative notice that there were eighteen challenged ballots. No record exists that specifies whose ballots were challenged. On February 17, 1970 the Commission certified PBA Local 153 and 157 Jointly as the exclusive representative for a unit of all permanent correction officers.

Agreements between the parties do not establish the past representation status of the Deputy Warden. The recognition clause consistently referred to "all correction officers" without reference to specific title inclusions or exclusions. The clause relating to salaries has not referred to the title of Deputy Warden but this is contradicted by the reference to the title of Deputy Warden in the 1972, 1973 and 1974 Agreements under the Article relating to Promotions as

25/ Exhibit PE-9.

26/ Exhibit C-3.

27/ Exhibit C-4,

follows:

"The correction officer series shall be: County Correction Officer, County Correction Officer-Sergeant, County Correction Officer-Lieutenant, County Correction Officer-Captain, Deputy Warden."

Wage proposals submitted on behalf of correction officers by ^{28/} P.B.A. Local 157 do not mention the title of Deputy Warden.

Based on the above, it appears to the undersigned that there was no understanding between the parties regarding the past representation status of the Deputy Warden.

The Public Employer contends that the Deputy Warden should not be included in any collective negotiations unit because he is a managerial executive. The Petitioner alleges that the Deputy Warden is not a managerial executive and should be included in an unit with the superior officers. Although neither party addressed itself to the issue of whether a substantial actual or potential conflict of interest exists between the Deputy Warden and the superior officers, the undersigned is not restricted in his analysis to the legal arguments presented by the parties.

The agreement between the parties states that the Warden represents the Public Employer at the first step of the grievance procedure.^{29/} The Warden consults with the Deputy Warden with regard to grievances and the Deputy Warden handles first step conferences in the absence of the Warden.^{30/} In

^{28/} Exhibit PE-3 and PE-5.

^{29/} Exhibit PE-8, pg. 9.

^{30/} Transcript, April 5, 1976, pg. 28-29.

addition, the Deputy Warden is responsible for assuming the duties of the Warden when the Warden is not available.^{31/}

Based on the above, the undersigned finds that the Deputy Warden is so closely aligned to the management interests of the Public Employer that a substantial actual and potential conflict of interest exists in relation to the interests of the superior officers. This finding negates the claim that there is a sufficient community of interest between the Deputy Warden and superior officers. Therefore, the undersigned concludes that the Deputy Warden should not be included in a collective negotiations unit with superior officers. In view of the above-stated finding and in the absence of sufficient evidence that would enable the undersigned to ascertain whether or not the Deputy Warden exhibits the degree of independent judgment necessary for a finding that the Deputy Warden is a managerial executive, the undersigned concludes there is no need to determine whether the Deputy Warden is a managerial executive.^{32/}

For the reasons stated previously, the statutory exceptions of established practice, prior agreement or special circumstances have not been established in the instant matter. Therefore, the conclusion that there is a substantial potential and actual conflict of interest between the Deputy Warden and the superior officers would not have been disturbed even if

^{31/} Transcript, April 5, 1976, pg. 23-28.

^{32/} For discussion regarding managerial executive see N.J.S.A. 34:13A-5.3, N.J.S.A. 34:13A-3(f), and Essex County Board of Chosen Freeholders, H.O. 77-3, 2 NJPER _____ (1976).

the undersigned found that the Deputy Warden had in the past been specifically included in the unit of all correction officers represented by P.B.A. Local 157.

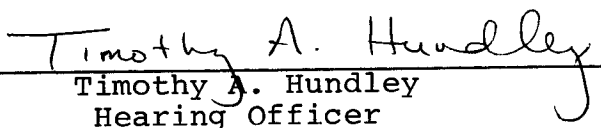
RECOMMENDATION

Based on the above findings, it is hereby recommended that an election be directed among the employees in the following unit:

"All County Correction Captains, Lieutenants and Sergeants employed by the Essex County Board of Chosen Freeholders but excluding the Warden, Deputy Warden, county correction officers, non-police employees, managerial executives, confidential employees, professional employees, craft employees and all other employees."

Those eligible to cast ballots in this election shall vote on whether or not they desire to be represented for purposes of collective negotiations by the Essex County Corrections Center Superior Officers Association. Due to the existence of a substantial actual and potential conflict of interest between the correction officers and the superior officers, the Policemen's Benevolent Association of New Jersey, Local 157 is precluded from representing this unit.

Respectfully submitted,



Timothy A. Hundley
Hearing Officer

DATED: Trenton, New Jersey
October 25, 1976