

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EGG HARBOR TOWNSHIP,

Public Employer,

-and-

Docket No. RO-84-52

EGG HARBOR TOWNSHIP SUPERIOR
OFFICERS ASSOCIATION,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission dismisses a representation petition which the Egg Harbor Township Superior Officers Association filed. The Association sought to represent a negotiations unit of the Township's police chief and police captain. The Township objected to the petitioned-for unit because, it claimed, the police chief and captains were managerial executives under the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A3(d). The Commission holds, pursuant to a statutory amendment in 1981, N.J.S.A. 40A:14-118, and an Appellate Division opinion issued in 1984, Gauntt v. Mayor and Council of the City of Bridgeton, 194 N.J. Super. 468 (App. Div. 1984), that municipal police chiefs in New Jersey must be conclusively presumed to be managerial executives within the meaning of the New Jersey Employer-Employee Relations Act and thus not entitled to the protections of that Act.

Prior to 1981, the Commission presumed that municipal police chiefs would ordinarily be considered managerial executives, but also held that this presumption could be rebutted if unusual circumstances were present indicating that a particular police chief played no or little role in the formulation or effectuation of departmental policies. In re Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980).

In 1981, the Legislature amended N.J.S.A. 40A:14-118 to ensure that once a municipality appointed a police chief, that police chief would have full power to operate the police department and effectuate departmental policies. Prior to this amendment, that statute did not confer any power or authority upon police chiefs and did not prevent local officials from interfering with the operation of the police force.

In 1984, the Appellate Division interpreted this statute and made clear that appointed police chiefs had complete power and responsibility over the operation of their police departments

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Petitioner.

Appearances:

For the Public Employer, Steven S. Glickman, Esq.

For the Petitioner, Edgar Unsworth & Alfred Lisicki,
Pro Se

DECISION AND ORDER

On October 28, 1983, the Egg Harbor Township Superior Officers Association ("Association") filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission. The Association seeks to represent a negotiations unit composed of Egg Harbor Township's ("Township") police chief and police captain.

On November 14, 1983, the Township filed a response objecting to the petitioned-for unit. It asserts that the police chief and captain are managerial executives under the New Jersey Employer-Employee Relations Act, specifically, N.J.S.A. 34:13A-3(d), and thus may not be included in any collective negotiations unit. It further argues that even if the police captain is not a managerial executive, a negotiations unit may not consist of only one employee.

On December 8, 1983, the Administrator of Representation issued a Notice of Hearing. On January 5, 18, and 23, 1984, Hearing Officer Judith E. Mollinger conducted a hearing. The parties examined witnesses, introduced exhibits, and submitted post-hearing briefs by April 6, 1984.

On June 22, 1984, the Hearing Officer issued her report and recommended decision, H.O. No. 84-16, 10 NJPER ____ (¶ ____ 1984) (copy attached). She found that the police chief and police captain were not managerial executives; there was no conflict of interest between the police chief and police captain; and the proposed unit was appropriate for collective negotiations. Accordingly, she recommended that a representation election be directed in this unit.

On July 9, 1984, after receiving an extension of time, the Township filed exceptions. It asserts that the police chief and police captain are managerial executives and that the proposed unit is therefore inappropriate for collective negotiations.

Pursuant to N.J.A.C. 19:11-8.8, the Commission has transferred this case to itself for appropriate action.^{1/}

We have reviewed the record. While we adopt and incorporate the Hearing Officer's findings of fact (pp. 2-18), we add the following facts.

^{1/} The parties asked to have consideration of the Hearing Officer's report held in abeyance while they tried to settle this matter. When these efforts were unsuccessful, they requested that consideration proceed.

Daily Operations

The parties stipulated that:

[t]he day-to-day operations of the department other than the work hours, which [are] contractually controlled, are handled by various superior officers through the chain of command.

These operations include shift assignments, manpower per shift, daily duty assignments, when and where breaks and lunches are to be taken, vacation schedules, overtime schedules, assignment of police vehicles, and maintenance of personnel files. The chief is at the top of the command chain and thus has control over these matters.

The Township Committee has the power to delegate to department heads, such as the police chief, certain powers statutorily granted to the Township. The Township Committee has vested the chief with wide discretion to run the department. For example, when the chief was first appointed, the Committee informed him that he was empowered and expected to correct deficiencies in the department. The chief then implemented several changes, including shift changes designed to re-establish the chain of command. The committee had not ordered or approved these changes.

The chief has often exercised his authority to reorganize the department. In 1977, the chief ordered and implemented an immediate shift change due to a manpower shortage. In 1979, to bring about a more unified command, the chief recommended,

and the governing body approved, a reduction from three to two divisions and the establishment of the rank of captain as Division Commander. The chief also created the job description for the new rank and recommended the two officers appointed to fill the positions. In 1981, the chief recommended, and the governing body approved, a new table of organization which eliminated one captain's position and established lieutenants as Division Commanders.

The chief also has the authority to make and change assignments without prior approval of the governing body. In addition, the chief has discretion, without the need for an authorizing ordinance, to reorganize the department through the creation of a new bureau.

The chief's authority to run the department also encompasses using outside experts. For example, adopting the recommendations of an expert he retained, the chief implemented overlapping nine hour shifts in order to correct manpower shortages during shift changes.

The chief informs the governing body how he runs the department. His memoranda detail the changes made and recommend further improvements.

Collective Negotiations

The chief was a member of the Township's negotiating team during the negotiations which led to the 1979-1980 agreement. He participated in the Township's caucuses and advised the committee about the department's policies and the impact of particular proposals on those policies.

Budget and Expenditures

The governing body bases the budget on detailed proposals which the chief submits. The chief proposes some line items directly and has the power to determine the amounts allocated to various line items in the budget proposal. The chief and his subordinates have advised the Township Committee about the necessity and priority of budget line items. For example, the police department's budget rose from \$65,000 in 1978 to \$150,000 by 1980. The governing body then reviewed the budget in detail with the chief. The chief and the committee developed priorities to determine whether the Township could afford a particular line item. This procedure has been followed ever since. Furthermore, the Committee, following budget meetings, has sought more input from the chief on budget items to determine their priority. The mayor testified that in his five years on the Township Committee he could not remember the Committee telling the chief he could not purchase an item he believed necessary.

The final budget contains a lump sum for the police department except for a specific allocation for police vehicles. In almost all cases, it appears that the chief is given wide discretion to spend appropriated monies in the manner he thinks best. Further, the chief has, and has exercised, the right to make purchases and obtain delivery of items up to \$4500 without prior approval of the Committee.

We now consider whether the Township's police chief is a managerial executive. In the past, we have recognized that

municipal police chiefs must ordinarily be considered managerial executives, but have found that unusual circumstances may lead to the conclusion that a particular police chief is not a managerial executive. In re Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980) ("Montvale"). We have thus considered the managerial executive status of police chiefs on a case-by-case basis.

Since our 1980 Montvale decision, however, the Legislature has amended N.J.S.A. 40A:14-118 to broaden the powers and duties of municipal police chiefs and to limit correspondingly the ability of governing bodies to intervene in a chief's operation of the police department. This change in the law makes inappropriate continued case-by-case inquiries into whether municipal police chiefs are managerial executives under our Act. Instead, we believe this change warrants converting Montvale's rebuttable presumption of managerial executive status into an irrebuttable one. Accordingly, we hold that the Township's police chief is a managerial executive.^{2/}

Section 13A-3(f) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., defines "managerial executives" as those "persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices." Montvale set forth the following standards for

^{2/} Given this analysis, we need not determine whether the Hearing Officer correctly applied the Montvale tests to the facts of this case.

determining whether a person is a managerial executive under this definition:

A person formulates policies when he develops a particular set of objectives designed to further the mission of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises.
6 NJPER at pp. 508-509.

See also In re County of Bergen, Bergen Pines County Hospital, D.R. No. 83-8, 8 NJPER 535 (¶13245 1982), request for review den. P.E.R.C. No. 83-76, 9 NJPER 47 (¶14022 1982), aff'd App. Div. Docket No. A-564-82T2 (10/18/83).

Montvale stressed that the chief law enforcement officer of a governmental entity must ordinarily be considered a managerial executive. The particular facts of Montvale, however, demonstrated an unusual situation in which the chief played no role in the formulation of policy and little role directing its effectuation in any but the most routine matters. We found especially significant the frequent intervention of the mayor and police commissioners in daily departmental affairs and their preemption of the chief's decision-making powers in serious cases. In essence, the title

of police chief was not reflective of the powers the chief actually possessed. Therefore, under the facts of that case, the police chief was not a managerial executive.

Prior to August 24, 1981, N.J.S.A. 40A:14-118 gave the governing body of a municipality authority to establish a police department by ordinance; provide for its maintenance, regulation, and control; appoint officers and establish their powers, functions, and duties, and adopt and promulgate regulations for departmental government and discipline. Since this statute did not then mention police chiefs, the New Jersey Supreme Court held that the statute conferred no power or authority upon police chiefs. Instead, police chiefs possessed only those powers that governing bodies conferred upon them by ordinances, resolutions, rules and regulations. Thus, a police chief, as in Montvale, might be a chief in name only. Smith v. Tp. of Hazlet, 63 N.J. 523 (1973).

Effective August 24, 1981, N.J.S.A. 40A:14-118 was amended to specify the powers of municipal police chiefs. This statute now provides:

The governing body of any municipality, by ordinance, may create and establish as an executive and enforcement function of municipal government, a police force, whether as a department or as a division, bureau or other agency thereof, and provide for the maintenance, regulation and control thereof. Any such ordinance shall, in a manner consistent with the form of government adopted by the municipality and with general law, provide for a line of authority relating to the police function and for the adoption and promulgation by the appropriate authority of rules and regulations for the government of the force and for the discipline of its members. The ordinance may provide for the appointment of a

chief of police and such members, officers and personnel as shall be deemed necessary, the determination of their terms of office, the fixing of their compensation and the prescription of their powers, functions and duties, all as the governing body shall deem necessary for the effective government of the force. Any such ordinance, or rules and regulations, shall provide that the chief of police, if such position is established, shall be the head of the police force and that he shall be directly responsible to the appropriate authority for the efficiency and routine day to day operations thereof, and that he shall, pursuant to policies established by the appropriate authority:

a. Administer and enforce rules and regulations and special emergency directives for the disposition and discipline of the force and its officers and personnel;

b. Have, exercise, and discharge the functions, powers and duties of the force;

c. Prescribe the duties and assignments of all subordinates and other personnel;

d. Delegate such of his authority as he may deem necessary for the efficient operation of the force to be exercised under his direction and supervision; and

e. Report at least monthly to the appropriate authority on the operation of the force during the preceding month, and make such other reports as may be requested by such authority.

As used in this section, "appropriate authority" means the mayor, manager, or such other appropriate executive or administrative officer, such as a full-time director of public safety, or the governing body or any designated committee or member thereof, or any municipal board or commission established by ordinance for such purposes, as shall be provided by ordinance in a manner consistent with the degree of separation of executive and administrative powers from the legislative powers provided for in the charter or form of government either adopted by the municipality or under which the governing body operates.

Except as provided herein, the municipal governing body and individual members thereof shall act in all matters relating to the police function in the municipality as a body, or through the appropriate authority if other than the governing body.

Nothing herein contained shall prevent the appointment by the governing body of committees or commissions to conduct investigations of the operation of the police force, and the delegation to such committees or commissions of such powers of inquiry as the governing body deems necessary or to conduct such hearing or investigation authorized by law. Nothing herein contained shall prevent the appropriate authority, or any executive or administrative officer charged with the general administrative responsibilities within the municipality, from examining at any time the operations of the police force or the performance of any officer or member thereof. In addition, nothing herein contained shall infringe on or limit the power or duty of the appropriate authority to act to provide for the health, safety or welfare of the municipality in an emergency situation through emergency directives.

In Quaglietta v. Haledon, 182 N.J. Super. 136 (Law Div. 1981) ("Quaglietta"), the Court stated that this legislation was intended:

...(1) to provide for a line of authority with respect to the exercise of the police function in municipalities; (2) to establish the police force as an executive and enforcement function of municipal government; (3) to grant municipalities the sole option of determining whether to establish the position of police chief; (4) to grant statutory powers to police chiefs by mandating that they shall be in charge of their departments and providing for their specific duties and responsibilities, but only in those instances where the position of police chief is established by the municipal governing body; (5) to prevent interference by elected officials individually in the operation of the police force and (6) to designate the "appropriate authority" to exercise regulatory power over the police function in each form of government.
Id at 145. (Emphasis supplied)

The Court then found invalid an ordinance which divested a police chief of his statutory authorities and instead placed these authorities in a police director occupying a position between the chief and the governing body. Thus, by amending the statute, the Legislature withdrew from a municipality, once it appointed a

police chief, the power to prescribe the chief's duties and to interfere with the chief's operation of the force. In short, N.J.S.A. 40A:14-118 confers statutory powers upon police chiefs which insure that they are chiefs in more than name.

In Gauntt v. Mayor & Council of the City of Bridgeton, 194 N.J. Super. 468 (App. Div. 1984) ("Gauntt"), the Appellate Division of the Superior Court recently reviewed the legislative history of the amendment to N.J.S.A. 40A:14-118. The Court concluded that while municipal governing bodies retain the authority to fix policy and formulate fundamental principles and broad guidelines, chiefs of police now have responsibility for effectuating those principles through their responsibility for the efficiency and routine day to day operation of their police departments. Acting on a police chief's complaint in lieu of prerogative writ, the Court restrained the defendant's mayor and director of the police department from interfering with the police chief's duties and responsibilities under N.J.S.A. 40A:14-118. In particular, the Court found that under N.J.S.A. 40A:14-118, the chief of police now has complete power to prescribe the duties and assignments of police personnel; to have officers report to him rather than the governing body; to appoint officers to specific positions, including Acting Chief of Police; to make transfers and interdivisional assignments without the prior approval of the governing body, and to institute disciplinary proceedings.^{3/}

^{3/} The Court did not agree with the plaintiff police chief that N.J.S.A. 40A:14-118 gave police chiefs absolute rights to determine the department's internal structure and to be the hearing officer in discipline cases.

Under N.J.S.A. 34:13A-3(f), an employee is a managerial executive if he or she is charged "...with the responsibility of directing the effectuation of management policies and practices...." We believe that N.J.S.A. 40A:14-118, as interpreted in Quaglietta and Gauntt, invests municipal police chiefs with precisely that responsibility in the operation of police departments. Thus, this statutory command establishes that police chiefs are managerial executives and eliminates the need for case-by-case inquiries into the powers a particular municipal police chief actually uses and the extent of a governing body's interference with such powers. Under Gauntt, any contention that a particular police chief's powers and duties under N.J.S.A. 40A:14-118 are being illegally interfered with must be litigated in a court action in lieu of prerogative writ, rather than a representation proceeding before this Commission.^{4/}

Having determined that the Township's police chief is a managerial executive, we must dismiss the instant petition. Regardless of whether or not the police captain is also a managerial executive, a one employee negotiations unit would be inappropriate. Mass v. Borough of Shrewsbury, P.E.R.C. No. 79-42, 5 NJPER 45 (¶10030 1979), aff'd 174 N.J. Super. 25 (App. Div. 1980), certif. den. 85 N.J. 129 (1980).

^{4/} We, of course, express no opinion as to whether N.J.S.A. 40A:14-118 has been violated in this case. We also caution that N.J.S.A. 40A:14-118's broadening of the authority of police chiefs does not displace the obligation of municipalities and their representatives, including police chiefs, to comply with their negotiations obligations and other responsibilities under our Act.

ORDER

The Petition for Certification of Public Employee Representative filed by the Egg Harbor Township Superior Officers Association is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hipp, Newbaker, Suskin and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
November 1, 1984
ISSUED: November 2, 1984

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

In the Matter of

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Public Employer,

-and-

DOCKET NO. RO-84-52

EGG HARBOR TOWNSHIP SUPERIOR
OFFICERS ASSOCIATION,

Petitioner.

Synopsis

A Hearing Officer of the Public Employment Relations Commission finds that the police chief and police captain of the Township of Egg Harbor are not managerial executives within the meaning of the New Jersey Employer-Employee Relations Act. Further she finds that no substantial conflict of interest prevents the inclusion of both positions in a unit of superior officers.

She recommends a secret mail ballot election for a collective negotiations unit of superior officers comprised of the chief and captain.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The report is submitted to the Commission for review of the report, any exceptions thereto and the record. The Commission may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law.

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Petitioner.

Appearances:

For the Public Employer
Steven S. Glickman, Esquire

For the Petitioner
Edgar Unsworth & Alfred Lisicki, pro se

HEARING OFFICER'S
REPORT AND RECOMMENDATIONS

On October 28, 1983, a Petition for Certification of Public Employee Representative was filed with the Public Employment Relations Commission ("Commission") by the Egg Harbor Township Superior Officers Association ("Association") seeking a collective negotiations unit of the police chief and the police captain employed by the Egg Harbor Township ("Township") (C-1). ^{1/} *

In its response filed November 14, 1983, ^{2/} the Township objected to the unit. It argued that the chief was a managerial position within the definition of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") and that this position should therefore be excluded from the unit and since a one-member unit is not appropriate the police captain would not be

*Footnotes appear at the conclusion of this decision.

entitled to form a unit, even if his position were to be established as non-managerial.

Pursuant to a Notice of Hearing issued December 8, 1983, a hearing was held January 5, 18 and 23, 1984. At the hearing, the parties were given an opportunity to examine witnesses, to present evidence and to argue orally. The parties waived oral argument and both submitted post-hearing briefs by April 6, 1984. Neither party filed reply briefs and the record was closed.

Therefore, a dispute exists concerning the composition of a collective negotiations unit and the matter is properly before the Hearing Officer for Report and Recommendations.

Issues

1. Is the police chief of Egg Harbor Township a managerial executive within the meaning of the Act?
2. Is the police captain of Egg Harbor Township a managerial executive within the meaning of the Act?

Findings of Fact

Based on the entire record of these proceedings the Hearing Officer makes the following findings of fact:

1. Egg Harbor Township is a public employer within the meaning of the Act; it is subject to the provisions of the Act (Tl. 10).^{3/}
2. The Association is an employee representative within the meaning of the Act; it is subject to the provisions of the Act (Tl. 10).
3. The Township of Egg Harbor is governed by a five member Township Committee ("Committee") (Tl. 86). All members are elected

and serve part-time. One member of its Committee serves as its chairman and holds the title "Mayor." The Committee is divided into subcommittees, each of which oversees a specific operation of the Township's administrative departments (T1. 87; J-2 Section 2-8.3).

4. The Township administrative organization is divided into various departments: communications, roads, courts, finance, treasury, recreation, buildings and police (T3. 61-62). A department head manages each department and reports directly to the Committee (T3. 63). The Committee is vested with authority to oversee the various Township departments including the police (J-2 Section 2-8.3). There is no chief administrator for the Township (T3. 63).

5. The police department has 51 officers (T3. 31, 92). Its budget for 1978 was \$65,000 a year; in 1980 it had increased to \$150,000 per year (T3. 29). The 1983 budget request was for \$375,000; the Committee approved a budget for \$250,000 (T3. 30). The chief is the executive officer of the police department; his position is similar to that of all the other department heads (T3. 58; J-2 Section 2-8.4). Next to the chief, in descending order of supervision, is the administrative captain (J-75) - a position whose status is the subject of this proceeding.

The police department is further divided into two sub-divisions (J-75): the Criminal Investigation Division ("CID") and the Patrol Division. These divisions have equal status. Patrol division is commanded by Lieutenant Habermarhl (T1. 41). The division commanders report directly to the captain and chief (J-9, 75). They oversee and direct the work of sergeants, patrol officers, and clerical staff

(Tl. 55). The functions of CID staff are to conduct various criminal and civil investigations, internal police investigations, criminal history and background checks on applicants for liquor or merchantile licenses (Tl. 27), and other related duties (Tl. 55). The functions of the staff in the patrol division include traffic duty, vehicle auctions, and taxi safety inspections (Tl. 61, 71).

Division commanders take directions from both the chief and Committee members (Tl. 41). Committee members often make direct inquiries of the CID's and patrol division's staff regarding ongoing investigations, vehicle inspections and vehicle auctions (Tl. 61). For example, patrol division was recently given direct orders by Committee members, to expedite car auctions (Tl. 61) and to forward all requests for street lights directly to the Committee clerk's office for approval (Tl. 66, 67).

Changes in the table of organization for the police department are finalized by the Committee, sometimes upon the recommendations of the chief (J-71, 72, 73). Recently the chief recommended a single administrative captain position, the one in dispute here; this recommendation was adopted (J-3, 9, 37, 39, 75, Section 2-8.4a).

6. Sergeants, lieutenants and all full-time patrol officers are in a collective negotiations unit represented by Local 77, P.B.A. Inc. ("PBA") (J-1). Negotiations between the Committee and the PBA are conducted by members of the Committee itself (P-1). The chief is not included in either the actual negotiations or Committee caucuses (T2. 12). The chief has participated in collective negotiations twice in the last few years: in 1976, for the 1977-78 contract and in 1978,

for the 1979-80 contract. His participation was limited, though he did represent the Committee and attend its caucuses. His participation involved advisory duties but no participation in any decision-making processes (T2. 11-13). He was not asked to participate in collective negotiations for contracts covering the years 1981, 1982 or 1983 (T2. 12). Since the earlier negotiations, the chief has had no involvement in collective negotiations.

7. Chief Unsworth was appointed acting police chief in October 1976 and his position was made permanent July 1977 (T2. 10; J-4). The chief's job description and duties are set out in Section 2-8.4 of the Egg Harbor Ordinances. According to that section, his responsibilities in the Township are commanding the police force, controlling the assignment and stationing of the members and directing the police work. His authority is subject to the Committee's rules, regulations and orders; he may also perform other duties required by the Committee. The terms and conditions of his employment are set by the Committee. His salary, vacation schedule, sick leave, authorization to attend seminars, and expense reimbursements are all approved or disapproved by the Committee (J-15, 24, 29, 49). However, the chief is responsible to file a monthly activity report with the Committee (J-16, 35).

8. Police Captain Alfred G. Lisicki was appointed captain in December 1979 (T2. 14; J-5, 7) and, as all captains, he served

as a division commander (J-9, 71). Prior to that he served as a lieutenant, as a sergeant, and as a patrol officer in the Detective Division. However, as of 1981, the captain's level of authority has changed: the police department's table of organization was changed to provide for only one administrative captain's position (J-75). Thus, Mr. Lisicki's responsibilities increased. These changes were reflected in revised job specifications (J-3). Since 1980, the Committee has been responsible for setting all terms and conditions of the captain's employment (J-6, 24, 25).

Section 2-8.4a of the Township's revised Ordinances sets out the duties of the captain's position. This section indicates that the rank of captain is next in command to that of the chief and is superior to all other ranks in the police department. The captain's duties include: initiation of appropriate discipline for neglect of duty or for disobedience of orders by department employees; issuing of orders to assure public safety and efficient operation of the department; planning activities for the health and welfare of the citizens. Section 2-8.4a also authorizes the captain to instruct subordinate supervisors on their duties; to ascertain that personnel are attired in the proper uniform and have the proper equipment; and to assist the chief in the performance of all his duties. Additionally, he is responsible for the maintenance of records and files and may perform police duties as required (J-2).

9. Pursuant to 2-8.3 of the Township Ordinances, the Committee is vested with the power of the "supervision, regulation and control of the police department" and the "authority to appoint, suspend, try

and remove all officers, members and employees of the police department" (J-2). Programs and policies of the police department are established by the Committee as a whole, some of which include a scuba program (J-8), a police vehicle inspection program (J-13; P-1), the explorers program (J-78), and the ECHO program (J-79). Additionally, there is a bomb emergency program which establishes the mayor as the primary emergency control officer and the chief as the third in command. Finally, there is a training, testing and awards program (J-50) and an auto disposal program (J-64; Tl. 64-69). The Committee designated enforcement of parking regulations (J-54) and taxi cab inspections to specific police officers. The Committee has decided that the deputy mayor has final approval of street lights (J-48). The Committee also oversees various routine projects such as no parking regulations (J-44), debris and weed complaints (J-18, 35, 36, 52), traffic control assignments and speed signs (J-52), and court appearances (J-53). Pursuant to Township Ordinance (J-2 Section 2-8.10) the Committee promulgates policies, rules and negotiates collectively with the PBA and establishes police department programs (P-1; J-8, 13, 37, 48, 78).

10. The Committee sets the budget for the police department. The parties made the following stipulations regarding the budget (Tl. 20):

E. BUDGET PREPARATION

1. The superior officer in charge of each section prepares the budget for his section and submits it to the Services Division.
2. The Services Division coordinates the budget submissions from all sections and submits the budget proposal to the Chief of Police.

3. The Chief of Police reviews the budget, and with his administrative staff has a short budget meeting with the governing body.
4. The entire salary and wage portion of the budget is contractually controlled. Over ninety (90%) percent of the other expense portion of the budget is covered by the Collective Bargaining Agreement.
5. The governing body determines the amount to be included in the other expense portion of the budget. Sometimes the governing body notifies the Chief of Police where to make reductions in the budget or which line items to eliminate. Sometimes the governing body notifies the Chief of Police of his operating expense budget, and permits the Chief of Police to determine the amounts to be allotted to the various line items.

The Petitioner in this case indicated that "sometimes" means that the chief is not always delegated power for the allotment of an amount in budget line items (Tl. 20). The Employer indicates that "sometimes" means "not always" (Tl. 20). Recently, the police sub-committee directed the transfer of \$20,000 from the department's general operating fund into a special expense fund without consulting with the chief (J-23).

Each division commander in the police department has prepared a proposed budget for his own section; it is based on current and anticipated operating expenses. These proposals are submitted to the chief. The chief forwards these requests to the police sub-committee for review and final authorization (the chief does review these but does not revise the budget proposals himself) (T3. 28-31).

The Committee then schedules budget hearings. At that time, the chief and other officers are afforded an opportunity to explain, clarify and justify the department's budget requests (T3. 5, 8, 69). The Committee then reviews each line item (T3. 28-29). Although the

chief's recommendations are important to the Committee, it is the Committee that grants final approval of the police department budget (T3. 9). The chief is not included in the Committee's deliberations and plays no role in the decision-making process to determine the final budget amounts. The money appropriated for each category establishes the spending limits for the department's operations (T3. 30) and purchases, including limits for such items as police vehicles (T3. 5) and personnel expenses (T3. 42; J-22). The chief may not exceed the limits established in each category nor may he reallocate money among the categories (T2. 28, T3. 72). However, changes in budget appropriation may be made by the Committee. The chief is then informed of such changes and he cuts expenditures accordingly (T3. 72). When the chief anticipates that expenses for a particular line item will exceed the amount allocated, he requests that the Committee make adjustments to those budget items (T3. 29; J-32).

11. The parties stipulated the following facts regarding expenditures for budgeted items and the operation of the police department (T1. 16):

C. EXPENDITURES

1. Standard Township procedure is for three (3) signatures to be attached on any and all vouchers submitted to the Township for payment from any department.
2. In general, all vouchers submitted by the Police Department are approved. The exceptions are as follows: (1) Very few vouchers where the individual's name appears; (2) Where the voucher submitted is for a non-budgeted item, and; (3) Where "Mid-term" budget revisions reduce the amount of the police department operating expense budget.

3. Discretion for expenditures are [sic] generally left up to the Chief of Police, so long as he stays within his other expense budget. However, as stated previously, discretion is limited by contractual requirements.

Within the voucher system required for payment of expenses, the chief has limited discretion. As noted previously, he is not permitted to reallocate money from one budget category to another (J-32). The Committee reviews and approves all expenditures and three signatures of its members are required for payment to be made for expenses (T3. 70; P-1). The payments are only made after the Treasurer certifies that funds are available. All departments use the same system of voucher and receipts (T3. 10). Although the chief has discretion to sign vouchers, the money must still be certified through the Treasurer and paid by the Committee as a whole (T3. 10-18). However, there have been occasions when vouchers signed by the chief and certified by the Treasurer have not been paid for expenses of the police department (J-15, 21). Also, certain expenses have not been approved for the chief, such as his attendance at conferences. In one case, certification of money available was made by the Treasurer, however, expenses were not reimbursed; the Committee offered no explanation (T3. 83, 88-91). Additionally, on one occasion the chief was disciplined for exceeding the limited amount of allocated money in the budget for the purchase of police vehicles (J-22). On another occasion, a suggestion made by a member of the Committee to purchase certain fire extinguishers for the cars was not acceptable to the police department (J-13), and therefore a recommendation against the purchase was made.

The chief is authorized to sign vouchers for purchases of \$4,500 or less (T3. 23). For items costing more than \$4,500, the chief is expected to submit the specifications for bid solicitation (T3. 23); if an item is under \$4,500 and an approved budget line item, the chief may make purchases and take delivery before the voucher is signed (T3. 24, 26-27). Vouchers are also used to pay individual employee's expenses after certification that they are "legally correct" and the money has been "appropriated" (T3. 73, 74). However, since the chief's expenses for an ICAP conference were disapproved (T3. 76; J-21), it is not clear what "legally correct" refers to. (Witnesses did not define this term when used).

12. The Committee bargains collectively with the PBA (P-1). The chief is not now included in this process. In the past, the chief sat in on collective negotiations but his participation was limited to that of advisor. In fact, his participation ceased altogether after the 1979-80 contract (T2. 4). He no longer participates in the Committee caucuses or in collective negotiations with the PBA (T2. 12, 13). However, he does serve as the Township's representative at step 2 of PBA's contractual grievance procedure and he serves in an informal capacity at step 1 (J-1). The parties stipulated the following facts (T1. 16):

D. GRIEVANCE PROCEDURE

1. Prior to using the grievance procedure, the Sergeant, Lieutenant and Captain try to resolve the grievance. The Sergeant, Lieutenant and the Captain have the right to resolve the grievance on behalf of the Township.

2. Any departmental grievance (i.e. vacation scheduling) based upon an order by the Chief of Police can only be decided by the Chief.

However, the Committee (Township) has authority over the chief to resolve grievances at step 3 (Tl. 17). The final step of the process is binding arbitration (Tl. 18).

3. Pursuant to the first and second steps of the grievance procedure, the Chief of Police hears the grievance and has the right to resolve the grievance. The Chief does not have to check with the Police Committee or any other individual prior to settling the grievance.

13. The parties stipulated to the following facts regarding the hiring of personnel for the police department (Tl. 22):

F. HIRING

1. The Police Department maintains a list of all eligible applicants.
2. Interviews of prospective applicants are conducted by the Chief of Police, the Police Committee, and a Chief of Police from outside the Township.
3. Interviews are conducted as a body, and the entire interviewing committee decides whether an applicant goes on the eligible list.
4. The Police Committee or governing body determines the number of new hires.
5. The Police Committee informs the Chief of Police as to the number of new hires, and requests the Chief to forward to the Committee the names and applications of the top applicants.
6. The governing body selects the new hires from these applicants.

The chief keeps a separate file of the names of eligible applicants for police department positions (J-38). He uses this information to make hiring recommendations to the Committee which then makes the

final hiring decision. Promotions are handled in the same way (J-41, 81).

14. The parties stipulated to the following facts regarding performance evaluations (Tl. 23):

H. EVALUATIVE FUNCTIONS

1. Evaluations are performed annually.
2. Evaluations are performed by the officer's immediate supervisor and submitted to the Chief of Police and Captain.
3. The evaluations are utilized by the department at the training level for the purposes of training.

Evaluations are made annually by the employee's immediate supervisor; these evaluations are submitted to the captain and chief. This material is kept by the captain in locked files (Stip. A-8). Three people have access to these files -- the chief, the captain and the chief's secretary.

Regarding the training of employees, the parties stipulated as follows (Tl. 22):

G. TRAINING

1. The major portion of training entitlement is covered by the Collective Bargaining Agreement. In-service training is handled by the training officer of the Police Department.

15. The parties stipulated to the following facts regarding disciplinary procedures (Tl. 5):

B. DISCIPLINARY PROCEDURE

1. The Sergeant, Lieutenant and Captain have the right to give verbal and/or written reprimands and emergency suspensions.
2. If there is an allegation of violation of departmental rules and regulations, an investigation is undertaken. After the investigation is completed and if charges are filed, the Chief of Police hears the case.

- 3. The Chief of Police has the right to suspend any officer for up to a maximum of five (5) days without further authorization. The Chief of Police notifies the Police Committee of all suspensions.

Stipulation #3 is modified to indicate that Section 2-8 of the Township Ordinance is on the record as Exhibit J-2 (Tl. 5). Petitioner clarifies stipulation #3 to indicate that every suspension decision made by the chief is subject to the governing body's approval or disapproval (Tl. 5).

- 4. Any action or violation or charge which could result in demotion or dismissal must be heard by the entire governing body.

The Employer agrees that the governing body is notified (Tl. 14).

A. DAY-TO-DAY OPERATIONS

* * *

- 8. Maintenance and Personnel Files: Personnel files for all police department employees are kept under lock and key in the office of the Secretary to the Chief of Police. The only employees having access to these files are the Chief of Police, Captain, and the Secretary to the Chief of Police.

The Committee is empowered to hold hearings to determine just cause for the removal, demotion, suspension, firing or other penalties imposed on department employees (P-1; J-2 Section 2-8.15).

The chief is empowered to suspend patrol officers for a maximum of five days pending a hearing (T3. 32, 46, 77-79, 82; J-55, 60, 61, 62). He also hears disciplinary appeals and contract grievances (T3. 34; P-1; J-9, 63). However, the Committee may choose to hear disciplinary matters rather than have the chief hold the hearing (T3. 35, 79-82; J-34, 46).

The Committee has authorized both the chief and the captain to conduct internal investigations (T3. 33, 46, 86, 87; J-46). However, the Committee, itself, has inquired into employees' use of sick leave, disability leave (J-83) and into some police officers' behavior at open Committee meetings (J-1). The parties stipulate to the following (T3. 96):

The township attorney recommended to the Committee that it, rather than the chief, hear certain, if not all, disciplinary matters so that the chief could avoid any conflict of interest.

The Committee is empowered by Section 2-8.14 and 15 of the Township Ordinances to decide "just cause" and hear charges against all police officers (J-2).

16. The parties stipulate to the following facts concerning the day-to-day operations of the police department (T1. 11):

A. DAY-TO-DAY OPERATIONS

The day-to-day operations of the department, other than the work hours, which is contractually controlled, are handled by various superior officers through the chain of command. The day-to-day operations are enumerated below, along with the superior officer directly responsible for that operation:

1. Shift Assignments: Shift assignments are the direct responsibility of the Lieutenant.
2. Number of Men Per Shift: The number of men per shift is the direct responsibility of the Lieutenant.
3. Daily Duty Assignments: Daily duty assignments are the direct responsibility of the immediate supervisor.
4. When and Where Breaks and Lunches are to be Taken: The immediate supervisor is directly responsible for determining when and where breaks and lunches are to be taken.

5. Vacation Schedules: Although the eligibility and procedure for selecting vacations is somewhat covered by the Collective Bargaining Agreement, all vacation schedules are approved through the Chief of Police, on behalf of the Township.
6. Overtime Schedules and Approval of Overtime: The Sergeants are initially responsible for scheduling and approving overtime. Since the Captain is responsible for preparing the overtime vouchers, the Captain monitors the overtime. If it appears that there is substantial overtime for any divisions, section, or individual, the Captain will investigate and correct any situation requiring correction.
7. Assignment of Police Vehicles: The assignment of police vehicles is the direct responsibility of the Sergeants and Division Commanders.
8. Maintenance of Personnel Files: Personnel files for all police department employees are kept under lock and key in the office of the Secretary to the Chief of Police. The only employees having access to these files are the Chief of Police, Captain, and the Secretary to the Chief of Police.

Several examples show that the Committee takes an active role in the day-to-day operations of the police department:

- It concerns itself with shift assignments, shift operations and revised schedules for police officers (T3. 12, 21-22; J-20, 82).
- Although the chief implemented various changes in the department's operation, in early 1976, these changes were based upon recommendations of the Prosecutors Office and therefore the chief simply implemented those recommendations (J-67).
- In 1980, the Mayor inspected the police vehicles and ordered a certain kind of propane fire extinguishers for use in patrol cars; however, these extinguishers were not appropriate for the police vehicles.
- In 1983, the chief was required to answer an inquiry from the Committee concerning the number of department vehicles which needed replacement;

the final decision on that matter was made by the Committee (J-45).

- In February, 1983, the Committee made specific duty assignments -- it transferred a sergeant from one specific position to another because the Committee had become aware that the patrol unit was without a permanent sergeant (J-14, 17); it also authorized a particular sergeant to make training assignments (J-20).
- The Committee regularly receives copies of memoranda concerning officer assignments and department general operating orders (J-20).
- Sometimes, however, the chief does make reassignments of police officers from patrol divisions to the detective division (T3. 40).

The Committee is ultimately responsible for the approval of liquor licenses. On a regular basis, the CID reports on license applicants are sent to the Committee through the chief (T1. 55, 86). However, quite often the chairman of the license sub-committee makes direct inquiry about investigations to the CID officers (T1. 43, 47, 55, 60, 85, 86, 87, 88). The chairman does this on a spontaneous basis, often when the captain or chief are not there. Therefore, the responsibility for notifying the captain and chief that the inquiry has been made falls on the CID police officers.

17. Terms and conditions of employment for police officers are determined by contract (J-1). Division commanders assign overtime subject to final approval by the Committee (T1. 27) before the voucher for overtime pay is signed (T1. 13). Division commanders may also assign police officers to emergency duty upon approval of the chief (T1. 32-42) and subject to his further direction. During an emergency, division commanders may also authorize overtime. Division commanders exercise little discretion in assigning the overtime hours

for high school activities because the number of overtime hours required has been predetermined by the school superintendent and the Committee (T1. 29).

Sergeants may authorize overtime for patrol officers who are required to stay to complete a particular assignment already in progress (T1. 42).

18. The captain exercises some authority in disciplining patrol officers. In some cases, he conducts departmental hearings on grievances or for investigations of police officers (J-17, 64, 66). He is authorized to attempt to resolve contractual disputes and other grievances at the lowest level possible (T2. 18).

The captain plays a limited role in the preparation of the department's budget; he assists the chief in reviewing the division requests before they are submitted to the Committee (T2. 15, 16). He plays no role in the final decision-making process (T2. 17). He also plays no role in the interviewing or screening of candidates for employment or promotion.

Like the chief, the captain has no discretion on allocating money for daily expenses or for the general operation of the department (T2. 17-24).

The captain's terms and conditions of employment are set by the Committee and payment for expenses is by voucher (T2. 17). However, some of his training expenses have not been paid (T2. 22).

Applicable Law

Managerial Executive

Section 13A-3(f) of the Act defines "managerial executives" as those "persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices,..."

Section 5.3 excludes managerial executives from the protections and rights afforded by the Act to public employees. ^{4/}

In In re Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980) affirming D.R. No. 80-32, 6 NJPER 198 (¶11097 1980) ("Montvale"), the Commission applying the definition in section 3(f), set forth the following standards for determining whether a person is a managerial executive as defined by the Act i.e., that a person formulates policy or directs its effectuation:

A person formulates policies when he develops a particular set of objectives designed to further the mission of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises.

6 NJPER at pp. 508-509.

See, In re County of Bergen, Bergen Pines County Hospital, D.R. No. 83-8, 8 NJPER 535 (¶13245 1982) (adopting the standards set forth out in Montvale), request for review denied P.E.R.C. No. 83-76, 9 NJPER 47 (¶14022 1982) aff'd App. Div. Docket No. A-564-82T2 (10/18/83) ("Bergen Pines").

In applying Montvale to subsequent cases, as in Bergen Pines, we have focused on the three factors enumerated in determining whether persons "possess and exercise a level of authority and independent judgment sufficiently to affect broadly the organization's purposes or its means of effectuation of these purposes" to be titled "managerial executive." Such persons need not have final responsibility for decisions but the level of authority exercised must meet the standard established. ^{5/} The power claimed must be exercised regularly. ^{6/} Additionally, "those chosen for directing and effectuating policy must be empowered with a substantial measure of discretion in deciding precisely how the policy should be effectuated." Montvale, D.R. No. 80-32, slip op. p. 22 (emphasis added).

Additionally, policy in a public employment context is defined as:

"...the development of particular sets of objectives of a governmental entity designed to further the mission of the agency and the methods of achieving such objectives. Those who formulate policy are those who select a course of action from among the alternatives and those who substantially and meaningfully participate in the essential processes which result in the selection of a course from the alternatives available." Montvale, 6 NJPER 202.

Clearly, a managerial executive must have the authority to make operative decisions. In other words, a managerial executive must

be allowed to exercise substantial discretion, independent of the employer's established policies and procedures, to set policy governing the objectives of a governmental entity and to fashion methods of achieving such objectives. This authority to make operative decisions on behalf of the employer is distinguished from mere discretion exercised by supervisory employees. Section 5.3 of the Act describes a supervisory employee as one "having the power to hire, discharge, discipline, or to effectively recommend the same".

Clearly, as we have previously indicated, good policy reasons exist for considering the chief law enforcement officer an essential member of the employer's management team. However, if there is a dispute over the functional responsibilities of a position, then we must examine these responsibilities very closely. For example, merely designating someone as "chief" would not automatically result in a finding of managerial status. As previously stated, managerial status is determined by analysis of the relative position of the employee in the organization hierarchy; the employee's functions and responsibilities; and the extent of discretion exercised.

In applying the Act's definition of managerial executive to the facts in this case, I find that neither the chief nor the captain are managerial executives.

Analysis

As in Montvale,

- neither the chief nor the captain in Egg Harbor formulates managerial policy or objectives nor does either direct the effectuation of these policies in the police department.

- Neither participates in final determinations regarding the department's budget, personnel complement, employee promotion and selection or employee discharge.
- Neither participates in collective negotiations with the PBA.
- Neither has authority beyond the second level of the contract grievance procedure to settle employee grievances.
- Neither has authority or discretion to transfer funds from one budget category to another, to make purchases for the department, to approve personnel expenses, to authorize payments for overtime, or to establish department programs without approval of the police sub-committee or the Committee as a whole.

The police sub-committee oversees the police department operations very closely - often assuming responsibility for the payment of personnel and daily department operations. The chief's discretion in the exercise of his duties is merely routine and ministerial. The captain, who is the chief's subordinate, has even less authority and discretion.

In deciding the appropriateness of the unit proposed by the Association, it is necessary to determine whether a conflict of interest exists between the chief and the captain that dictates against the inclusion of both in the same collective negotiations unit. Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971). ^{7/}

With respect to police departments or quasi-military structures, the Commission has determined that patrol officers and superiors should be placed in separate units except in very small departments where the conflict of interest, if any, is de minimis. ^{8/}

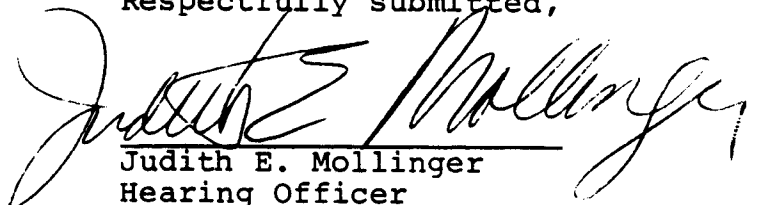
In the instant case, the captain is directly subordinate to the chief; he acts in the chief's absence but has no greater authority. He, like the chief, hears grievances only at the first and second level of the department grievance procedure. The chief has no evaluative functions vis-a-vis the captain. Together they supervise the daily operations of the police department. It is evident that there is little, if any, conflict of interest between the chief and the captain that would dictate against a collective negotiations unit including both positions.

Based on the foregoing, I find the proposed unit appropriate.

Recommendation

1. The positions of police chief and police captain are not managerial executives within the meaning of the Act.
2. The unit proposed by the Association is appropriate for collective negotiations.
3. A yes/no secret mail ballot election should be directed in the collective negotiations unit; eligible employees shall vote on whether or not they wish to be represented by the Association. The appropriate unit shall be: police chief and police captain excluding all other employees of Egg Harbor Township.

Respectfully submitted,


Judith E. Mollinger
Hearing Officer

DATED: June 22, 1984
Trenton, New Jersey

Footnotes

- 1/ Commission exhibits will be designated as "C", Joint exhibits as "J", and Association exhibits as "P". The Township submitted only joint exhibits with the Association.
- 2/ The Township's written position statement filed in response to the unfair practice charge was resubmitted as its answer to the Complaint.
- 3/ References to the Transcript of Proceedings are as follows: "T1." for January 5, 1984, "T2." for January 18, 1984, "T3." for January 23, 1984.
- 4/ N.J.S.A. 34:13A-5.3 excludes managerial executives from the protections and rights afforded by the Act to public employees. Section 13A-3(f), added in 1974, defines managerial executives as those "persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district." The Act, as amended, Law 1968, Chap. 303 § 4 effective July 1, 1968; Law 1974, § 123, subsection 2.
- 5/ See, In re Gloucester County Welfare Board, D.R. No. 83-36, 9 NJPER 388 (¶14176 1983); In re City of Trenton, D.R. No. 83-33, 9 NJPER 382 (¶14172 1983); In re City of Newark and Professional Fire Officers Association Local 1860, IAFF, AFL-CIO, D.R. No. 82-18, 7 NJPER 640 (¶12288 1981), H.O. No. 82-2, 7 NJPER 481 (¶12213 1981) fn. 57; cf. East Brunswick and East Brunswick PBA Local 145, D.R. No. 82-42, 8 NJPER 187 (¶13080 1982); In re City of Jersey City, D.R. No. 80-36, 6 NJPER 278 (¶11132 1980).
- 6/ Middlesex County Welfare Board, P.E.R.C. No. 10 (1969); State of New Jersey and Council of New Jersey State College Locals, D.R. No. 82-35, 8 NJPER 87 (¶13036 1982).
- 7/ The New Jersey Supreme Court established the following principles for examining the nature of a conflict of interest:

If performance of the obligations or powers 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. 57 N.J. at 425.

* * *

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. 57 N.J. at 425-426. (emphasis in the original)

8/ See, In re City of Paterson, D.R. No. 78-23, 3 NJPER 385 (1977); In re Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977); In re City of Elizabeth, P.E.R.C. No. 71 (1972); In re City of Union City, P.E.R.C. No. 70 (1972); and In re City of Camden, P.E.R.C. No. 52 (1971).