

D.R. NO. 2020-15

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

In the Matter of

MIDDLESEX COUNTY SHERIFF'S OFFICE,

Public Employer,

-and-

Docket No. RO-2020-032

MIDDLESEX SHERIFF'S SERGEANTS
ASSOCIATION, FOP LODGE 59,

Petitioner,

-and-

MIDDLESEX COUNTY SHERIFF'S SUPERIOR
OFFICERS ASSOCIATION, PBA LOCAL 165A,

Intervenor.

Appearances:

For the Public Employer, Middlesex County Counsel
Office (Michael Williams, of counsel)

For the Petitioner, Markowitz and Richman, attorney
(Matthew D. Areman, of counsel)

For the Intervenor, Mets Schiro and McGovern, LLP,
attorneys (James M. Mets, of counsel)

DECISION

On January 2, 2020, Middlesex Sheriff's Sergeants Association, FOP Lodge 59 (FOP), filed a representation petition for a secret ballot election for Certification of Representative in a separate collective negotiations unit of sheriff's sergeants employed by the County of Middlesex and the Sheriff of Middlesex County (County). Sheriff's sergeants are currently included in a

superior officers unit with sheriff's lieutenants and sheriff's captains, excluding rank and file sheriff's officers, and is represented by Middlesex County Sheriff's Superior Officers Association, PBA Local 165A (PBA). The petition was accompanied by an adequate showing of interest.

On January 9, 2020, I approved PBA's written request to intervene on the basis of its submitted and current collective negotiations agreement (CNA) covering the petitioned-for employees for the term of January 1, 2017, through December 31, 2020. N.J.A.C. 19:11-2.7.^{1/} PBA and the County opposed the severance of sheriff's sergeants from the existing superior officers unit, and the County filed and served an initial position statement on January 14, 2020.

The assigned Commission staff agent requested FOP to provide a certification that it would be and act as a separate organization from any that admits or represents non-supervisory employees^{2/} and to articulate a valid reason for severance. On January 16, 2020, FOP submitted the requested certification and filed and served a position statement, alleging that a substantial conflict of interest exists between sheriff's

^{1/} FOP's petition was timely filed after the end of the third year of the CNA. N.J.A.C. 29:11-2.8(d).

^{2/} See City of Camden, P.E.R.C. No. 82-89, 8 NJPER 226 (¶13094 1982) (explaining requirements and basis for what we have since called a Camden affidavit or certification).

sergeants and the other unit titles, West Orange Bd. of Educ. v. Wilton, 57 N.J. 404, 425-427 (1971) (Wilton). FOP argues that the Commission has an axiom or presumption that there is an inherent substantial conflict of interest normally requiring supervisory officers to be severed from subordinate officers, even if those subordinate officers are themselves supervisory officers, regardless of a lengthy negotiations history, absent exceptional circumstances such as a small unit where authority is virtually identical.

The parties reiterated their respective positions during an investigatory conference on January 16, 2020, during which the County and PBA did not consent to an election in the petitioned-for unit. PBA, however, indicated that it desired to be among the ballot choices in an election for the petitioned-for unit, should the Commission order the election.

On January 17, 2020, as part of our administrative investigation,^{3/} the staff agent sent detailed questions and requests for information to the parties, with initial responses and position statements/briefs due January 27, 2020, and replies to adversaries due January 31, 2020. Factual assertions were requested to be presented in certifications or affidavits from individuals with personal knowledge, together with any relevant

^{3/} See Hunterdon Cty., P.E.R.C. No. 2012-29, 38 NJPER 252 (¶85 2012); Teaneck Tp., P.E.R.C. No. 2009-25, 34 NJPER 379 (¶122 2008); N.J.A.C. 19:11-2.6(a).

documents. The staff agent advised that written job descriptions were not a substitute for competent evidence of job duties and authority actually and regularly exercised, and that the failure to provide competent evidence could result in a rejection of the party's position.

On January 27, 2020, FOP filed and served its position statement, along with a certification of Sheriff's Sergeant Dariusz Szczesny; an evaluation and an approved overtime report of Szczesny; and portions of the Middlesex County Sheriff's Office Rules and Regulations and the Middlesex County Sheriff's Office Manual. The FOP also advised that it was incorporating its earlier position statement submitted on January 16, 2020.

On January 27, 2020, the County filed and served a certification of Sheriff Mildred S. Scott; the portion of the Middlesex County Sheriff's Office Policy and Procedures pertaining to performance evaluations; and the Civil Service Commission job specifications for Sheriff's Officer Captain, Sheriff's Officer Lieutenant, and Sheriff's Officer Sergeant. The County also wrote that it was incorporating its earlier position statement submitted on January 14, 2020.

On January 27, 2020, PBA filed and served its position statement, along with a certification of PBA Local 165A President Sheriff's Lieutenant Christopher Neder; the current CNA for the existing unit; the Civil Service Commission job specifications

for sheriff's officer captain, sheriff's officer lieutenant, and sheriff's officer sergeant; the portions of the Middlesex County Sheriff's Office Policy and Procedures pertaining to organization and administration, internal affairs, and performance evaluations; and a copy of a filed grievance.

On January 31, 2020, the County filed and served a reply statement. No other party submitted a reply statement.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2. The disposition of the petition is properly based upon our administrative investigation. No substantial or disputed material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. I find the following facts.

Sheriff's Lieutenant Neder is the President of PBA Local 165A. He was hired as a sheriff's officer in Middlesex County in January 2001, promoted to sheriff's sergeant in 2006, and promoted to sheriff's lieutenant in 2010. He certifies that since he has been employed by the County, sheriff's sergeants, sheriff's lieutenants, and sheriff's captains have been in a collective negotiations unit together, separate from a unit of sheriff's officers below the rank of sergeant. He certifies that there have been at least nine CNAs dating back to 1977 wherein sheriff's sergeants have been included in the same unit with sheriff's lieutenants and sheriff's captains.

The current CNA between PBA and the County extends from January 1, 2017 through December 31, 2020. The recognition provision defines the collective negotiations unit as "all employees employed by the County in the Sheriff's Office in Transportation, Courts, Identification, Investigations, Communications, Process, and the Administrative Divisions in the following job titles: Sheriff's Officer Sergeants, Sheriff's Officer Lieutenant, Sheriff's Officer Captain, Director of Narcotics."^{4/} The Sheriff and Undersheriff are not included in the unit.

For Step 1 of the grievance procedure, the CNA provides that grievances ". . . shall be discussed with the employee(s) involved and the Association Representative with the immediate Superior, designated by the Sheriff. The answer shall be made within three (3) days by such immediate Superior to the Association." Step 2 is described as submission to the Sheriff or any person designated by the Sheriff; Step 3 as submission to the Personnel Director; and Step 4 as filing for arbitration. The CNA also provides that grievances must initially be filed within 30 days of the incident or the employee's knowledge of the incident.

^{4/} For purposes of this decision, the titles in the unit other than Sheriff's Officer Sergeants will be collectively referred to as the "other unit titles."

The Sheriff of Middlesex County is Mildred Scott. The Middlesex County Sheriff's Office is subject to the jurisdiction of the Civil Service Commission and uses the Civil Service Commission job specifications for the titles, sheriff's officer sergeants sheriff's officer lieutenant, and sheriff's officer captain. Sheriff Scott certifies that sheriff's officer lieutenants in Middlesex County do not perform the following tasks listed in their Civil Service Commission job specifications: may conduct disciplinary hearings in alleged misconduct of personnel; may evaluate reports on undercover operations, determine priorities, and assign personnel to cases.

Sheriff Scott certifies that the Sheriff's Office follows civil service procedures set forth in statutes and regulations for hiring, firing, promoting, and disciplining, and that the other unit titles are not delegated a role in these decisions to hire, fire, promote, or discipline sheriff's sergeants. She certifies that she does not recall any instance when the other unit titles hired, fired, promoted, or disciplined a sheriff's sergeant, or recommended any of those actions.

Sheriff Scott certifies that the Sheriff has final, binding authority with regard to all hiring, firing, and disciplinary decisions; that there are no prior recommendation steps; and, accordingly, that there are no applicable recommendations that could have been changed or followed. She certifies that the

Sheriff is responsible for initiating disciplinary investigations and the filing of charges pursuant to the outcome of the investigations.

PBA President Neder certifies that in his experience since being hired in January 2001, sheriff's sergeants, sheriff's lieutenants, and sheriff's captains have never had the authority to effectively recommend hiring, firing, promoting, demoting, or disciplining personnel; that he is not aware of any instances where the other unit titles have made such effective recommendations about sheriff's sergeants; and that such responsibility has always resided with the Sheriff and Undersheriff. He certifies that personnel cannot be hired directly into the rank of sheriff's sergeant.

Sheriff Scott certifies that all sheriff's officers, regardless of rank, are responsible for reporting instances when another officer violates departmental policies or procedures that could subject that latter officer to discipline, and that all sheriff's officers may be required to submit written reports as part of the investigatory process conveying personal observations and providing relevant information pertaining to the subject conduct. She certifies that while it is anticipated that superior officers will make verbal corrections and recommendations to subordinate officers from time to time, the Sheriff's Office does not maintain records of such instances.

She certifies that beyond reporting alleged violations of policies and procedures and making verbal corrections to officers of lower rank (for which records of such corrections are not maintained), sheriff's captains and sheriff's lieutenants do not have a formal role in the process of disciplining sheriff's sergeants other than as possible witnesses to report their observations.

Neder certifies that sheriff's sergeants, sheriff's lieutenants, and sheriff's captains can make non-disciplinary corrections such as counseling, retraining, and performance notices. He certifies that under the Middlesex County Sheriff's Office Policy and Procedures, they can recommend reprimands but cannot issue them without approval of at least the Undersheriff. He certifies that he is unaware of any unit member issuing a verbal reprimand to sheriff's sergeants.

Sheriff Scott certifies that she does not recall any instances when a sheriff's captain or sheriff's lieutenant issued an emergency suspension of a sheriff's sergeant. Neder certifies that although the Middlesex County Sheriff's Office Policy and Procedures Manual pertaining to internal affairs provides that a supervisor may immediately suspend an employee from duty under limited circumstances (when necessary to maintain safety, health, order, or effective direction of public services; or when the employee is unfit for duty, is a hazard to others, has been

charged with a third degree crime or greater, or has been charged with a disorderly persons offense or greater while on duty or where the act touches upon employment), in his experience, no unit member has issued such a suspension against any other unit member, and such suspension decisions have always been made by the Sheriff or Undersheriff.

Neder certifies that the formal procedure for discipline is to forward the matter to the Internal Affairs Unit (IAU) for investigation; that the personnel assigned to the IAU report directly to the Sheriff and Undersheriff; that the Undersheriff is responsible for the IAU; and that no sheriff's lieutenants or sheriff's captains are assigned to the IAU. The IAU will take the initial complaint against an officer of any rank and investigate the matter. Any supervisor can receive a complaint of misconduct and forward it to the IAU. The IAU will investigate the complaint and forward its findings and recommendation to the Sheriff or Undersheriff. The Sheriff or Undersheriff will then determine if disciplinary charges are warranted.

Neder certifies that officers of all ranks are required to report misconduct, which may or may not trigger an investigation by the IAU, but that no officer can file disciplinary charges; only the Sheriff or Undersheriff files charges.

Sheriff Scott certifies that she recalls only one instance when a sheriff's captain or sheriff's lieutenant reported misconduct or deficient performance of a sheriff's sergeant; i.e. when they reported that sheriff's sergeant feigned sickness. Sheriff Scott certifies that the Sheriff initiated the disciplinary process by calling on the IAU to further investigate the matter.

Sheriff Scott certifies that she recalls only one instance when a sheriff's captain met with a sheriff's lieutenant and a sheriff's sergeant after the latter two had filed complaints against one another. The sheriff's captain reported to the Sheriff about his meeting with both officers, and the Sheriff determined that it was not necessary to initiate the disciplinary process.

Sheriff Scott certifies that all unit titles are responsible for evaluating officers of an inferior rank. She certifies that no tangible personnel actions, including increments, are directly tied to the evaluation of sheriff's sergeants by the other unit titles. She certifies that each evaluated officer maintains the right to appeal any aspect(s) of the evaluation to the Sheriff, who has broad discretion to modify or reject the findings in the initial performance evaluation, and who maintains final, binding authority over all performance evaluations.

Neder certifies that some sheriff's sergeants report directly to the Sheriff and Undersheriff and are not evaluated by other unit members. He certifies that in his supervisory experience, no sheriff's sergeants have been disciplined or had the emoluments of their employment denied based on a performance evaluation performed by another unit member. He certifies that, to his knowledge, no personnel actions, including increments, are tied to the evaluations of sheriff's sergeants conducted by the other unit titles.

Sheriff Scott certifies that, despite the CNA specifying that Step 1 of the grievance procedure prescribes submission of a matter to the immediate supervisor, in practice, the PBA has bypassed Step 1 and the initial submission of the grievance has been to the Sheriff, pursuant to Step 2. Neder also certifies that the practice has been that grievances are initially submitted to the Sheriff. He further certifies that sheriff's captains and sheriff's lieutenants have no direct role as an employer representative in the process.

Neder's certification includes as an exhibit a previously filed grievance, dated March 26, 2015, and addressed from PBA Local 165A President Paul Lane to Human Resources Director Dennis Cerami. The grievance is a Step 3 filing concerning the denial of an overtime payment to Sheriff's Lieutenant Laury Hamilton. Its summary of facts explains that her submitted overtime report

was returned to her and stamped "DENIED" on November 12, 2014, with a hand-written note from Undersheriff Kevin Harris stating that it should be resubmitted without including the time for lunch and breaks. The summary of facts further explains that Step 1 occurred on December 10, 2014, when Hamilton, President Lane, and Sheriff Scott met within 30 days of the denial of the overtime payment, and it explains that Sheriff Scott again denied the overtime payment.

The document also explains that Step 2 occurred when a grievance report was submitted to "Administration" by Sheriff's Sergeant Randy Einhorn on March 11, 2015. It explains that President Lane received a reply the next day that the grievance was untimely because it was not filed within 30 days of the incident or the employee's knowledge of the incident. President Lane's position in the Step 3 filing was that the grievance was filed within 30 days when Hamilton, President Lane, and Sheriff Scott met on December 10, 2014.

No party in this representation matter has provided us the result of this particular Step 3 grievance. But I infer from Sheriff Scott's and Neder's certified statements (regarding the practice of initiating the grievance process, together with the Sheriff's and Neder's submission of the Step 3 filing as an exhibit) that this grievance was ultimately

considered by the County to have commenced on December 10, 2014, when Scott met with Lane and Hamilton.

Sheriff's Sergeant Dariusz Szczesny certifies on behalf of the FOP that sheriff's sergeants are under the direct supervision of and are evaluated by sheriff's lieutenants and sheriff's captains. He submitted as exhibits two employee evaluation reports that he identifies as evaluations of himself performed by Sheriff's Lieutenant Robert Jankowski. These reports indicate that Jankowski is his supervisor and that Szczesny was evaluated for the periods of October 1, 2017 to October 1, 2018 and October 1, 2018 to October 1, 2019. Rating options for different evaluation criteria include outstanding, acceptable, unacceptable, and not applicable. The reports also indicate the number of late arrivals and sick days. There is no indication of recommendations for personnel actions. The two reports are unsigned, though signature lines appear for both a supervisor and a reviewer.

Szczesny certifies that sheriff's lieutenants assign and approve overtime worked by sheriff's sergeants. He provides as an exhibit two unsigned overtime report forms submitted in his name on January 16 and 17, 2020. Both documents reveal unsigned signature lines for whomever approves the overtime. The "Notified By:" line on the two forms identify Sheriff's Lieutenant Einhorn and Sheriff's Lieutenant Neder, respectively.

I infer that Einhorn and Neder notified Szczesny of the work and assigned it to him.

Szczesny provides the definitions portion of the Middlesex County Sheriff's Office Manual. Sergeant is defined as a "first line supervisor;" lieutenant as a "middle management law enforcement administrator," and captain as a "high-ranking law enforcement administrator." Szczesny certifies that lieutenants exercise the same authority and responsibility as captains; command the tour and perform roll call. He certifies that captains serve as Director and have charge of the shift. He also certifies that the tasks of all superiors are accurately described in the Manual. But other than the duties described above, Szczesny doesn't certify any specific duties from the Manual or whether they are regularly exercised.

Although Szczesny writes that sergeants may be disciplined by lieutenants and captains, he hasn't elaborated upon the source of that purported authority, nor provided any examples of it having been exercised. No submitted document(s) reveal any disciplinary action taken by lieutenants and captains against sergeants.

Szczesny also references the CNA's grievance procedure in certifying that, for grievances filed by or on behalf of sergeants, their immediate superiors serve as the Step 1 designees. Szczesny doesn't certify about, nor provide examples

of any particular grievances when an immediate superior officer so acted. No documents submitted show that lieutenants or captains act on behalf of the Sheriff or County as a Step 1 designee for grievances concerning sergeants. Nor do any documents submitted on behalf of the FOP rebut the certifications and documents from Sheriff's Scott and Neder showing that such grievances are initially presented to the Sheriff directly.

ANALYSIS

The Commission is responsible for determining the appropriate collective negotiations unit when questions concerning representation of public employees arise. N.J.S.A. 34:13A-6(d). When more than one unit is potentially appropriate, the Commission must decide which unit configuration is the most appropriate. State v. Prof'l Ass'n of N.J. Dep't of Educ., 64 N.J. 231, 257 (1974) (State Professional). The Act mandates that the Commission define the negotiations unit "with due regard for the community of interest among the employees concerned." N.J.S.A. 34:13A-5.3. "What is called for on the part of the Commission is 'due regard for', not exclusive reliance upon such community of interest." State Professional at 257.

In State Professional, the Supreme Court upheld the Commission's use of other policy considerations, including the interests of the employer and the public at large, when the Commission determined that it would generally give preference to

broad-based units. Id. This reasoning for the Commission's preference was based on the policy considerations of the Act for stability and harmony^{5/} that would be jeopardized by a multiplicity of units caused by fragmentation and the likelihood of attendant problems of competing demands, whipsawing, and continuous negotiations. State Professional at 241.

The Commission does not intervene in matters of recognition and unit definition except in the event of a dispute. N.J.S.A. 34:13A-5.3. An incumbent majority representative and the employer can voluntarily agree to sever an existing negotiations unit into two separate negotiations units. However, if a third party petitioner seeks only some but not all of the employees in an existing unit without the consent of the incumbent majority representative and the employer, the Commission will find that the unit sought by the "severance" petition is more appropriate than the existing unit in only three situations.

In the first situation, even if a community of interest appears in the petitioned-for unit, we will not disturb the relationship of an existing prima facie appropriate unit unless there is a showing that such relationship is unstable or that the incumbent organization hasn't provided responsible representation. Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61, NJPER Supp. 248 (¶61 1971).

5/ See N.J.S.A. 34:13A-2.

In the second situation, if there is a showing that the existing unit is inappropriate due to a statutory exclusion or a substantial conflict of interest, we may find that the petitioned-for unit is more appropriate even in the absence of a Jefferson showing. See Bergen Pines Hosp., D.R. No. 80-20, 6 NJPER 61 (¶11034 1980) (explaining that a representation petition seeking to sever a professional title from a non-professional unit where no professional option had been exercised would be appropriate); Town of West New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1987) (finding a petition to sever superior officers from an existing unit that included patrol officers was appropriate due to a substantial conflict of interest within the meaning of Wilton).^{6/}

6/ We have sometimes explained that a conflict of interest may create the unstable relations contemplated by Jefferson. See Somerville Boro., D.R. No. 2005-2, 30 NJPER 382 (¶121 2004). However, we have usually treated a conflict of interest showing for severance as distinct from the Jefferson showing. Essex Cty., H.O. No. 77-3, 3 NJPER 55 at n.12 (1976) ("[W]here the Commission has found that the preservation of a unit comprised of supervisors or near-supervisors and non-supervisory titles is not to be sustained, it has applied only the [Wilton] criterion to its analysis [T]he standards for the severance of non-supervisory employees from a broad-based, rank and file unit enunciated in [Jefferson], are not dispositive of the evaluation of a mixed unit."), adopted D.R. No. 77-14, 3 NJPER 97 (1977); Cumberland Cty. Sheriff, D.R. No. 91-17, 17 NJPER 73 (¶22034 1991) (noting that an argument that a mixed unit is inappropriate under Wilton standards and should be severed into separate units of all supervisory officers and all non-supervisory officers would be "compelling," but a petition to sever only some of each is analyzed under

(continued...)

The third situation involves multi-employer units (as opposed to joint-employer units), which we will sever along employer lines unless all of the parties to the existing negotiations relationship agree to continue the arrangement.

Bergen Cty. Sheriff, Bergen Cty., P.E.R.C. No. 84-98, 10 NJPER 168 (¶15083 1984); Ocean Cty. Sheriff, P.E.R.C. No. 99-70, 25 NJPER 117 (¶30051 1999), aff'd 26 NJPER 170 (¶31067 App. Div. 2000); Camden Cty. Health Services Center, D.R. No. 89-36, 15 NJPER 379 (¶20161 1989); Bloomfield Tp. Bd. of Health, Bloomfield Tp., D.R. No. 2008-13, 34 NJPER 130 (¶56 2008).^{7/}

In this case, the only basis FOP alleges for severance is a substantial conflict of interest under Wilton, falling under the second situation explained above.^{8/} Accordingly, if a substantial conflict of interest between sheriff's sergeants and

6/ (...continued)

Jefferson standards and only appropriate where the existing unit is unstable or has not been provided responsible representation). This decision will likewise treat conflict of interest as a distinct basis for severance.

7/ Some cases have considered the absence of consent to a multi-employer arrangement and the possibility of each employer demanding separate negotiations as adequately establishing unstable relations under Jefferson. See Bergen Cty. Sheriff, Bergen Cty., Ocean Cty. Sheriff. Other cases have considered this situation to be distinct from a Jefferson basis for severance. See Camden Cty. Health Services Center, Bloomfield Tp. Bd. of Health, Bloomfield Tp. For purposes of this decision, it will be considered distinct.

8/ FOP does not argue that sheriff's sergeants are not statutory supervisors but that the other unit titles are, and thus does not argue that a statutory exclusion applies. See N.J.S.A. 34:113A-6(d).

the other unit titles is not found, the existing broader unit will be found more appropriate than the petitioned-for separate unit of sheriff's sergeants, and the petition will be dismissed.

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

. . . nor, 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.

N.J.S.A. 34:13A-6(d) provides, in pertinent part:

The division shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and nonsupervisors

The Commission has held that, ". . . the Act does, in effect, define a supervisor to be one having authority to hire, discharge, discipline or to effectively recommend the same."

Cherry Hill Tp., Dep't of Public Works, P.E.R.C. No. 30, NJPER Supp. 114 (¶30 1970). However, "[a] determination of supervisory status . . . requires more than a job description or assertion that an employee has the power to hire, discharge, discipline or effectively recommend." Hackensack Bd. of Ed., H.O. No. 85-3, 10 NJPER 527 (¶15241 1984), adopted P.E.R.C. No. 85-50, 11 NJPER 21 (¶16010 1984). "An indication that the power claimed to be possessed is exercised with some regularity is needed." Id.

(quoting Somerset Cty. Guidance Ctr., D.R. No. 77-4, 2 NJPER 358 (1976)); see also Butler Bor., H.O. No. 91-1, 17 NJPER 209 (¶22088 1991), adopted P.E.R.C. No. 91-99, 17 NJPER 260 (¶22119 1991) (holding that “[a]ll of the circumstances of a particular case must be reviewed in order to determine whether the employee has and regularly exercises such power”).

Even units with no statutory supervisors or consisting entirely of statutory supervisors may be inappropriate if there is nevertheless a substantial conflict of interest. In West Orange Bd. of Educ. v. Wilton, 57 N.J. 404, 425-427 (1971), the Supreme Court of New Jersey, in analyzing a unit with more than one supervisory level, explained that “representatives of the employer and the employees cannot sit on both sides of the negotiating table” because “both employer and employee organization need the undivided loyalty of their representatives and their members . . . if fair and equitable settlement of problems is to be accomplished.” It determined:

If performance of the obligations or power delegated by the employer to a supervisory employee whose membership in the unit is sought creates an actual or potential substantial conflict between the interests of a particular supervisor and the other included employees, the community of interest required for inclusion of such supervisor is not present. While a conflict of interest which is de minimis or peripheral may in certain circumstances be tolerable, any conflict of greater substance must be deemed opposed to the public interest.

In City of Camden and Int'l Ass'n of Fire Fighters, Local 788, P.E.R.C. No. 52, NJPER Supp. 195 (¶52 1971), aff'd NJPER Supp. 2d 12 (¶4 App. Div. 1972), certif. den. 62 N.J. 70 (1972), the Commission, in analyzing whether a conflict of interest may exist even among employees who are not statutory supervisors, wrote:

The supervisor versus non-supervisor distinction is not the only boundary to be considered when diagraming the area of common interest on an organization chart. One may have various authorities over other employees, still not be a supervisor as the Commission defines that term, yet be disqualified from the unit inclusion because by their nature and exercise such authorities preclude a common bond. Seen from another view, such authorities, though not legally supervisory in character, may nevertheless be so intimately related to service of the management interest that failure to recognize such in making a unit determination would tend to or would in fact compromise that interest. [Id. at NJPER Supp. 196]

In Monmouth Cty. Sheriff's Office, D.R. No. 2015-16, 41 NJPER 508, 513 (¶159 2015), the Director of Representation wrote:

[In order] [t]o determine whether such conflicts exist, we must examine the facts of each particular case. Any conflicts greater than peripheral or de minimis are against the public interest. An employee's role in evaluations or grievance procedures is a significant factor in determining whether an actual or potential substantial conflict exists. Our case law requires evaluations to be closely connected to personnel actions. Another consideration in determining if an actual or potential substantial conflict exists is whether the historical relationship between the superior and other included

employees reveals compromised interests or rights. (citations omitted).

The Commission has "consistently held that supervisors' evaluations must be closely tied to a personnel action or disciplinary decision in order to find a Wilton conflict." State of New Jersey (Montclair State University), D.R. No. 2018-15, 44 NJPER 244, 250 (¶70 2018), adopted P.E.R.C. No. 2018-42, 44 NJPER 398 (¶111 2018); New Jersey Turnpike Auth., P.E.R.C. No. 98-28, 23 NJPER 511 (¶28249 1997) ("Recommendations for another's evaluations which might then serve as recommendations for another's personnel decisions are too far removed from the personnel decisions to create a conflict of interest substantial enough to remove [a] title[] from the unit."). Westfield Bd. of Ed., P.E.R.C. No. 88-3, 13 NJPER 635 (¶18237 1987).

Acting in a lead capacity; assigning, scheduling, guiding, directing, and overseeing the work of others; authorizing payments and performing administrative functions; and submitting reports of work completed or evaluations of others without effective recommendations for or close ties to personnel actions do not implicate supervisory status under the Act nor a substantial conflict of interest. City of Linden, D.R. No. 2011-12, 38 NJPER 159, 160 (¶46 2011); Academy Urban Leadership Charter High School, D.R. No. 2018-16, 44 NJPER 253 (¶72 2018); State of New Jersey (Dept. of Law and Public Safety), D.R. No.

93-25, 19 NJPER 385 (¶24169 1993); Jackson Tp., D.R. No. 2020-6, 46 NJPER 133 (¶30 2019).

In West Paterson Bd. of Ed., P.E.R.C. No. 77, NJPER Supp. 333 (¶77 1973), aff'd P.E.R.C. No. 79, NJPER Supp. 352 (¶79 1973), the Commission confronted the issue of the impact of the Wilton decision's reference to actual, potential, and de minimis conflicts of interest on the established practice and prior agreement statutory exceptions to the general prohibition against mixed units of statutory supervisors and non-supervisors in N.J.S.A. 34:13A-5.3 and -6(d).^{9/} The Commission explained:

Contrary to the Board, we attach great weight to the history of the parties' relationship and little weight to the possibility that at some future time an actual conflict of interest may develop. This relative distribution of weight was not a factor in Wilton since the Court was not confronted with examining an historical relationship and it specifically reserved on the question of the exceptions. The exceptions are directed to the past--the practice and agreement of the parties--and it seems elementary that past fact, not future possibility, was intended as the area for examination in making the determination: do circumstances exist which dictate an exception to the rule prohibiting mixed units? Future contingencies are an acceptable and, in fact, generally controlling consideration in most determinations concerning supervisors because, in the absence of a history, there is only expectation and probability that the

^{9/} The Commission held in P.E.R.C. No. 79 that the exceptions applied to negotiations relationships and agreements prior to the enactment of the Act in 1968, and affirmed P.E.R.C. No. 77 in all other respects.

interests of supervisor and those supervised will clash, to the detriment of some right entitled to protection. But where past experience exists, such can obviously be a more accurate gauge of probabilities than mere speculation not benefitted by hindsight. And that is, we think, what the Legislature intended: the preservation of mixed units where, in spite of this anomaly, the experience of the parties has demonstrated their ability to negotiate and administer agreements while at the same time protecting the integrity of their interests, and where that experience has further demonstrated no compelling reason to terminate or alter that relationship. Relating this interpretation to the Wilton formula, the effect of such an experience is to eliminate from significance what the Court described as potential conflict of interest, or, more precisely, to reason that while a potential for conflict may be forecast, past experience has proven it to be unrealized, not of a substantial kind but rather de minimis, and therefore, in the words of the Court 'tolerable'.

Conversely, Wilton considerations provide a frame of reference for identifying those situations where circumstances mitigate against, rather than dictate, the preservation of a mixed unit, i.e., where past experience reveals compromise of interest or significant detriment to the rights of either party, to the employees or segment thereof. Under this approach, neither a finding of established practice, prior agreement, nor an acknowledgment of possible future conflict would necessarily dispose of the question of the mixed unit's appropriateness. The history of the relationship would have to be examined.

* * *

. . . . It cannot be denied that the opportunity to be derelict has and does exist. But the performance of Baumann demonstrates, if anything, that he has been

able to faithfully serve both interests
• • •

The case reduces itself to the final position of the Board: the mere potential for conflict requires the removal of supervisors from the unit. We should think that if that possibility is to be credited as a persuasive factor, there would have been some event, conduct or pattern of behavior in the seven-year experience before this hearing which would confirm the Board's present expectation and strongly suggest, if not conclusively demonstrate, the inappropriateness claimed for this unit, and the adverse consequences resulting from its existence. The fact that the record speaks to the contrary shows the claimed potential to be insubstantial and sufficiently remote to disqualify it as a controlling factor. The record further shows that over the years the parties have successfully negotiated, concluded and administered agreements for this unit (except once, in 1970, during the pendency of the earlier case) with no showing that the interest of either party or that of the employees has been compromised. Finally, the record shows no compelling reason to disturb the existing relationship. In sum, there exists a set of circumstances which dictates an exception to the rule.

However, prior to West Paterson, the Commission in City of Union City, P.E.R.C. No. 70, NJPER Supp 295 (¶70 1972) applied a presumption in cases involving units of rank and file police or fire employees mixed with superior officers that is not applied in cases involving only superior officers or civilian employees.

The Commission explained:

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.

The intersection of the presumption of substantial conflict of interest between superior officers and rank and file in police and fire units in the absence of a clearly established de minimis situation with the actual/potential conflict of interest

dichotomy for pre-1968 negotiations relationships articulated in West Paterson was addressed in Town of West New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1987). There, the Commission held that even if the conflict of interest is potential, rather than actual, severance of rank and file from superior officers was required for even pre-1968 relationships if substantial and not clearly established as de minimis. The Commission stated:

While there was no specific factual setting where a superior officer was actually torn between his divided loyalties to his employer and his unit, thus damaging the public interest, such a standard is too exacting and is inconsistent with West Paterson especially when public safety employees are involved. Rather, we believe severance is appropriate for uniformed employees even where there has been an "established practice" where, as here, the employees' job responsibilities place him in a substantial conflict of interest with his subordinates.

However, an exception to the West New York rule was developed in several decisions involving the Town of Harrison. In Town of Harrison, D.R. No. 92-8, 18 NJPER 29 (¶23008 1991) (Harrison I), the petitioner sought to sever a unit that included rank and file and superior officers, while the incumbent representative and employer objected. The Director ordered an election after holding that rank and file will be severed from superior officers even if the latter are not statutory supervisors and regardless of whether or not they had a pre-1968 negotiations relationship. In Town of Harrison, P.E.R.C. No.

92-76, 18 NJPER 86 (¶23038 1992) (Harrison II), the Commission vacated the Director's decision, writing:

[T]here are circumstances present in this case which compel an investigation of evidence beyond that which was considered by the Director. This case is somewhat unique in that the employer has joined with the incumbent union in claiming that there is no conflict of interest between rank and file and superior officers. There is also a history of at least eighteen years which must be weighed against the potential for conflict which the Director found.

We believe, given the positions of the parties, that there are insufficient facts in the record to determine whether there is a substantial conflict of interest, either potential or actual.

The Commission remanded and the Director later assigned the matter for hearing. In Town of Harrison, H.O. No. 93-1, 19 NJPER 37 (¶24018 1993) (Harrison III), the hearing officer found that there were 50 officers in the police department (including approximately 35 patrol officers); that none of them except the Chief were statutory supervisors; that there was no pre-1968 negotiations relationship sufficient for the established practice or prior agreement exceptions to mixed units but there was a formal negotiations relationship for nearly 20 years; that during that time, there were no incidents of actual substantial conflict of interest; and that although the mere potential for conflict had existed, that potential had never actualized. The hearing officer explained:

Another very significant aspect of this case is the fact that the public employer, with the perspective and experience of a nearly 20-year collective negotiations history, has found no conflict of interest between superior and rank and file police officers and, like the incumbent employee organization, does not seek to modify the existing negotiations unit. Substantial weight should be given to the employer's position that the Town's interest has not been compromised since it is the employer who is responsible for maintaining the public's health, safety and welfare. While the Town's position is not determinative, it must be considered as a significant factor in the absence of evidence that the employees' interests have not been served during the lengthy existence of this negotiations unit.

The hearing officer found the extant unit to be appropriate and recommended that it be maintained. In Town of Harrison, P.E.R.C. No. 93-104, 19 NJPER 268 (¶24134 1993) (Harrison IV), the Commission adopted the hearing officer's findings of fact and recommendation to dismiss the severance petition. The Commission added:

There has not been a single incident amounting to an actual substantial conflict of interest. Although there may be a potential conflict of interest, as there is in any police department, in nearly 20 years that potential has never been realized. Further, in our remand we noted that the history of stable labor relations must be weighed against the potential for conflict. Here there has been a stable negotiations relationship for at least 18 years and no actual substantial conflict of interest has materialized.

. . . . This is the first time that we have considered severance of superior officers

where the employer contends that there has been no conflict between superior and rank-and-file officers. The employer's experience is relevant because it has been in a key position over the decades to assess whether the potential for a conflict of interest has been realized. In the absence of any evidence of a conflict undermining its managerial interests, the employee's position is an important consideration.

The Commission distinguished West New York because there the employer had not taken any position regarding severance. Thus, under the holding of Harrison IV, where both the incumbent representative and employer oppose severance on the basis of a lack of conflict of interest, we will find potential conflicts of interest between rank and file and superior officers to be de minimis where they have not been actualized or resulted in divided loyalties or compromised interests during a lengthy negotiations relationship, even for post-1968 negotiation relationships involving units that are not small.^{10/} Cf. West Paterson ("Relating this interpretation to the Wilton formula, the effect of such an experience is to eliminate from significance what the Court described as potential conflict of interest, or, more precisely, to reason that while a potential

10/ City of Union City referenced a small police department as merely an example of where a de minimis situation might typically be established for a mixed line and superior officer unit. Harrison IV provides an example for a larger unit. As explained in Brookdale Community College, D.R. No. 2017-10, 43 NJPER 216 (¶66 2016), the size of the unit is a relevant but not dispositive factor, and even small units may be found to have impermissible conflicts of interest.

for conflict may be forecast, past experience has proven it to be unrealized, not of a substantial kind but rather de minimis, and therefore, in the words of the Court 'tolerable'").

Contrary to FOP's argument, the initial presumption of conflict of interest applied to units that include rank and file officers with superior officers (which is only overcome when a party clearly establishes a de minimis situation) does not apply when analyzing units consisting of only superior officers. In City of Union City, where the presumption was first articulated, the Commission found under the facts of that case, that the presumption was not overcome and allowed the severance of all superior officers ranks (excluding the Chief and Deputy Chief who were found to be statutory supervisors) from a unit that included rank and file officers. Although the extant unit representative questioned whether each superior officer rank would require its own unit, the Commission noted that no party to the case had sought that arrangement and that the issue need not be decided at that time. The Commission found the unit of different ranks of superior officers to be appropriate, without presuming that there was an intolerable conflict of interest.

Similarly, in West New York, the Commission approved a petition seeking to carve out a unit of sergeants, lieutenants, and captains from a unit that also included rank and file officers, even though there had been a pre-1968 negotiations

relationship. In determining that even potential conflicts of interest (in the absence of the employer arguing that such conflicts had not been actualized) warranted severance, the Commission only applied the presumption of conflict to the relationship between rank and file officers and superior officers, not to the relationship of the various superior officer ranks with each other.

Fair Lawn Boro., D.R. No. 79-30, 5 NJPER 165 (¶10091 1979), decided after City of Union City, clearly shows the different approach taken when analyzing the appropriateness of mixed units of rank and file and superior officers, compared with units of only superior officers. In Fair Lawn, the petitioner sought a unit of superior officers of several ranks, which would require severing sergeants from a unit that also included patrolmen. The incumbent representative of the sergeants and patrolmen unit opposed the severance and argued that a more serious conflict existed between sergeants and the other superior officer ranks. The Director summarized the cases that provided for the presumption of a conflict of interest between rank and file officers and superior officers unless exceptional circumstances are demonstrated. The Director found that the record did not demonstrate that the exceptions applied and determined that severance of the sergeants from the patrolmen was appropriate. By contrast, the Director wrote that the record did not establish

that there was a substantial potential conflict of interest in the inclusion of sergeants in the superior officers unit, and he explicitly declined to speculate (merely on the basis of the incumbent representative's allegations) that there was a sufficient potential for Wilton conflict to warrant finding that the proposed unit was inappropriate. Stated differently, the Director did not presume an inherent conflict as with the patrolmen that required the party opposing severance to establish an exception; rather, he required the party asserting potential conflict as between levels of supervisory ranks to establish such conflict in the record.

Teaneck Tp., H.O. No. 87-21, 13 NJPER 557 (¶18203 1987), modified P.E.R.C. No. 88-20, 13 NJPER 721 (¶18270 1987) also demonstrates the Commission's preference for broader superior officer units and the absence of a presumed conflict. In that case, a captains association filed a representation petition seeking to represent a unit of previously unrepresented captains. The employer argued that it was more appropriate for the captains to be included in an existing unit of sergeants and lieutenants. The hearing officer noted the numerous cases where the Commission found broad superior officer units appropriate and distinguished West New York's presumption of conflict when patrol officers are involved. He also noted that since the employer was in the best position to determine if its managerial efficiency was

compromised, its assertion that there was no conflict of interest should be given adequate deference, despite the paramilitary employment model and clearer delineation of authority, in the absence of facts establishing something more than a de minimis conflict of interest between the captains and the other police superiors. He found that the captains association did not establish a substantial conflict of interest. The Commission agreed that superior officer units are normally approved since public policy favors broad-based negotiations units, and also agreed that the community of interest among the captains and the other superior officers outweighed any conflict of interest suggested by the record. The Commission ultimately dismissed the petition of the captain's association due to a concern for an undue proliferation of small units.^{11/} See also Montville Tp., H.O. No. 87-13, 13 NJPER 333 (¶18138 1987); adopted P.E.R.C. No. 87-140, 13 NJPER 483 (¶18178 1987) (dismissing Township's petition seeking to exclude captains from superior officers unit);

11/ The hearing officer had recommended a separate unit not because of conflict of interest but because he was not persuaded that a separate unit would cause undue proliferation and because the sergeants and lieutenants association, which was not shown by the hearing record to be affiliated with the captains association, had indicated its opposition to including captains. In determining that undue proliferation was a concern, the Commission found that the two associations did have ties, and that the sergeants and lieutenants association had not asserted that it would refuse to represent the captains.

a finding of merely some evaluative responsibility did not establish a substantial potential conflict of interest).

In Monmouth Cty. Sheriff's Office, D.R. No. 2015-6, 41 NJPER 508 (¶159 2015), no substantial potential supervisory conflict of interest was found between captains and the existing unit of lieutenants and sergeants. The employer did not provide any examples of the captains responding to grievances on the employer's behalf; evaluations were not directly tied to personnel actions; and disciplinary charges could only be filed with the approval of the undersheriff. The Director found that the authority of captains over their subordinates was similar to the authority that lieutenants and sergeants wielded over their respective subordinates, such as evaluating, testifying against them in disciplinary proceedings, approving their leave time, authorizing overtime assignments, and participating as part of a panel for promotions. The Director found that these facts did not indicate that the captains' inclusion would create anything more than a de minimis conflict, and distinguished as having "little bearing" those cases involving rank and file patrol officers, that would presume an intolerable conflict of interest.^{12/}

^{12/} The Director nevertheless found that the captains should be excluded because of their confidential status.

In City of Burlington, D.R. No. 2004-7, 29 NJPER 501 (¶158 2003), the Director wrote:

There is a presumed community of interest among levels of superior officers in police units

* * *

Determination of supervisory conflict of interest requires more than a job description or bald assertion that an employee has authority to hire, discharge, discipline, assign, evaluate, or promote other employees. The Commission requires evidence that the authority is regularly exercised [U]nless the authority claimed is actually exercised with some regularity by the employee in question, the mere claim of possession of the authority is a sterile attribute unable to support the actual finding of such authority

Although the job description for the captain in that case described the authority to discipline sergeants and lieutenants, the employer had not formally or informally given the captain that authority. Accordingly, the Director did not find even a de minimis conflict of interest. The Director also noted the Commission's policy on broad-based units and that the single captain would otherwise be denied representation until at least one other captain was hired to allow for a narrow captains-only unit. The Director clarified the captain as being included within the superior officers unit. See also U.M.D.N.J., D.R. No. 2007-12, 33 NJPER 97 (¶33 2007) (accreting lieutenant to sergeants unit where employer did not provide sufficient facts

demonstrating impermissible conflict of interest; employer did not show lieutenant evaluated subordinates or assisted in disciplining them, despite recitation of those duties in printed job descriptions).

Thus, cases involving alleged conflicts of interest among different superior officer ranks do not utilize a presumption of conflict and are treated similarly to cases involving civilian units, where the party alleging conflict must establish in the record the job duties actually and regularly performed that demonstrate the asserted conflict. See Jackson Tp., D.R. No. 2016-4, 42 NJPER 389 (¶110 2015) (no conflict found where Township, which asserted conflict, did not provide any examples of unit employees entertaining grievances or providing evaluations or recommendations concerning other unit employees that were relied on by the administration in rendering disciplinary decisions or implementing personnel actions).^{13/}

13/ Cf. Camden Housing Auth., D.R. No. 2014-7, 40 NJPER 219 (¶84 2013) (holding that petitioner did not meet its burden of producing adequate and competent evidence comparing job duties actually performed through work samples or certifications to demonstrate confidential or managerial executive status); City of Burlington, H.O. No. 2002-1, 28 NJPER 1 (¶33000 2001) (holding that the party seeking application of a statutory exemption bears the burden of proving its applicability), citing NLRB v. Ky. River Cty. Care, Inc., 532 U.S. 706, 711-12 (2001) (finding that the Board's burden rule was supported by the general rule that the burden of proving applicability of a special exception generally rests on the one who asserts it and because it was (continued...)

This case involves an extant unit of superior officers that excludes rank and file sheriff's officers. Accordingly, the City of Union City presumption of conflict when rank and file officers are also involved does not apply. Rather, there is a "presumed community of interest" among the superior officers. City of Burlington. As the County and the incumbent representative, PBA, oppose FOP's proposed severance of sheriff's sergeants from the broader superior officer unit, FOP needed to have submitted facts showing that the duties actually and regularly performed by employees in the other unit titles created a substantial rather than a de minimis conflict of interest. Id. I find that FOP did not establish a substantial conflict of interest warranting severance.

FOP submitted evaluation forms filled out by a sheriff's lieutenant for a sheriff's sergeant. However, FOP has not submitted evidence or certified statements that such evaluations are closely tied to personnel actions. Recommendations for personnel actions are not shown on the forms. The forms, with separate signature lines for a supervisor and evaluator, also suggest that the evaluations are subject to independent review. Sheriff Scott certifies that the Sheriff has broad discretion to

13/ (...continued)

easier for the asserter to prove the exercise of the relevant duties than to disprove the exercise of any relevant duties).

modify or reject the findings in the initial performance evaluation and maintains final, binding authority over all performance evaluations.

FOP submitted unsigned overtime report forms and certifies that sheriff's lieutenants assign and approve overtime for sheriff's sergeants. FOP certifies that sheriff's sergeants are under the "direct supervision" of sheriff's lieutenants and sheriff's captains and that the Middlesex County Sheriff's Office Manual defines a lieutenant as a "middle management law enforcement administrator" and a captain as a "high-ranking law enforcement administrator." The only duties specifically identified by FOP are those related to evaluations and overtime; commanding the tour; performing roll call; and, for captains, serving as Director and having complete charge of the shift. However, a recitation of titles and generalized written duties in a job description or personnel manual can't substitute for a proffer of specific actual and regularly performed duties; and, of the duties specifically identified, a showing of how they are tied to personnel actions. In the absence of such a proffer, I cannot detect a substantial conflict of interest. Monmouth Cty. Sheriff's Office; City of Linden; Academy Urban Leadership Charter High School, State of New Jersey (Dept. of Law and Public Safety); Jackson Tp.

FOP does not allege that the other unit titles hire, fire, or promote sheriff's sergeants or effectively recommend those actions. With regard to the role of sheriff's captains and sheriff's lieutenants in disciplining sheriff's sergeants, the FOP hasn't elaborated upon that process, nor identified where such authority is set forth, or when that authority was previously exercised. No documents reveal any disciplinary actions taken by lieutenants and captains against sergeants.

Sheriff Scott certifies that the Sheriff has final, binding authority over all hiring, firing, and disciplinary decisions; that there are no prior recommendation steps; and, accordingly, there are no applicable recommendations that could have been changed or followed. She certifies that the Sheriff is responsible for initiating disciplinary investigations and the filing of charges, pursuant to the outcome of the investigations.

Only two incidents in the record concern discipline and investigations of sheriff's sergeants. In one, a superior officer reported misconduct or deficient performance of a sheriff's sergeant for feigning sickness. However, the Sheriff initiated the disciplinary process by calling on the Internal Affairs Division to further investigate the matter. In the other incident, a sheriff's captain met with a sheriff's lieutenant and a sheriff's sergeant after both had filed a complaint against one another. The sheriff's captain reported to the Sheriff about his

meeting with both officers, and the Sheriff determined that it was not necessary to initiate the disciplinary process. Thus, the record shows that sheriff's captains and sheriff's lieutenants have no formal role in the disciplinary process itself, and that decisions to initiate the process and conduct formal investigations are made by the Sheriff. As in Monmouth CTY. Sheriff's Office, where disciplinary charges could only be filed with the approval of the undersheriff (although unit employees could testify in disciplinary hearings), there is no evidence presented here of a substantial conflict of interest.

The FOP refers to the CNA's grievance procedure in maintaining that, for grievances filed by or on behalf of sergeants, their immediate superiors serve as Step 1 designees. However, the FOP hasn't identified any particular grievances where that happened. No documents show that lieutenants or captains acted on behalf of the public employer as a Step 1 designee for grievances concerning sergeants, or otherwise rebutting the certifications and documents from Sheriff Scott and Lieutenant Neder indicating that the practice has been for such grievances to be initially presented to the Sheriff, directly. The mere claim of authority under a job description is a sterile attribute without a showing that the authority is actually and regularly exercised. City of Burlington. Similarly, the mere claim of a role in the grievance process under a collective

negotiations agreement is a "sterile attribute" when the parties to that agreement have in practice followed a grievance process in which no unit employees act on behalf of employer interests for grievances filed by or on behalf of subordinates.

Without evidence in the record that other unit titles actually and regularly hire, fire, promote, discipline, or effectively recommend such personnel actions regarding sheriff's sergeants; or serve the public employer's interests in the grievance process; and without evidence of actual compromised interests, I find that the FOP has not demonstrated even a potential substantial conflict of interest.

Even if I were to find that the written (but not followed) contractual grievance procedure created a potential conflict of interest or that the presumption of conflict for units also including rank and file officers applied - which I do not find - I would nevertheless find under the facts of this case that the presumption is overcome and that a de minimis situation is clearly established.

Harrison IV is the relevant precedent. In that case, because both the incumbent representative and employer opposed severance on the basis of a lack of conflict of interest, we found that the potential conflicts of interest between rank and file and superior officers were de minimis because they had not been actualized or resulted in divided loyalties or compromised

interests during the 18-year post-1968 negotiation relationship in the 50-officer police department.

In this case, both the incumbent representative and employer oppose severance on the basis of a lack of conflict of interest. No evidence has been presented that shows that any potential conflict of interest (if presumed from the CNA's written but unfollowed grievance procedure or from the paramilitary structure or rituals) has been actualized or resulted in divided loyalties or compromised interests (i.e., actual conflict of interest). The unit has included sheriff's sergeants with sheriff's lieutenants and sheriff's captains since at least 1977, making its stable negotiations relationship with the County even longer than the relationship in Harrison IV. The list of unit employees, provided by the County in the initial processing of this case, shows that the unit has 20 officers,^{14/} even smaller than the unit sustained in Harrison IV. Thus, the factual conditions are present in this case to find that any potential for conflict has been unrealized by past experience and not substantial, but rather de minimis and tolerable. Harrison IV; Teaneck Tp.; Cf. West Paterson. Therefore, since any conflict of interest is not substantial, it cannot be the basis for severance.

^{14/} In its first position statement, FOP estimated approximately 28 officers.

In the absence of any other proffered reason why PBA's unit is inappropriate, I find PBA's unit to be appropriate. FOP has not averred any other valid basis for severance to disturb the existing appropriate unit. See Jefferson. Accordingly, I find that PBA's existing unit is the most appropriate unit and dismiss FOP's representation petition.

ORDER

The representation petition of Middlesex Sheriff's Sergeants Association, FOP Lodge 59 is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

/s/Jonathan Roth
Jonathan Roth
Director of Representation

DATED: April 6, 2020
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 April 21, 2020.