

E.D. NO. 76-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF AVALON,
Public Employer-Peti-
tioner,

Docket No. CU-155

-and-

POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL NO. 59,
Employee Representative.

SYNOPSIS

The Executive Director clarifies an existing municipal police unit, determining that the sergeants, detective sergeant and captain are not supervisors within the meaning of the Act and that there is no conflict of interest that would require those officers to be excluded from a unit of patrolmen. Accordingly, these superior officers shall remain in the existing unit. Additionally, he determines that employees, including dispatchers, who have been appointed as "special officers" pursuant to N.J.S.A. 40A:14-146, are policemen within the meaning of the Act and may continue to be represented by the P.B.A.

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LOCAL NO. 59,
Employee Representative.

For the Public Employer-Petitioner, Robert E. Murray, Esq.
(Mr. Martin Pachman, of Counsel).

For the Employee Representative, Schneider, Solomon and
Aronson, Esqs.
(Mr. David Solomon, of Counsel).

DECISION

Pursuant to a Notice of Hearing to resolve a question concerning the unit status of certain employees in the Borough of Avalon Police Department, a hearing was held on March 29, 1975 before Hearing Officer Leo M. Rose at which all parties were given an opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. On May 22, 1975, a supporting brief was filed on behalf of Policemen's Benevolent Association, Local No. 59. Thereafter, on September 11, 1975, the Hearing Officer issued his Report and Recommendations, attached hereto and made a part hereof. Exceptions have not been filed to the Hearing Officer's Report and Recommendations.

It was the recommendation of the Hearing Officer that the dispatchers/special officers be removed from the unit of policemen and that the patrolmen, sergeants, detective sergeant,

and captain remain in the unit.

The undersigned has considered the entire record and the Hearing Officer's Report and Recommendations and makes the following findings of fact:

1. The Borough of Avalon ("Borough") is a public employer within the meaning of the New Jersey Employer-Employee Relations Act (the "Act") and is subject to its provisions.

2. Policemen's Benevolent Association, Local No. 59 ("P.B.A.") is an employee organization within the meaning of the Act and is subject to its provisions.

3. The Borough has petitioned the Commission for a clarification of unit, seeking to exclude dispatchers, special officers, sergeants, the detective sergeant and captain from the existing negotiating unit. It is the position of the P.B.A. that the aforementioned titles are properly included in the unit. Therefore, there is a question regarding the composition of the unit and the matter is properly before the undersigned for a determination.

4. With regard to the sergeants, detective sergeant and captain, the undersigned finds, in agreement with the Hearing Officer, that they are not supervisors within the meaning of the Act, i.e., they do not have the power to hire, discharge, discipline or to effectively recommend such action. The record clearly establishes that the power to hire, discharge, and discipline is within the province of the Director of Public Safety and/or the Chief of Police.

While informal opinions may be solicited from the captain and sergeants, they are not dispositive on any decision regarding hiring, firing, or discipline. Chief Foley's testimony details instances where the recommendations of superior officers concerning disciplinary actions against patrolmen were completely disregarded. The Chief makes an independent review in all such situations.

The Employer also relies on the doctrine of conflict of interest as enunciated by the Supreme Court in Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971), reversing and remanding P.E.R.C. No. 8 (1969), as a basis for excluding the superior officers from the unit. This doctrine does not appear to be applicable to the facts of this case. Although all witnesses were subject to extensive examination and cross-examination, citing myriad hypothetical situations, no witness corroborated the alleged conflict. Grievances, for example, are filed directly with the Chief and the Chief testified that none of the grievances in the past two years included decisions made by sergeants or the captain. The testimony leads to the conclusion that any conflict of interest is de minimus in character. See In re Borough of Rockaway, E.D. No. 43 (1972). The undersigned therefore agrees with the Hearing Officer that the captain, detective sergeant and sergeants are not supervisors within the meaning of the Act and should remain in the present unit.

5. The question of the inclusion of dispatchers/special officers is somewhat more complex. In actuality this issue

involves the performance of three separate jobs: special police officer, civilian police dispatcher, and special police officer/dispatcher.

The record indicates that the Borough employs four dispatchers in its Police Department on a year round basis. Of these four men, three are special officers vested with police powers pursuant to N.J.S.A. 40A:14-146. These powers are renewed on an annual basis subject to action by the municipal governing body. The remaining dispatcher is not a special officer and functions solely as a radio/telephone dispatcher.

During the summer months, the Borough employs an additional six to eight special officers in order to cope with a greatly expanded populus. During their on-duty hours, these men perform substantially the same duties as regularly employed patrolmen. There was also testimony to the fact that a college student is hired for the summer to act as a dispatcher in order to free special officers/dispatchers for assignment to street patrol. Thus, the complement of officers on the force includes regular officers, special officers, and special officers/dispatchers, all of whom perform traditional law enforcement duties.

In their testimony, Chief Foley and Sergeant Davison indicated that performance of police functions by the special officers/dispatchers is not limited to summer months. They are regularly engaged in signing complaints, "frisking" prisoners, incarcerating and caring for prisoners, occasionally carrying weapons and making arrests on duty, and, at the option of the

squad commander, working along with the regular police on street patrol while a regular officer functions as the dispatcher. The lone dispatcher not sworn as a special officer does not perform any of the aforementioned tasks and confines his duties to functioning as a dispatcher.

All dispatchers are uniformed, are subject to the same longevity and vacation schedule as regular police, as well as other benefits, share the same locker room, and are under the direct command of the Chief of Police. In given instances they have been subject to a 24-hour "on call" status as are regular police.

On the evidence presented, it is the finding of the undersigned that dispatchers/special officers share a community of interest with the regular police officers in the negotiating unit. In fact, the Borough has negotiated with this combined unit at least since 1973. None of the proffered testimony reveals any difficulties or conflicts which arose because of the unit's composition. Their inclusion in the unit would be appropriate unless they are disqualified based upon the following argument.

It is the Borough's contention that the unit as presently constituted is in contravention of the Act's restrictions on the representation of police and non-police. N.J.S.A. 34:13A-5.3. The substance of this contention rests in the wording of N.J.S.A. 40A:14-146 providing for the appointment of special police, which states in part: "They shall not be

members of the police force...." Thus, placement of special officers in a unit with regular officers is asserted to be in violation of N.J.S.A. 34:13A-5.3, which provides in pertinent part: "...except where established practice, prior agreement, or special circumstances dictate the contrary, no policeman shall have the right to join an employee organization that admits employees other than policemen to membership." The Hearing Officer found this argument dispositive in recommending that dispatchers/special officers be removed from the existing unit.

The undersigned disagrees. While N.J.S.A. 40A:14-146 provides that special officers shall not be members of the police force, it does not state that they are not policemen or that they cannot be included in a negotiating unit with other policemen. The record evidence reveals that the special officers do engage in police work and should be considered as policemen. They have and exercise police power. See County of Gloucester v. P.E.R.C., 107 N.J. Super. 150 (App. Div. 1969), aff'd per curiam, 55 N.J. 333 (1970) (rev'g P.E.R.C. No. 11, August 20, 1969).

Thus, the undersigned finds special officers to be policemen within the meaning of the Act. This finding applies to those special officers who are employed only in the summer months as well as to dispatchers/special officers employed throughout the year. Each is appropriately included in the unit represented by the P.B.A. in this matter. It is noted that most

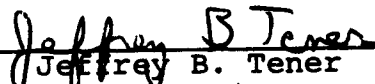
of the dispatchers/special officers have served in such a position for over five years, having been successively reappointed on an annual basis. Additionally, those special officers employed in the summer months, while working only seasonally, have an annual return rate of over 50%. For the reasons cited above, these employees are found to be appropriately included in the unit represented by the P.B.A.

There remains the unit placement of the dispatcher who has not been appointed as a special officer pursuant to N.J.S.A. 40A:14-146. The record in this matter does indicate that even that dispatcher shares certain aspects of the employment relationship with other unit members. Nevertheless, this dispatcher is not a policeman within the meaning of the Act. Whether the facts of this case would suggest the application of one of the statutory exceptions (i.e., except where...special circumstances dictate the contrary, no policeman shall have the right to join an employee organization that admits employees other than policemen to membership" [emphasis added]) cannot be determined from this record.

In view of the foregoing facts, the undersigned clarifies the appropriate unit for collective negotiations as all police officers employed by the Borough of Avalon, including Patrolmen (women), Sergeants, Special Officers, Dispatchers/Special Officers, the Detective Sergeant and the Captain. Excluded from the unit shall be the Chief, managerial executives,

craft, professional, and clerical employees, and supervisors within the meaning of the Act. The status of the civilian dispatcher, if not resolved by the parties voluntarily, may be the subject of a further proceeding before the Commission.

BY ORDER OF THE EXECUTIVE DIRECTOR



Jeffrey B. Tener
Executive Director

DATED: Trenton, New Jersey
March 3, 1976

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF AVALON,
Public Employer

-and-

Docket No. CU-155

P.B.A. LOCAL NO. 59,
Employee Representative

Appearances:

For the Employer:
Robert E. Murray, Esquire
By Martin R. Pachman, Esquire

For the Employee Representative:
Schneider, Solomon & Aronson, Esquires
By David Solomon, Esquire

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

Pursuant to the filing of a Petition for Clarification of Unit filed by the Borough of Avalon (hereinafter "Employer"), a hearing was held on March 29, 1975, in the Municipal Building, Avalon, New Jersey. The undersigned was the duly designated Hearing Officer of the Commission and all parties had full opportunity to make oral argument, present evidence, to examine and cross examine witnesses, to rebut, sum up and file briefs.

Based on the entire record in this matter, the Hearing Officer finds:

1. The Borough of Avalon is a Public Employer within the meaning of the New Jersey Employer-Employee Relations Act and is subject to the provisions thereof.

2. Local 59, Police Benevolent Association (hereinafter P.B.A.) is an Employee Representative within the meaning of the Act.
3. Inasmuch as there is a dispute concerning the composition of the unit, this matter is properly before the Commission for determination.

The Borough of Avalon employs a police force composed of the following: One chief, one captain, five uniformed sergeants, one detective sergeant, and eight patrolmen. In addition, there are four dispatchers (Tr. p. 20, 1.5). In part, the instant dispute concerns the dispatchers, who, since 1973, (Tr. p. 9, 1.11) were included in the same collective negotiations unit as the patrolmen, sergeants, detectives and captain. The Employer argues that the unit, as presently constituted, is in contravention of the Act in that said Act proscribes the inclusion of police and non-police in the same unit (Tr. p. 8, 1.10) Reference is to Section 34:13A-5.3, which reads in pertinent part, "...except where established practice, prior agreement or special circumstances dictate the contrary, no policemen shall have the right to join an employee organization that admits employees other than policemen to membership." 7 Until recently, the dispatchers have also served as special officers during the summer, but one newly-appointed dispatcher serves only in that capacity and is not a special officer (Tr. p. 20, 1.12 et seq.). The P.B.A. defends the present unit on the grounds that it is congruent with Borough of Rockaway and Patrolmen's Benevolent Association (E.D. No. 43). There, petitioning P.B.A. sought to represent a unit excluding only the chief, but including one lieutenant, two sergeants, and six patrolmen. The unit as described above was found appropriate by the Executive Director and an election was directed. The Executive Director further found the conflict of interest claimed to inhere in a mixed unit "would not diminish or compromise departmental discipline."

In the instant case, it is clear that there are two classes of employees--special officers-dispatchers and dispatchers. It is equally obvious that when the dispatchers are only dispatchers, they are excluded from the police unit. However, when they function as special officers, they function as police in summer months. Therefore, when they are serving as police in accordance with 34:13A-5.3, they could be construed as police, but when they serve as dispatchers, then they are employees, in conformance with 34:13A-3 (c), namely, non-police.

There is no claim to the exceptions set forth in the Act ("established practice, prior agreement or special circumstances"), so that there is no need herein to consider that provision of the Act. Thus, the dispatchers who serve as special officers are like any other special officers hired for a fixed term.

Furthermore, although the P.B.A. generally does not represent non-permanent officers (Tr. p. 122, 1.12 et seq.) as corrected by letter of Martin R. Pachman, Esquire, dated May 7, 1975 and special officers appear to be non-permanent, the undersigned sees no devolvement upon the Commission to enforce such rule. If the local of the P.B.A. desires to deviate from the rules established by their own state body, that is a matter between the local and the parent body. But concerning dispatchers, as dispatchers, divorced from the special police designation, at that point the local seems to be in contravention of that provision of the Act cited above. Therefore, there is a clear foreclosure in the Act for the presence in a police local of dispatchers and an accompanying presumption that the P.B.A. may not represent dispatchers.

On the other hand, the clear language of the appropriate statute empowering municipalities to appoint special officers, cited by counsel for petitioner (tr. p. 8, 1.4) seems to be dispositive of the right of

Respondent to represent special police. Said statute reads, in pertinent part, "The governing body of any municipality, whenever they shall deem it necessary, may appoint special policemen for terms not exceeding one year and revoke such appointments without cause or hearing. They shall not be members of the police force, and their powers and duties shall cease at the expiration of the terms for which they were appointed or upon revocation of their appointments."* (emphasis added).

The undersigned is unable to speculate on the intent of the legislature in considering special officers as non-members of the police force, but surely such relegation would seem to give legislative sanction to barring them from a unit of police. Perhaps the transitory nature of the work force involved is sufficiently wide spread to warrant a conclusion that special officers would be considered casual employees, more particularly in a resort setting. (Tr. p. 37, 1.8) (Tr. p. 19, 1.12). Therefore, in view of the clear language of the statute cited above, the undersigned finds and concludes that special officer-dispatchers are not properly includable in a unit of police officers either as dispatchers, as discussed above, or as police, pursuant to the Statute cited.

The other issue raised by the petition herein was the presence of the captain and sergeants in the same unit with patrolmen. On the one hand, petitioning employer cited Wilton** to support a claim that patrolmen and superiors in the same unit created a conflict of interest situation, ipso facto. On the other hand, Respondent P.B.A. cited aforementioned Borough of Rockaway (cited above) in defense of a commingling of higher ranks in the same unit. It may be well to examine the seeming contradictions

*40A:14-146, N.J.S.A.

**Board of Education of the Town of West Orange v. Elizabeth Wilton, et al, 57 N.J. 404 (1971).

in the matters cited not only for their bearing on the instant matter, but also for the edification of those similarly situated. In Wilton, a unit of principals and assistant principals sought and was granted, recognition by the Board of Education. The Board willingly so acted, but refused to include the Director of Elementary Education in the same unit. Therefore, the unit filed a representation petition with P.E.R.C.; the hearing officer supported the Board, but the decision of the Commission upheld the requested unit. The Board took the matter to the courts and the Supreme Court found, "Ordinary consideration of employer-employee relations make it sensible to say that if performance of assigned duties by a particular supervisor bespeaks such an intimate relationship with the management and policy-making function as to indicate actual or potential substantial conflict of interest between him and other supervisory personnel in a different or lower echelon of authority, such supervisor should not be admitted to the same negotiating unit. Admission would not be fair either to the supervisory employees or to the employer. Obviously, no man can serve two masters."

The citation above pretty thoroughly encapsulates the thinking of the Court and, a fortiore, the philosophy adopted by the Commission. In the aforementioned Borough of Rockaway, the same notion of conflict of interest obtruding in a unit composed of supervisors and supervised was treated differently. There the delegation of powers did not suffice to make the superior officers "supervisors" within the meaning of the Act ["...having the power to hire, discharge, discipline, or to effectively recommend the same...et seq. (Section 34:13A-5.3)], and the Executive Director found conflict between patrolmen, sergeants, and lieutenants to be de minimis and directed an election in the unit as described above as appropriate. Obviously, the old adage that "circumstances alter cases" is applicable to unit determination, thus one is compelled in each case to look to function, not title, to assess properly the amount of authority

passed down through the hierarchy.

An examination of the transcript, in a search for such delegation to sergeants of those authorities cited in the Act as the criteria for establishing supervisory status, reveals the following:

Sgt. Davison on direct:

Q: "Do you have the right to discipline a patrolman?"

A: "Not to my knowledge. I bring it to the attention of the Chief."

Later, the same witness on cross-examination,

Q: "Now has there been any time during your service as a Sergeant in the Borough of Avalon when a probationary employer was assigned to your squad?"

A: "Yes, sir."

Q: "And have you been called upon by the Commissioner of Public Safety or the Chief of Police or the Captain of Police?"

A: "To give a verbal report as to the...or a written report as to how such probationary officer was working out...? (sic)

A: "Yes, and in a very informal and oral manner, yes."

(It is well to note that the above testimony was given in the presence of the Chief). Earlier in the hearing, on the subject of hiring, on re-direct testimony by the Chief of Police:

Q: "Does the Director of Public Safety on his own have the authority to hire anybody?"

A: "He certainly does."

Q: "Is he the only one who would have the authority to hire anybody?"

A: "In my department."

Q: "Yes?"

A: "Yes."

Later, in the same passage, in regard to discharge, same witness:

Q: "Now in terms of firing anyone, is there a procedure by law which has

to be followed in terms of termination?"

A: "Now, you're getting into a different category. Are you talking about patrolman, sergeants, lieutenants, captains, now?"

Q: "That's correct."

A: "In order to fire anyone under Title 40 you must present a set of charges and have them at a hearing no sooner, no later than 30 days upon presentment of charges."

Q: "And--"

A: "And only after a hearing and they are found guilty will they be dismissed."

The undersigned found all testimony replete with references to a highly-centralized authority, in that the Chief or the Commissioner was informed in all circumstances and decisions emanated from above, even on minutiae. Even on the question of retention of a new employee, the evaluation by a sergeant was so informal as to approach the casual, as set forth in Sgt. Davison's testimony cited above and uncontraverted elsewhere.

Therefore, the undersigned is constrained to believe that the statutory authorities which are the mark of a supervisor are absent, under the present practice of the Avalon Police Department, irrespective of practice as set forth in the S.O.P. (Rules and Regulations and Standard Operational Procedure of the Avalon Police Department, Exhibit P-1).

In effect, all that has been said above regarding the limitations on the authority of the sergeants is equally applicable to the Captain.

The following should suffice to show that the "hire, fire, discipline or effectively recommend same" authorities do not inhere in the rank of Captain in the Avalon Police Department:

Captain Weed, on direct:

Q: "In the event that a violation of the rules of the Department comes to your attention, what do you do?"

A: " I report it to the Chief."

Q: "Do you have the authority to hire?"

A: "No, sir."

Q: "Fire?"

A: "No, sir."

Q: "Do you recommend to the Chief the actions concerning discipline of the members of the Police Department?"


A: "I may discuss it, but not in written recommendation, no. (Tr. p. 116, l. 14, et seq.)

As observed herein in regard to the sergeants, the image of a highly centralized department emerges, and such impression is more easily grasped when the size of the department is considered.

In regard to all issues presented in this matter, therefore, the undersigned finds and concludes as follows:

1. It is recommended the dispatchers-special officers be removed from the unit of police;
2. It is recommended that a unit of patrolmen, sergeants, detective sergeant and captain remain in one collective negotiations unit. The public employer herein should not be precluded from re-opening this matter when and if there is a substantial change in the composition of the unit or genuine delegation of necessary authorities to sergeants and/or superior officers so as to clearly show their supervisory status. Here and now the undersigned finds that the de minimis doctrine as set forth in Rockaway is compatible with the instant matter.

RESPECTFULLY SUBMITTED,


Leo M. Rose
Hearing Officer

DATED: September 11, 1975
Trenton, New Jersey