

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

In the Matter of

BOROUGH OF FAIR LAWN,

Public Employer,

-and-

DOCKET NO. RO-78-124

FAIR LAWN POLICE SUPERIOR
OFFICERS ASSOCIATION,

Petitioner,

-and-

POLICE BENEVOLENT ASSOCIATION,
LOCAL 67,

Intervenor.

SYNOPSIS

The Director of Representation in affirming the recommendations of the Hearing Officer, determines that a collective negotiations unit consisting of the Borough police superior officers including sergeants, lieutenants, captains and the deputy chief is an appropriate collective negotiations unit and directs that a secret ballot election be conducted among these employees to ascertain their representational desires. The Director finds, consistent with the record evidence and with prior Commission decisions, that a substantial conflict of interest exists between sergeants and patrolmen to warrant the severance of sergeants from the existing collective negotiations unit consisting of sergeants and patrolmen. The Director additionally determines that the invocation of the binding interest arbitration process pursuant to N.J.S.A. 34:13A-14 et seq. does not and should not present an interest arbitration bar to the filing of a representation petition during the period in which the interest arbitration process is being pursued.

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Appearances:

For the Public Employer
Seymour Cohen, Esq.

For the Petitioner
Captain Clarence Loebel

For the Intervenor
Osterweil, Wind & Loccke
(Mr. Richard D. Loccke, of Counsel)

DECISION AND DIRECTION OF ELECTION

On January 4, 1978, a Petition for Certification of Public Employee Representative was filed with the Public Employment Relations Commission (the "Commission") by the Fair Lawn Police Superior Officers Association (the "Association") with

respect to a proposed collective negotiations unit consisting of all superior officers employed by the Borough of Fair Lawn (the "Borough"). More specifically, the proposed unit consists of all sergeants, lieutenants, captains, the deputy chief, and the chief of police, but excluding patrolmen. Police Benevolent Association, Local 67 (the "PBA"), having submitted a recently expired collective negotiations agreement covering patrolmen and sergeants, was granted Intervenor status in this proceeding pursuant to N.J.A.C. 19:11-2.7.

Pursuant to a Notice of Hearing, a hearing was held before Commission Hearing Officer Arnold H. Zudick on July 25 and August 29, 1978, at which all parties were afforded an opportunity to present evidence, to examine and to cross-examine witnesses, and to argue orally. The Borough and the Association filed a joint post-hearing brief, while the PBA filed a letter memorandum in lieu of a brief. On December 21, 1978, the Hearing Officer issued his Report and Recommendations, a copy of which is attached hereto and made a part hereof. The PBA filed exceptions to the Hearing Officer's Report. The Borough has accepted the Report. The Association has not excepted to the Report. Neither the Borough nor the Association has filed an answering brief to the PBA's exceptions.

The undersigned has considered the entire record, including the Hearing Officer's Report and Recommendations, the transcript and the exceptions, and on the basis thereof finds and

determines as follows:

1. The Borough of Fair Lawn is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), is the employer of the employees involved herein, and is subject to the provisions of the Act.

2. The Fair Lawn Police Superior Officers Association and Police Benevolent Association, Local 67 are employee representatives within the meaning of the Act and are subject to its provisions. ^{1/}

3. The Association has filed a Petition for Certification of Public Employee Representative proposing a unit consisting of all sergeants, lieutenants, captains, the deputy chief, and the chief of police, excluding all patrolmen. The PBA currently represents a unit consisting of all sergeants and patrolmen employed by the Borough and states that it would be inappropriate to remove sergeants from its unit. At hearing, the parties stipulated the

^{1/} The PBA excepts to the Hearing Officer's finding that the Association is an employee representative. The PBA has not provided any documentary evidence and specific argument in support of this claim. The record reveals that PBA declined to stipulate to the employee representative status of the Association, apparently because the Association had previously entered into contractual agreements with the Borough covering lieutenants and captains under another name. Later in the record, the PBA stipulated that the Fair Lawn Police Superior Officers Association "presently represents" all lieutenants and captains. The undersigned finds that the Association meets the requirements of N.J.S.A. 34:13A-3(e) as an employee representative within the meaning of the Act in that it is authorized by employees to act on their behalf and to represent them.

issue as: whether sergeants employed by the Borough more appropriately belong in a negotiations unit with patrolmen or in the proposed negotiations unit of sergeants, lieutenants, captains, the deputy chief, and the chief of police. Other issues raised by the PBA were: (1) the Petition in this matter was untimely filed under Commission rules and should be dismissed; (2) the PBA had invoked the interest arbitration process pursuant to the Commission's rules prior to the filing of the instant Petition by the Association, and therefore, an "interest arbitration bar" existed to the filing of the Petition; (3) the Association was essentially filing a decertification petition for sergeants and, accordingly, the showing of interest in support thereof was not supported by 30% of the employees in the unit represented by the PBA; and (4) the petitioned-for unit was not appropriate, primarily due to a conflict of interest between the officer ranks.

Accordingly, there is a question concerning the representation of employees, a dispute exists, and the matter is properly before the undersigned for determination.

4. On the question of timeliness, the Hearing Officer found that N.J.A.C. 19:11-2.8(c)(2) ^{2/} was not controlling, there 2/ N.J.A.C. 19:11-2.8(c) provides:

During the period of an existing written agreement containing substantive terms and conditions of employment and having a term of three years or less, a petition for certification of public employee representative or a petition for decertification of public employee representative normally will not be considered timely filed unless:

* * *

(2) In a case involving employees of a county or a municipality, any agency thereof, or any county or

(Cont'd)

being no collective negotiations agreement in effect with the PBA, covering sergeants, on January 4, 1978, the date the Petition was filed. The undersigned agrees and further finds that on the date the Petition was filed no agreement existed covering any of the employees involved in the Petition. The undersigned concludes that none of the circumstances described in N.J.A.C. 19:11-2.8, which might bar the filing of a Petition, are involved herein. ^{3/}

5. With regard to the interest arbitration bar theory advanced by the PBA, the Hearing Officer found that N.J.A.C. 19:11-2.8 does not provide for an interest arbitration bar. Further, the Hearing Officer analyzed the process of interest arbitration as an aspect of the negotiations process, and noted that the Commission had rejected prior claims that the active status of negotiations imposes a bar to an otherwise timely filed Petition. ^{4/}

4/ (Cont'd)

municipal authority, commission or board, the petition is filed not less than 90 days and not more than 120 days before the expiration or renewal date of such agreement.

* * *

3/ PBA claims that when the parties to a collective negotiations agreement have operated under a contract, "there can only be a single opportunity to file a representation petition," i.e., during the "window period" (90-120 days prior to contract expiration) established by N.J.A.C. 19:11-2.8(c)(2). The PBA misconstrues the nature of the "contract bar" rule, which is intended to insulate only existing agreements. The Commission's policy, as illustrated in the Franklin Township decision, footnote 4 below, is to permit filing of a petition once an agreement expires.

4/ In re Township of Franklin, P.E.R.C. No. 64 (1971); In re City of Atlantic City, D.R. No. 78-31, 4 NJPER 56 (¶ 4027 1977); In re County of Passaic, D.R. No. 77-7, 3 NJPER 22 (1976).

The undersigned agrees with the Hearing Officer and adopts his recommendation for the reasons stated in his Report. The undersigned is not convinced by PBA's arguments that the policies of the Act are best effectuated through the creation of an interest arbitration bar. The PBA advances the following arguments in favor of establishing an interest arbitration bar: the bar would effectuate the prompt settlement of labor disputes; avoid a "new wave of litigation and representation proceedings" while a terminal process is being invoked; promote "orderly movement through dispute resolution processes;" and "avoid public waste." These issues, while not presented in the context of a claimed interest arbitration bar, were considered by the Commission in Franklin Township, supra, n.4, wherein the Commission weighed the rights of employees to effectuate changes of their collective negotiations representatives during a critical negotiations period. In Franklin Township, the Representation Petition was filed two days before the mediation effort resulted in a "memorandum of agreement."

Binding interest arbitration, as an impasse resolution procedure, is unique in that it results in the imposition of a contractual settlement by a relatively fixed date certain, where the parties have failed to mutually resolve their impasse. Under Commission rules and the provisions of Chapter 85 ^{5/} interest arbitration proceedings may occur after the current agreement has

^{5/} P.L. 1977, c. 85 amendments to the Act, N.J.S.A. 34:13A-14 through 21.

expired. The legislature has stated that:

It is the public policy of this State that in public fire and police departments, where public employees do not enjoy the right to strike, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes, and to that end the provisions of this act, providing for compulsory arbitration, shall be liberally construed.

It is noted that, in spite of the terminal step provided by the legislation, the statute encourages the parties to achieve settlement voluntarily, through negotiation, mediation and fact-finding before the expiration of the contract. Where the parties are successful in concluding a successor agreement prior to the expiration of the current contract, a new contract bar is created pursuant to Commission rules, resulting in an extended insulated period. Where the parties are not successful in resolving the successor agreement before contract expiration, they may resort to interest arbitration. Upon expiration of the contract, employees should be free to choose between filing for a new representative or entrusting the incumbent representative with the culmination of the collective negotiations process, including binding interest arbitration. The undersigned does not detect any intent by the legislature, in enacting Chapter 85, to deprive employees of the free choice, discussed above, which they have enjoyed heretofore. On the contrary, the deprivation of such free choice could result

in the frustration of the stated policy of Chapter 85, in that it might result in lowered employee morale and impair the efficient operation of the public safety department. As noted earlier, the Commission has rejected claims that the contract bar period should be extended after a contract has expired. The undersigned finds that the creation of an interest arbitration bar would intolerably restrict the rights of employees to petition for a change of representation and, accordingly, finds that there is no interest arbitration bar.

6. The Hearing Officer found the Petition as seeking the certification of a public employee representative, that it was correct in form and filed with an adequate showing of interest, and, therefore, appropriate for processing. The Hearing Officer correctly analyzed these issues. ^{6/}

7. The Hearing Officer further concluded that a conflict of interest exists between sergeants and patrolmen and that the

^{6/} Under N.J.A.C. 19:11-2.1, once the Director of Representation has determined the adequacy of the showing of interest, its validity is not subject to collateral attack. However, the undersigned, in response to the exception of the PBA, notes that the showing of interest required in a petition for certification is 30% of the employees in the unit alleged to be appropriate. N.J.A.C. 19:11-1.2(a)(8). Accordingly, in order to be adequate, the showing of interest in the instant Petition had to consist of at least 30% of the sergeants, lieutenants, captains, deputy chief and chief. The PBA incorrectly asserts that the instant Petition is a "decertification" petition since it might result in a removal of sergeants from the PBA represented unit. The undersigned has previously distinguished between "RO" and "RD" petitions in In re Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248 (1977), and explicitly recognized therein the applicability of "RO" petitions in circumstances identical to those presented herein.

appropriate unit placement for sergeants is in a unit consisting of superior officers. The PBA excepts, claiming that a more serious conflict exists between the various superior officer ranks than between sergeants and patrolmen. The undersigned concludes, based upon the record, that the Hearing Officer's analysis is correct.

In In re Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977), the undersigned summarized the Commission's approach to questions concerning the appropriate unit definition for police employees, and restated the standards applicable to these matters:

There is now a long line of Commission decisions on the question of whether superior officers may be included in negotiations units with patrolmen. The standards utilized by the Commission in reaching these determinations are presented in 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). Generally, these decisions provide that except in very small departments where any conflict of interest between superior officers and rank and file personnel is de minimis in nature, the quasi-military structure of police departments virtually compels that superior officers and patrolmen be placed in separate units. This is so inasmuch as the exercise of significant authority in a chain of command operation produces an inherent conflict of interest within the New Jersey Supreme Court's definition of that concept in Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971). The existence of an inherent conflict of interest in these circumstances must lead to a determination that separates superior officers from rank and file notwithstanding a previous history of collective negotiations in a combined unit. Moreover, the finding of such conflict is not contingent upon a finding that the superior officers are supervisors within the meaning of N.J.S.A. 34:13A-5.3.

In South Plainfield, supra, the undersigned referred to the Commission's conclusion in the Union City matter, supra:

We are persuaded, however, after almost four years of 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 undersigned, in South Plainfield, further observed:

The Union City rationale was relied upon, and its facts analogized, in a subsequent decision In re Borough of Sayreville, E.D. No. 76-27, 2 NJPER 85 (1976); rev. denied, P.E.R.C. No. 76-35, 2 NJPER 174 (1976), aff'd App. Div. Docket No. A-3325-75 (Apr. 1, 1977) (Unpublished Opinion) pet. for certif. denied, 75 N.J. 29 (1977). The Appellate Division stated:

In reviewing a determination of an administrative agency in a matter such as this, the courts ordinarily give deference to the expertise of the agency entrusted with the duty of developing and applying an expertise in the area delegated to it. See Close v. Kordulak Bros., 44 N.J. 589, 599 (1965). Allowing for such deference to the presumed expertise in the developing field under the jurisdiction of PERC, we conclude that there is sufficient evidence in the record to support its determination and affirm essentially for the reasons expressed in its written decision.

In view of the Appellate Division's affirmance of the Sayreville decision, the standards utilized by the Commission in this decision are now the standards by which all such cases will be determined. Accordingly, in cases involving police department units, superior officers will normally be severed from rank and file personnel

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

The record demonstrates that neither of the above enumerated exceptions are applicable to the matter herein. The record further demonstrates that a substantial actual conflict of interest exists between sergeants and patrolmen to warrant the severance of sergeants from a unit containing patrolmen inasmuch as sergeants exercise significant authority in the department's chain of command operation.

The record does not establish that there is a substantial potential conflict of interest in the inclusion of sergeants in the superior officers unit, nor does the record establish any substantial actual or potential conflict between the various levels of superior officers. The undersigned notes that neither the Petitioner nor the employer raise any concerns with regard to actual or potential conflicts among the ranks included in the proposed officers' unit. In Wilton, supra, the Court noted:

Moreover, there is no issue here concerning the propriety of including principals and assistant principals in the same negotiating

unit. The possibility of conflict arising out of the principals' duty to supervise assistant principals which might arise in certain settings (which we do not consider in this case), is not involved because the Board of Education has raised no issue with respect to this joint membership in the Association. [57 N.J. at 409]

In light of the decision of the Court, the record evidence, and in the absence of any claim by the employer of actual or potential conflict, the undersigned declines to speculate merely on the basis of the Intervenor's allegations, that there is a sufficient actual or potential for Wilton conflict to warrant a finding that the proposed unit is inappropriate.

8. Lastly, the Hearing Officer found that the police chief is a managerial executive, and he recommended, therefore, that the unit proposed by the Petitioner include sergeants, lieutenants, captains and deputy chief, but that it exclude the chief.

As noted supra, the Association has not excepted to the Hearing Officer's recommendations. The Borough has advised that it accepts the Hearing Officer's Report and Recommendations. The PBA has not specifically excepted to the Hearing Officer's recommendation as to the chief notwithstanding the inclusion, as part of its exceptions, of its post-hearing brief detailing its position on this issue. ^{7/} However, the PBA argues that the Hearing Officer exceeded his authority in recommending the proposed unit, claiming that the issues presented by the parties were solely limited to

^{7/} Before the Hearing Officer, the PBA maintained: "It is not asserted here that as a rule the Chief of Police is without bargaining rights."

the issue of whether sergeants more appropriately belong in a negotiations unit with patrolmen or in the proposed negotiations unit of sergeants, lieutenants, captains, deputy chief and chief. In essence, the PBA contends that unless the entirety of the petitioned-for unit, including the chief, is found to be the appropriate superior officers unit, the Petition must be dismissed and the status quo retained. The undersigned determines that the PBA's position is without merit. First, the PBA reads the language of the stipulated issue too restrictively. Second, and more important, the Commission's responsibility in disputed representation matters, such as the one posed herein, is to determine the appropriate unit, N.J.S.A. 34:13A-6(d), and to this end the undersigned caused the conduct of an evidentiary hearing. The undersigned finds that the Hearing Officer and the parties developed an evidentiary record which is sufficient to permit the undersigned to render a determination as to the appropriate collective negotiations unit, consistent with the statutory obligation.

Further, inasmuch as the PBA has been granted intervenor status in this proceeding on the basis of its collective negotiations agreement covering sergeants, and the undersigned having determined that sergeants may not appropriately be included with patrolmen in a collective negotiations unit, the standing of the PBA to contest the appropriateness of the petitioned-for unit of superior officers is questionable. However, notwithstanding PBA's questionable standing, its arguments that the Petition should be dismissed are

unacceptable. The Petition submitted in this matter proposes a unit of all police superior officers. The Association asserted that this definition would include all sergeants, lieutenants, captains, the deputy chief and the police chief. The determination that one of these individuals cannot be included within the scope of the petitioned-for unit because that individual is not entitled to negotiations rights under the Act does not require that the question concerning representation should be discontinued in its entirety. In In re Bridgewater-Raritan Regional Board of Education, D.R. No. 79-12, 4 NJPER 444 (¶ 4201 1978), the public employer argued that a petition seeking a proposed unit of all substitute teachers should be dismissed where certain substitutes were found not to be public employees within the meaning of the Act. In essence, the public employer argued that unless a proposed unit is found to be completely appropriate the petition must be dismissed. The undersigned stated:

There is no support for the Board's position -- either in the record or in Commission policy -- that the Commission's inquiry into a question concerning representation should be discontinued where it is found that certain personnel, proposed by a Petitioner for inclusion in a unit, are not identifiably within the definition of the collective negotiations unit. A determination which identifies non-public employees and which excludes non-public employees from a proposed unit does not alter the definition of the proposed unit nor does it establish a sub-group or sub-unit. Accordingly, the undersigned must reject the Board's contention that 'neither the Board nor the Association addressed itself to the question of whether any subdivision of the whole class of per diem substitute teachers and nurses qualifies as public employees within the meaning of the Act.'

The PBA's position herein, if accepted, would chill the rights of employees to seek representation in appropriate units since it would ultimately require that employees' rights to seek exclusive representation should be postponed until the precise appropriate unit composition is formally posed before the Commission. The Commission rejects this argument as it would not be consistent with the legislative intent to provide employees with a choice of representation in an expeditious manner. Accordingly, the Commission's policy has been and remains that unless the petitioned-for unit is substantially different from the unit found appropriate, the petitioner and other interested employee representatives are entitled to an election. In this matter, the determination that one individual would not be entitled to inclusion in the proposed unit is insignificant. Therefore, since the parties agree that the chief would not appropriately be included in a unit of superior officers, and it appearing from the record that the police chief is a managerial executive within the meaning of the Act, the undersigned adopts the Hearing Officer's recommendation and determines that the police chief is a managerial executive and should be excluded from the proposed unit.

Accordingly, the undersigned determines that the appropriate unit is: all superior officers employed by the Borough of Fair Lawn, including sergeants, lieutenants, captains and the deputy chief, but excluding the police chief, patrolmen, managerial executives, confidential employees, professional employees and craft employees.

The undersigned directs that a secret ballot election be conducted among employees in the unit found appropriate no later than thirty (30) days from the date set forth below. Those eligible to vote are employees set forth above who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or temporarily laid off, including those in military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Pursuant to N.J.A.C. 19:11-9.6 the public employer is directed to file with the undersigned and with the Fair Lawn Police Superior Officers Association an election eligibility list, consisting of an alphabetical listing of the names of all eligible voters together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by the undersigned no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously filed with the Fair Lawn Police Superior Officers Association, with statement of service to the undersigned. The undersigned shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

Those eligible to vote shall vote on whether or not they desire to be represented for the purpose of collective

negotiations by the Fair Lawn Police Superior Officers Association.

The exclusive representative, if any, shall be determined by the majority of valid ballots cast by the employees voting in the election. The election directed herein shall be conducted in accordance with the provisions of the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: April 11, 1979
Trenton, New Jersey

STATE OF NEW JERSEY
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THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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FAIR LAWN POLICE SUPERIOR OFFICERS
ASSOCIATION,

Docket No. RO-78-124

Petitioner,

-and-

POLICE BENEVOLENT ASSOCIATION, LOCAL 67

SYNOPSIS

A Commission Hearing Officer in considering a petition for a unit of superior officers including sergeants, lieutenants, captains, deputy chief and chief recommends (1) that neither the commencement of interest arbitration proceedings nor the conduct of negotiations will bar the processing of an otherwise timely filed representation petition; (2) that sergeants employed by the Borough are supervisors within the meaning of the Act, and have an inherent conflict of interest with patrolmen and must be removed from the patrolmen's unit; (3) that the chief of police is a managerial executive or at least a confidential employee within the meaning of the Act and is inappropriate for inclusion in any negotiations unit; and (4) that an election be directed in a unit including sergeants, lieutenants, captains and the deputy chief employed by the Borough but excluding the chief of police, patrolmen, and all other employees.

The Hearing Officer also discussed the Commission's authority concerning representation petitions and its responsibility to determine the most appropriate unit.

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 Director of Representation who reviews the Report, any exceptions thereto filed by the parties and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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POLICE BENEVOLENT ASSOCIATION, LOCAL 67,

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Appearances:

For the Public Employer
Seymour Cohen, Esq.

For the Petitioner
Capt. Clarence Loebel

For the Intervenor, Osterweil, Wind & Loccke, Esqs.
(Richard D. Loccke, Esq.) of Counsel)

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

A Petition for Certification of Public Employee Representative was filed with the Public Employment Relations Commission (the "Commission") on January 4, 1978, by the Fair Lawn Police Superior Officers Association (the "Association") for a unit of all superior officers employed by the Borough of Fair Lawn (the "Borough") including sergeants, lieutenants, captains, deputy chief, and chief, and excluding patrolmen. The Police Benevolent Association, Local No. 67 (the "PBA") submitted a recently expired collective agreement repre-

senting the sergeants in question and pursuant to N.J.A.C. 19:11-2.7 was granted Intervenor status herein.

The Borough and the Association argued that sergeants should be removed from the unit including patrolmen because of an inherent conflict between those titles, and because the petitioned for unit was the most appropriate. The PBA argued that the sergeants should remain in their unit because at most only a de minimis conflict existed between sergeants and patrolmen, whereas a greater conflict existed between sergeants and the superior officers including the chief.

Pursuant to a Notice of Hearing from the Director of Representation dated April 13, 1978, hearings were held before the undersigned Hearing Officer on July 25 and August 29, 1978, in Newark, New Jersey, at which time all parties were given an opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. Subsequent to the close of hearing all parties filed written briefs in this matter. Briefs were originally due by October 10, 1978, but an extension of time was granted by the undersigned until November 3, 1978. ^{1/}

Upon the entire record in this proceeding, the Hearing Officer finds:

1. That the Borough is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, as amended, (the "Act") ^{2/} and is subject to its provisions.

2. That the Association and the PBA are employee representatives within the meaning of the Act and are subject to its provisions.

^{1/} The Borough and the Association filed a joint brief in a timely fashion.

The PBA dated their submission as November 3, 1978, but the same was not postmarked until November 5, and was not received by the Commission until November 9, 1978. Although the submission was untimely, since there were no new arguments or facts presented, then the undersigned accepted the submissions. The PBA is cautioned to avoid untimely submissions in the future.

^{2/} N.J.S.A. 34:13A-1 et seq.

3. That the Association is seeking to represent in one unit all sergeants, lieutenants, captains, deputy chief and chief employed by the Borough.

4. That the PBA currently represents sergeants and patrolmen employed by the Borough in one unit and argues that it would be inappropriate to remove sergeants from that unit.

5. That the parties stipulated to the receipt of numerous joint exhibits. 3/

6. ~~That~~ the parties stipulated that the issue herein is whether sergeants employed by the Borough more appropriately belong in a negotiations unit with patrolmen or in the proposed negotiations unit of sergeants, lieutenants, captains, deputy chief and chief. 4/

7. That the other issues raised by the PBA were:

(a) that the Petition in this matter was untimely filed and should be dismissed.

(b) that because the PBA had commenced the interest arbitration process pursuant to Commission rules prior to the filing of the instant Petition, that an interest arbitration bar existed to the filing of the Petition and the same should be dismissed.

(c) that the Petition was unclear on its face and that the Association was really filing a decertification petition and that the showing of interest was insufficient.

(d) that the Commission only has two choices regarding this Petition. It may accept the unit as petitioned for, or it may dismiss the Petition.

3/ Joint Exhibits: J-1, Contract between lieutenants and captains (ranking officers) and Borough effective from January 1, 1976 - December 21, 1977; J-2, contract between PBA and Borough covering sergeants and patrolmen effective January 1, 1976 - December 31, 1977; J-3, Borough of Fair Lawn Police Dept. Table of Organization; J-4, Fair Law Police Ordinance 863; J-5, Fair Lawn Police Dept. Rules and Procedures; J-6, job descriptions; J-7, contract between PBA and Borough effective May 23, 1978 to December 31, 1979.

4/ Transcript (T), p. 10.

AnalysisTimeliness Issue

The PBA argues that the Petition in this matter was untimely filed. The evidence shows that the Petition was filed on January 4, 1978, during a time when no contract existed to otherwise bar the Petition. The PBA however, argues that the Petition was not filed pursuant to Commission Rules and claims that the Petition should have been filed pursuant to N.J.A.C. 19:11-2.8(c)(2). That rule provides that during the existence of a written agreement concerning employees of a municipality, the petition must be filed not less than 90 days nor more than 120 days before the expiration date of the agreement. ^{5/}

The PBA alleges that since 19:11-2.8(c)(2) was not followed, that the Petition was untimely. However, the undersigned notes that 19:11-2.8(c)(2) was not the controlling rule in this case. The facts in this matter show that the PBA did not have an existing unexpired collective agreement at the time the Petition was filed covering any of the titles which were the subject of the Petition. In that event the rule that applies is N.J.A.C. 19:11-2.8(b). That rule provides that when there is a certified or recognized representative, a petition will not be timely filed if during the preceding 12 months the employee representative has been certified by the Commission or recognized by the

5/ N.J.A.C. 19:11-2.8(c) is as follows:

During the period of an existing written agreement containing substantive terms and conditions of employment and having a term of three years or less, a petition for certification of public employee representative or a petition for decertification of public employee representative normally will not be considered timely filed unless:

1. In a case involving employees of the State of New Jersey, any agency thereof, or any State authority, commission or board, the petition is filed not less than 240 days and not more than 270 days before the expiration or renewal date of such agreement;
2. In a case involving employees of a county or a municipality, any agency thereof, or any county or municipal authority, commission or board, the petition is filed not less than 90 days and not more than 120 days before the expiration or renewal date of such agreement;
3. In a case involving employees of a school district, the petition is filed during the period between September 1 and October 15, inclusive within the last 12 months of such agreement.

public employer. ^{6/} Since the PBA was neither certified nor recognized during the preceding 12 months, then the Petition is timely filed. The undersigned notes that the Commission's policy regarding the filing of petitions is that when no contract bar exists to the filing of a petition, and when a petition has not been filed during a certification or recognition bar, then the petition can be considered timely filed at any time. In the instant matter the Petition was filed during a time when the PBA had no unexpired contract covering the employees in question and neither a certification or recognition bar existed. Therefore, the undersigned finds and recommends that the instant Petition was timely filed pursuant to Commission Rules and policy.

Interest Arbitration Bar Theory

In conjunction with its above-stated position regarding the timeliness of the Petition, the PBA also argues that the Petition is untimely because an interest arbitration bar existed at the time of the filing of the Petition. The PBA argues that it initially filed for interest arbitration pursuant to Commission rules on December 9, 1977, and that it had been involved in negotiations prior to and subsequent to that date. The PBA believes that in order to have a reasonably successful chance at negotiating a new agreement pursuant to interest arbitration, that it must have a negotiations period that is insulated from the filing of petitions concerning employees on whose behalf it is negotiating. The PBA therefore believes that an interest arbitration bar existed at the time the instant Petition was filed thus making the Petition untimely.

The undersigned has considered the PBA's novel argument concerning an interest arbitration bar. The Commission's rules provide for certification and

6/ N.J.A.C. 19:11-2.8(b) provides:

Where there is a certified or recognized representative, a petition for certification or decertification will not be considered as timely filed if during the preceding 12 months an employee organization has been certified by the Commission as the exclusive representative of employees in an appropriate unit or an employee organization has been granted recognition by a public employer pursuant to N.J.A.C. 19:11-3.1 (Recognition as exclusive representative).

recognition bars as well as a contract bar to the filing of petitions. ^{7/} However, the rules do not provide for an interest arbitration bar.

The Director of Representation has discussed bars to the filing of petitions in In re Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248 (1977). Moreover, the Commission has considered the issue of negotiations bars in the past and has found that the negotiations does not bar the processing of an otherwise timely petition. ^{8/} Therefore, noting the absence of any rules concerning an interest arbitration bar, and noting the Commission's policy against a negotiations bar, the undersigned finds and recommends that no bar existed to the filing of the instant Petition.

Clarity of the Petition

The PBA alleges that the Petition in this matter is procedurally defective because it is not an appropriate petition for certification of public employee representative, but, rather, is a petition for decertification. The PBA also argues that the showing of interest is insufficient and therefore the Petition should not have been processed.

The undersigned notes that the Petition in this matter was introduced at hearing as Commission exhibit C-1c. The form of the petition is the correct form for filing petitions with the Commission, and the appropriate box, R0-Certification of Public Employee Representative, is checked, and the description of the unit sought is as follows:

"All superior officers, sergeants, lieutenants, captains, deputy chief and chief of police, excluding patrolmen."

Although the PBA believes that the instant Petition is defective, the undersigned is convinced that the Petition was filed pursuant to Commission rules and on the

^{7/} N.J.A.C. 19:11-2.8(b) and (c).

^{8/} See In re Township of Franklin, P.E.R.C. No. 64 (1971); In re City of Atlantic City, D.R. No. 78-31, 4 NJPER 56 (¶4027, 1977); In re County of Passaic, D.R. No. 77-7, 3 NJPER 22 (1976).

correct form, and that it clearly states the unit sought. Moreover, the undersigned notes that the showing of interest issued by the Commission only, and is not subject to collateral attack.^{9/} Therefore, the undersigned believes that the instant Petition clearly and correctly states the unit sought and the processing of the same is appropriate.

Appropriateness Issue

As noted earlier, the parties stipulated that the primary issue herein was whether the sergeants employed by the Borough more appropriately belonged in a negotiations unit with the patrolmen or in the proposed unit of sergeants, lieutenants, captains, deputy chief and chief. In order to make that determination it is necessary to examine two issues: first, whether sergeants are supervisors within the meaning of the Act and exercise such authority over patrolmen, and second, whether an actual or potential conflict of interest exists with the inclusion of sergeants in a unit of patrolmen.

The evidence shows that the PBA was recognized as the majority representative for both sergeants and patrolmen and that a collective agreement was reached between the Borough and the PBA covering those titles on March 11, 1976. That agreement was effective until December 31, 1977, and the parties engaged in collective negotiations beginning in late 1977 in order to reach a new agreement. The evidence also shows that on February 18, 1976, the Borough and the ranking officers group, which included the ranks of lieutenant and captain, also entered into a collective agreement which was effective until December 31, 1977. Although the evidence shows that the PBA and the Borough finally reached another agreement which was executed on May 23, 1978, and was negotiated on behalf of patrolmen and sergeants, that agreement included a caveat that the agreement was subject to the current proceedings before the Commission.

^{9/} N.J.A.C. 19:11-2.1.

The evidence further showed that in the latter part of 1977, the ranking officers and the sergeants became aware of a conflict of interest that allegedly existed between the sergeants and the patrolmen. The ranking officers and sergeants therefore decided to form the Superior Officers Association which included the deputy chief and chief, and the Association filed the instant Petition shortly after the expiration of the ranking officers collective agreement.

The chief of police, Lou Risacher, provided a considerable amount of evidence concerning the operation of the Fair Lawn Police Department as well as the duties of the various titles under his command. The chief testified that there were approximately 37 patrolmen, 7 sergeants, 3 lieutenants, 2 captains, 1 deputy chief and 1 chief. ^{10/} He also testified that he had been a member of the Borough's police force for approximately 40 years and has been chief for 22 years. ^{11/} The Chief testified that he acts as Department head and must only justify his recommendations to the City Manager and Council. ^{12/} In that regard, the Chief indicated that during his tenure as chief neither the Manager nor the Council has ever denied his recommendations. ^{13/} Even more important, the Chief testified that he assisted the Borough in the negotiations process by providing information used in negotiations such as information concerning salaries, and by being available for consultation during the negotiations process. ^{14/}

The Chief, as well as other witnesses, also provided considerable information concerning the duties of a sergeant. The Chief testified, for example,

^{10/} T.I, p. 33.

^{11/} T.I, pp. 24-25.

^{12/} T.I, p. 46.

^{13/} T.I, p. 50.

^{14/} T.I, pp. 57-64.

that the sergeants have the authority to suspend patrolmen or recommend discipline, and they can reprimand or change the assignments of patrolmen when necessary. ^{15/} The Chief further testified that he is aware of situations where a sergeant has reported patrolmen for improper activity and the Chief has accepted the sergeant's recommendation. ^{16/} Deputy Chief DiPentima testified that sergeants can make effective recommendations and that sergeants evaluate patrolmen twice a year. ^{17/}

Further testimony concerning the duties of a sergeant came from two sergeants involved in this matter. Sergeant Boogertman testified that he has changed the assignments of patrolmen because of discipline problems, that he has reprimanded patrolmen, that he makes the field assignments, and finally, that he knows that he has the authority to make recommendations concerning the patrolmen. ^{18/} In addition, Sergeant Joseph Messere testified that he is aware of conflicts between sergeants and patrolmen, that he is aware that sergeants can make recommendations concerning patrolmen, and that he has made recommendations concerning discipline of patrolmen which have been implemented. ^{19/}

The PBA in assessing the evidence produced at the hearing argues that the unit petitioned for is inappropriate. It argued that the Chief of Police is not appropriate for inclusion in the unit and is perhaps a managerial executive within the meaning of the Act. Moreover the PBA argues that although sergeants may evaluate and make recommendations concerning patrolmen, that the lieutenants, captains, deputy chief and chief can certainly evaluate and make recommendations concerning the sergeants. The conclusion that the PBA reached

^{15/} T.I, p. 21.

^{16/} T.I, pp. 22 and 25.

^{17/} T.I, pp. 86, 93-94.

^{18/} T.I, pp. 119-125.

^{19/} T.2, pp. 52-62, 80-84.

is that there is a greater conflict with the sergeants' inclusion with the superior officers than with their inclusion with the patrolmen. It also argues that there is only a de minimis conflict, if any, between the patrolmen and the sergeants. The PBA therefore contends that the current unit of patrolmen and sergeants is more appropriate than the unit sought by the Association.

The Borough and the Association have reached a far different conclusion after reviewing the evidence. They argue that the evidence shows that sergeants are supervisors within the meaning of the Act and have a conflict of interest with patrolmen. Moreover, they cite several Commission cases wherein the Commission has considered the placement of superior officers (including sergeants) vis-a-vis patrolmen. 20/

The undersigned has considered the position of the parties as well as the evidence produced at hearing and finds that sergeants employed by the Borough are supervisors within the meaning of the Act and are not appropriate for inclusion in a unit with patrolmen. It is also evident that in addition to the sergeants' supervisory status, that a conflict of interest exists between the sergeants and patrolmen and that such a unit is not legally appropriate. 21/

The Commission has considered the placement of superior officers, which generally include sergeants, on many occasions. Although it is not necessary to review the Commission's policy in depth, several cases are nearly on point with the instant matter. For example in In re Town of Kearny, D.R. No. 78-30, 4 NJPER 54 (¶14025, 1977), superior officers which included sergeants, lieutenants and captains, were excluded from a rank and file unit because of an inherent conflict of interest with patrolmen. Similarly, in In re Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977), captains, lieutenants and sergeants

20/ See In re City of Union City, P.E.R.C. No. 70 (1972); In re Borough of South Plainfield, D.R. No. 78-18, 2 NJPER 349 (1977).

21/ See Board of Education of W. Orange v. Wilton, 57 N.J. 404 (1971).

were removed from the rank and file unit because of a conflict of interest with patrolmen. The undersigned believes that these and other similar cases are the controlling cases in the instant matter. Therefore, the undersigned finds and recommends that the Fair Lawn sergeants must be removed from the existing unit of patrolmen.

In addition, the evidence has shown that the chief of police is a managerial executive, and certainly a confidential employee within the meaning of the Act, and therefore is not appropriate for inclusion in any negotiations unit. The chief testified that he assists the Borough during the negotiations process and operates the Department, and the undersigned believes that such activity is sufficient reason to exclude his title from the petitioned for unit.

The evidence concerning the deputy chief, however, does not establish that said title is inappropriate for inclusion with the other superior officers. Although the deputy chief substitutes for the chief in his absence, the evidence shows that he merely assumes responsibility for the Department as next in command, but he does not assume the full authority and responsibilities of the chief. In In re City of Union City, P.E.R.C. No. 70 (1972), the superior officers were removed from a unit with patrolmen, but the chief was found to be managerial and was not included in the superiors unit. ^{22/} Consequently, the undersigned recommends that a unit including sergeants, lieutenants, captains, and the deputy chief but excluding the chief, and patrolmen, is the most appropriate unit for sergeants (and lieutenants, captains, and deputy chief) employed by the Borough.

^{22/} In City of Union City, *supra*, the deputy chief was also excluded from the superiors unit. However, the undersigned still does not believe that the deputy chief at Fair Lawn has the kind of responsibility that would warrant the exclusion of the title from the superiors unit.

Commission Responsibility

In its final argument the PBA alleges that the Commission--or its agent--can only approve the unit exactly as petitioned for, or dismiss the Petition. The PBA apparently does not believe that the undersigned can approve or recommend a unit different than that sought by the Petitioner.

The PBA's theory in this regard is a common misconception of the Commission's authority and responsibility. The Commission is provided the jurisdiction and authority by the Act to decide issues concerning representation. The Commission has the responsibility to determine the most appropriate unit and it is not foreclosed from approving the most appropriate unit merely because a petitioner sought a somewhat different unit. In fact, the Commission has often found appropriate a negotiations unit different than the one sought by the petitioner. ^{23/}

Accordingly, the undersigned believes that the unit recommended above is appropriate, and recommends that an election be conducted in that unit if the Borough is unable or unwilling to recognize the same.

Recommendations

Based upon the entire record herein, and for the above-stated reasons, the undersigned Hearing Officer recommends the following:

1. That the instant Petition was timely filed and filed in the correct form, and that neither a negotiations nor an interest arbitration bar existed to the processing of the Petition.
2. That sergeants employed by the Borough are supervisors within the meaning of the Act, and that they have an actual conflict of interest with patrolmen and should therefore be removed from the patrolmen's unit.

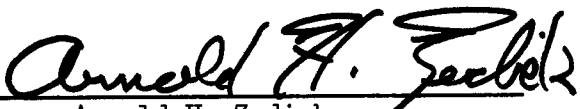
^{23/} See In re Rutgers, The State University, P.E.R.C. No. 76-49, 2 NJPER 229 (1976); In re City of Camden, P.E.R.C. No. 53 (1971); In re City of Camden, P.E.R.C. No. 52 (1971); In re Bridgewater-Raritan Regional Board of Ed., D.R. No. 79-12, 4 NJPER ____ (____, 1978).

3. That the chief of police is a managerial executive or minimally a confidential employee within the meaning of the Act and is not appropriate for inclusion in any negotiations unit.

4. That the unit sought by the Association is the most appropriate unit as modified herein. That pursuant to N.J.A.C. 19:11-5.1, an election be directed in the following recommended most appropriate unit: To include: All sergeants, lieutenants, captains, and deputy chief employed by the Borough. Excluding: The chief of police, patrolmen, and all other Borough employees.

5. That those employees of the Borough occupying included titles are eligible to vote in the election. They shall vote as to whether they wish to be represented for the purpose of collective negotiations in the above-described unit by the Fair Lawn Police Superior Officers Association or whether they wish no representation. 24/

Respectfully submitted,


Arnold H. Zudick
Hearing Officer

DATED: December 21, 1978
Trenton, New Jersey

24/ The undersigned believes that the Borough may be willing to recognize the Association as majority representative for the above-recommended unit if the proper request is made and support provided by the Association. It is therefore recommended that the Director determine whether an election is necessary herein.