

D.R. NO. 2013-14

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

In the Matter of

CITY OF HACKENSACK,

Public Employer,

-and-

Docket No. RO-2013-017

FRATERNAL ORDER OF POLICE  
LODGE 16,

Petitioner,

POLICEMEN'S BENEVOLENT ASSOCIATION  
LOCAL 9,

Intervenor

**SYNOPSIS**

The Director of Representation severs captains and lieutenants from a unit that included all rank-and-file and superior officers except chief and deputy chief. The Director finds that the captains and lieutenants should be separated from the existing unit, given the inherent conflict of interest created by their inclusion, and orders an election to determine if captains and lieutenants wish to be represented by the Fraternal Order of Police Lodge 16.

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Appearances:

For the Respondent,  
Wiss and Bouregy, PC, attorneys  
(Raymond R. Wiss, of counsel)

For the Petitioner,  
The Cushane Law Firm, LLC, attorneys  
(Thomas A. Cushane, of counsel)

For the Intervenor,  
Loccke, Correia, Limsky and Bukosky, attorneys  
(Richard D. Loccke, of counsel)

**DECISION**

On October 1, 2012, the City of Hackensack FOP Lodge 16 ("FOP") filed a representation petition seeking to represent police lieutenants and captains employed by the City of Hackensack ("City"). These superior officers are currently represented by the City of Hackensack PBA Local 9 ("PBA") in a

collective negotiations unit that also includes all rank-and-file police officers and sergeants. By letters dated October 10 and 12, 2012, the PBA intervened in this matter, pursuant to its current collective negotiations agreement with the City.

N.J.A.C. 19:11-2.7.

The PBA opposes the petition and does not consent to an election. It maintains that the PBA has "represented the petitioning employees as part of a bargaining unit covering all ranks except Chief and Deputy Chief for more than forty (40) years."

By letter dated January 23, 2013, the City takes no position with respect to the petition.

The parties attended an investigatory conference on December 18, 2012. The FOP submitted position papers on February 1 and 15, 2013, and the PBA submitted position papers on January 31 and February 15, 2013. We have conducted an administrative investigation of facts regarding the petition. N.J.A.C. 19:11-2.2.

On May 31, 2013, I issued a letter advising of the apparent facts in this case and of my analysis and tentative legal conclusions. Specifically, I wrote that I was inclined to issue a decision finding that the petitioned-for unit is appropriate and directing a secret ballot election among the lieutenants and captains in order to determine whether they wish to be

represented by the City of Hackensack FOP Lodge 16 or no representative. Finally, I invited any party to file any materials if it believed that my determinations are incorrect or if additional material facts should be brought to my attention. I wrote that those materials should be filed by the close of business, 5:00 p.m., June 11, 2013. No party has filed a response.

I find these facts:

The City and the PBA have signed collective negotiations agreements, the most recent of which extended from January 1, 2010 through December 31, 2012. The recognition clause of the agreement specifies that the PBA is the majority representative of all rank-and-file and superior police officers, excluding the Chief, Deputy Chief(s) and Inspector(s) employed by the City. The parties acknowledge that the PBA and the City have had a negotiations relationship for more than forty (40) years.

The police department consists of approximately one hundred and fourteen (114) police personnel. Specifically, the department consists of one (1) chief of police, zero (0) deputy chiefs, three (3) captains, seven (7) lieutenants, seventeen (17) sergeants, and eighty three (83) rank-and-file police officers.

#### **ANALYSIS**

N.J.S.A. 34:13A-5.3 provides in pertinent part:

. . . except where established practice,  
prior agreement or special circumstances

dictate the contrary, . . . any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, [shall not] have the right to be represented in collective negotiations by an employee organization that admits non-supervisor personnel to membership.

The New Jersey Supreme Court held in Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404, 425-427 (1971), that public employees who exercise significant power and responsibilities over other personnel should not be included in the same negotiations unit as their subordinates because of the conflict of interest between those employees and their supervisors.

Thereafter, in Town of West New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1988), the Commission reaffirmed its well-settled policy that we will ordinarily find a conflict of interest between superior officers and rank-and-file officers in a police department. The Commission further explained the rationale for its analysis, citing with approval South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977), in which the Director of Representation found:

. . . 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 conflict 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. [emphasis added; footnotes omitted. Id. at 350]

The Commission then ordered that superior officers be removed from the unit based upon the potential for a conflict of interest with rank-and-file officers, despite a history of a long relationship in one combined unit, and notwithstanding that the employer did not assert that an actual conflict existed. The Commission removed the superiors in the absence of direct evidence of actual conflict, because superior officers could potentially be torn between divided loyalties to their employer and their unit. This conflict, the Commission concluded, damages the public interest. Id. at 279.

Based upon these cases, we presume that in police departments, an inherent potential conflict of interest exists between police superior officers and rank-and-file police officers. The presumption is not dependent upon a finding of the supervisory status of superiors or upon the presence of actual conflict among the groups.

An exception may be found in small units if the duties and authority of superiors and rank-and-file are virtually identical so that any potential for conflict between the ranks is de minimis. See Town of Harrison, P.E.R.C. No. 93-104, 19 NJPER 268

(¶24134 1993), affirming H.O. No. 93-1, 19 NJPER 39 (¶24018 1992). See also Pine Valley Borough, D.R. No. 99-15, 25 NJPER 269 (¶30114 1999) (unit of three (3) patrolmen and one (1) sergeant appropriate where sergeant is not a statutory supervisor and performs the same duties as patrolmen); City of Greenwich, D.R. No. 99-7, 25 NJPER 61 (¶30023 1998) (small force exception applied where all ranks of small department have interchangeable responsibilities); Borough of Audubon Park, D.R. No. 88-6, 13 NJPER 741 (¶18278 1987) (small force exception applied to unit of one (1) sergeant and two (2) patrolmen); Borough of Merchantville, D.R. No. 80-38, 6 NJPER 305 (¶11147 1980) (unit appropriate where sergeant has no greater authority than patrol officers in ten (10) member department).

Here, the size of the City's police force precludes application of the small unit exception. Also, no special circumstances support the continuation of the historic unit. Finally, although the parties have a long history of a combined unit of superior and rank-and-file police officers, that history does not overcome the potential conflict or harm to the public interest. West New York. See also Woodbridge Tp., D.R. No. 96-19, 22 NJPER 216 (¶27116, 1996) (severance of superior officers appropriate despite 26 year negotiation history in the unit of 200 sworn police personnel where exercise of authority to

discipline or direct assignments of rank-and-file created intolerable conflict of interest).

I find that the captains and lieutenants should be separated from the existing unit, given the conflict of interest created by the inclusion of the lieutenants and captains with the rank-and-file police officers. The FOP has petitioned for their separation, and neither the PBA nor the City have asserted that a unit consisting of captains and lieutenants is inappropriate. Rather, the PBA has taken the position that, if the captains and lieutenants are severed from the existing unit, the sergeants should also be severed and included in the petitioned-for unit. Sergeants were not included in the petition, and no PBA affiliate has sought to intervene on their behalf in this petition.

Accordingly, I direct an election among employees in the following appropriate unit:

**Included**: All lieutenants and captains employed by the City of Hackensack.

**Excluded**: Managerial executives, confidential employees, non-supervisors, craft employees, professional employees, casual employees, chief, deputy chiefs, inspectors, sergeants, and all other employees employed by the City of Hackensack.

Captains and lieutenants will vote on whether they wish to be represented by the City of Hackensack FOP Lodge 16 or no representative. The election shall be conducted in accordance with the Commission's rules. The election shall be conducted no

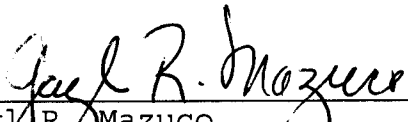


later than forty-five (45) days from the date of this decision. Those eligible to vote must have been employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off, including those in the military service. Ineligible to vote are employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Pursuant to N.J.A.C. 19:11-10.1, the public employer is directed to promptly file with us an eligibility list consisting of an alphabetical listing of names of all eligible voters in the unit, together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by the Director no later than 10 days before the date of the election. In a mail ballot election, the date of the election shall be the date on which the ballots are scheduled to be mailed. A copy of the eligibility list shall be simultaneously provided to the employees organization with a statement of service filed with us. We shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

The parties may be provided an opportunity to agree upon dates of the mail ballot election and designations on the ballot, within the time period set by this decision, subject to my

approval. The assigned staff agent will convene a conference call among the parties for this purpose. In the absence of an agreement among the parties, I shall determine the dates of the mail ballot election, the time and place of the counting of the ballots, and the designations on the ballot. N.J.A.C. 19:11-5.1.

  
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Gayl R. Mazuco  
Director of Representation

DATED: June 12, 2013  
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by June 26, 2013.