

P.E.R.C. NO. 93-104

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF HARRISON,

Public Employer,

-and-

HARRISON FRATERNAL ORDER
OF POLICE, LODGE 116,

Docket No. RO-H-92-42

Petitioner,

-and-

HARRISON POLICEMEN'S BENEVOLENT
ASSOCIATION, LOCAL NO. 22,

Intervenor.

SYNOPSIS

The Public Employment Relations Commission dismisses a representation petition filed by the Harrison Fraternal Order of Police, Lodge 116. The FOP seeks to represent a negotiations unit of patrol officers, detectives (plain clothes), traffic officers and all other police personnel below the rank of sergeant employed by the Town of Harrison. Those employees are currently represented by Harrison Policemen's Benevolent Association, Local No. 22 in a unit of all patrol officers, sergeants, lieutenants, captains and deputy chiefs. The Commission adopts a Hearing Officer's recommendation that the existing unit continues to be an appropriate unit.

P.E.R.C. NO. 93-104

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF HARRISON,

Public Employer,

-and-

HARRISON FRATERNAL ORDER
OF POLICE, LODGE 116,

Docket No. RO-H-92-42

Petitioner,

-and-

HARRISON POLICEMEN'S BENEVOLENT
ASSOCIATION, LOCAL NO. 22,

Intervenor.

Appearances:

For the Public Employer, Murray, Murray & Corrigan,
attorneys (David F. Corrigan, of counsel)

For Petitioner, Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

For Intervenor, Whipple, Ross & Hirsh, attorneys
(John C. Whipple, of counsel)

DECISION AND ORDER

On September 13, 1991, the Harrison Fraternal Order of Police, Lodge 116 ("FOP") petitioned to represent a negotiations unit of patrol officers, detectives (plain clothes), traffic officers and all other police personnel below the rank of sergeant employed by the Town of Harrison. Those employees are currently represented by Harrison Policemen's Benevolent Association, Local No. 22 ("PBA") in a unit of all patrol officers, sergeants,

lieutenants, captains and deputy chiefs. The petition was accompanied by an adequate showing of interest.

The Town and the PBA opposed the petition because it would alter the existing all-inclusive negotiations unit. In addition, the PBA argues that there is a pre-1968 history of negotiations between the Town and the PBA that warrants maintaining the existing unit structure.

On December 19, 1991, the Director of Representation directed an election. D.R. No. 92-8, 18 NJPER 29 (¶23008 1991). He found that the "quasi-military nature of a police force and the inherent authority of superior officers in such a chain of command creates an impermissible conflict of interest that can only be cured by the removal of superior officers from such units." Ibid. (citations omitted).

The Town requested review of the Director's decision and we remanded for further investigation. P.E.R.C. No. 92-76, 18 NJPER 86 (¶23038 1992). The Director then issued a Notice of Hearing.

On July 23, 1992, Hearing Officer Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On December 15, 1992, the Hearing Officer recommended dismissing the representation petition. H.O. No. 93-1, 19 NJPER 37 (¶24018 1992). He found that the superior officers were not supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.; there were no pre-1968

negotiations; and, under the unique facts of this case, there is no conflict of interest between superior and rank-and-file police officers. He concluded that the existing unit continues to be appropriate.

On January 27, 1993, after an extension of time, the petitioner filed exceptions. We will address the issues raised in those exceptions in the course of our analysis. On February 22, the employer filed a reply responding to each exception and urging adoption of the Hearing Officer's recommendation.

We have reviewed the record. We adopt the Hearing Officer's undisputed and thorough findings of fact (H.O. at 3-16).

N.J.S.A. 34:13A-5.3 provides that we shall determine negotiations units "with due regard for the community of interest among the employees concerned." It further provides that:

nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership....

This provision prohibits the placement of supervisors in negotiations units with non-supervisors unless one or more of the listed conditions are met. See also N.J.S.A. 34:13A-6(d). The petitioner excepts to the Hearing Officer's finding that the sergeants, lieutenants, captains and deputy chiefs are not supervisors within the meaning of the Act. We begin our analysis with that issue.

The Hearing Officer found that, except for the chief, none of the police personnel in Harrison have the authority to hire, discharge or discipline employees. He also found that superior officers do not effectively recommend disciplinary action. Any police officer, regardless of rank, must report to the chief breaches of departmental rules and regulations. The chief then initiates an independent investigation of the allegations. The petitioner correctly points out that superior officers are responsible for seeing that subordinates carry out the chief's orders. But those are not the types of responsibilities that trigger the statutory definition of supervisor. Contrast Town of West New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1987) (most superior officers had effective role in discipline). In determining whether these superior officers are supervisors, we must apply the Legislature's definition.^{1/}

The Hearing Officer found that, at least on a de facto basis, Captain Biernacki orally reprimanded patrol officer Nankivell for failing to complete required reports after Nankivell arrested a runaway juvenile. The petitioner contends that the Act was intended to define this "type of behavior as indicative of the

^{1/} The petitioner refers to a broader definition of supervisor found in a report of the Advisory Commission on Intergovernmental Relations and its model public sector bargaining statute. Neither that definition nor the broader definition of supervisor found in the National Labor Relations Act, 29 U.S.C. §152 (11), was adopted by the New Jersey Legislature.

incompatibility of superior and rank-and-file officers in a combined bargaining unit regardless of the number of times that it took place in the past." Exception No. 9. We agree with petitioner that if superior officers could and did discipline subordinates, then the superior officers would be supervisors within the meaning of the Act. But the record indicates only one oral reprimand, and the Hearing Officer found that it was unclear whether the superior officer had the authority to take the action. Compare Fairfield Tp., P.E.R.C. No. 92-115, 18 NJPER 299 (¶23127 1992) (foreman may have exceeded authority in disciplining employee). The chief testified that he has the authority to impose oral and written reprimands and suspensions of five days or less. Only the mayor and council can impose suspensions greater than five days or terminate employees. Under these circumstances, we agree with the Hearing Officer that a single oral reprimand, which the superior officer may not have had the authority to impose, is insufficient to show that these superior officers are supervisors within the meaning of the Act.^{2/}

Having found that these superior officers are not supervisors within the meaning of the Act, we next consider whether superior and rank-and-file officers lack the community of interest

^{2/} The petitioner claims that because Lieutenant Minutillo conducts all disciplinary investigations and hears disciplinary appeals, he therefore recommends discipline and should not be permitted to remain in the existing mixed unit. That issue is not properly before us in determining whether to accept the Hearing Officer's recommendation to dismiss this petition.

necessary to permit continuation of the existing unit. If there is a sufficient conflict of interest between superior officers and other officers, we will break up a unit, despite a history of stable relations. For example, in Town of West New York, we found that superior officers were supervisors and that there was an "established practice" of pre-Act give-and-take negotiations involving a negotiations unit containing those superior officers and their subordinates. Nevertheless, we severed the superior officers from the existing unit because their job responsibilities placed them in a substantial conflict of interest with their subordinates.

In Union City, P.E.R.C. No. 70, NJPER Supp. 295 (¶70 1972), we recognized that the military-like structure of a police department and the concomitant traditions of discipline, regimentation and ritual cannot be ignored when we consider whether or not a superior officer exercises any significant authority over a rank-and-file officer which would or could create a conflict of interest between the two. We stated:

In our view, where these considerations are real rather than merely apparent, it would be difficult indeed to conclude, in contested cases, that a community of interest exists between the lowest ranking subordinate and his superior, absent exceptional circumstances. We do not intend that this observation extend to those cases where the points of division are so few and so insignificant as to be termed de minimis, such as might not unreasonably be expected to exist in a small police or fire department. We are persuaded, however, after almost four years experience with this statute that unless a de minimis situation is clearly established, the distinction between superior officers and the rank and file should be recognized in unit determination by not including the two groups in the same unit. [Id. at 297]

Here, the Hearing Officer found that conflicts of interest between superior and rank-and-file officers have been de minimis over the past two decades. There has not been a single incident amounting to an actual substantial conflict of interest. Although there may be a potential conflict of interest, as there is in any police department, in nearly 20 years that potential has never been realized. Further, in our remand we noted that the history of stable labor relations must be weighed against the potential for conflict. Here there has been a stable negotiations relationship for at least 18 years and no actual substantial conflict of interest has materialized.

In making his recommendation, the Hearing Officer considered the fact that the public employer, with nearly two decades of experience with this all-inclusive unit, has found no conflict of interest between superior and rank-and-file officers, and, like the incumbent employee organization, does not seek to modify the existing unit. The petitioner argues that the employer's opinion should not be determinative and that the primary interests to be considered are those of the negotiations unit members. We believe that both the employer's position and the employees' interests must be considered. Neither is determinative; both are relevant. This is the first time that we have considered severance of superior officers where the employer contends that there has been

no conflict between superior and rank-and-file officers.^{3/} The employer's experience is relevant because it has been in a key position over the decades to assess whether the potential for a conflict of interest has been realized. In the absence of any evidence of a conflict undermining its managerial interests, the employer's position is an important consideration.^{4/}

The Hearing Officer found that there is no evidence that the all-inclusive unit has resulted in compromising any unit employee's statutory right to fair representation. The petitioner has not excepted to this determination. We will sever a group of employees from a negotiations unit where there has been a showing that the existing relationship is unstable or that the incumbent organization has not provided responsible representation. See

3/ In West New York, the employer declined to take a position concerning a severance petition. We noted that what the employer, employee organization, or employee desires is not the deciding factor in determining the appropriate negotiations unit. Id. at 280 n. 2.

4/ In Rochelle Park, D.R. No. 89-22, 15 NJPER 195 (¶20082 1989), aff'd App. Div. Dkt. No. A-5273-88T1 (3/19/90), the employer also took no position on the severance petition. The Director of Representation severed superior officers who were not supervisors based on a substantial and material potential conflict of interest. Review by us of that decision was not requested and we therefore did not review the facts of that case. Here, the employer contends that there is no conflict of interest warranting severance. We must review that contention as part of our overall consideration of this case. The petitioner's reliance on Elizabeth Fire Officers Ass'n v. Elizabeth, 114 N.J. Super. 33 (App. Div. 1971) is misplaced. That case, like West Orange Bd. of Ed. v. Wilton, 57 N.J. 404 (1971), involved conflicts of interest between supervisors, not between superior and rank-and-file officers.

Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61, NJPER Supp. 248 (¶61 1971). But there is no evidence in this record to support a finding that the interests of unit members have been compromised.

Having reviewed the record and considered each of the petitioner's exceptions, we adopt the Hearing Officer's recommendation:

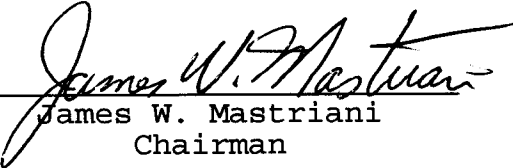
[B]alancing the unique facts present in this case which include a long, stable collective negotiations history with a unit structure inclusive of superior and rank and file officers, no evidence of any breach of loyalty to the Town's interest by either superior or rank and file officers, no evidence of conflict of interest amounting to more than that which is merely de minimis in nature, I find this unit continues to be an appropriate unit of Harrison Township police officers. [H.E. at 27]

We therefore dismiss the FOP's petition.

ORDER

The FOP's petition is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: May 20, 1993
Trenton, New Jersey
ISSUED: May 21, 1993

H.O. NO. 93-1

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

In the Matter of

TOWN OF HARRISON,

Public Employer,

-and-

FRATERNAL ORDER OF POLICE, LODGE 116,

Docket No. RO-H-92-42

Petitioner

-and-

POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL NO. 22,

Intervenor.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission recommends that the Commission dismiss a representation petition filed by FOP, Lodge 116. Lodge 116 seeks to sever the rank and file patrol officers from the extant collective negotiations unit comprised of all police personnel, excluding the chief. The Hearing Officer finds that superior officers are not supervisors within the meaning of the New Jersey Employer-Employee Relations Act and, under the unique facts of this case, no conflict of interest exists between superior and subordinate police personnel. The Hearing Officer finds no pre-Act negotiations relationship.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommendations, any exception 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.

H.O. NO. 93-1

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

In the Matter of
TOWN OF HARRISON,

Public Employer,

-and-

FRATERNAL ORDER OF POLICE, LODGE 116,

Docket No. RO-H-92-42

Petitioner

-and-

POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL NO. 22,

Intervenor.

Appearances:

For the Town of Harrison, Murray, Murray & Corrigan,
attorneys (David F. Corrigan, of counsel)

For the FOP Lodge 116, Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

For PBA Local 22, Whipple, Ross & Hirsh, attorneys
(John C. Whipple, of counsel)

**HEARING OFFICER'S
REPORT AND RECOMMENDATIONS**

On September 13, 1991, the Harrison Fraternal Order of Police, Lodge No. 116 filed a timely representation petition with the Public Employment Relations Commission seeking to represent a unit of all patrol officers, detectives (plain clothes), traffic officers and all other police personnel below the rank of sergeant

employed by the Town of Harrison (C-2).^{1/} The petitioned-for employees are currently represented by PBA Local No. 22 in an inclusive unit consisting of all sergeants, lieutenants, captains and deputy chiefs in addition to the patrol officers. The petition was accompanied by an adequate showing of interest.

The Town and the PBA opposed the petition because it would alter the present negotiations unit by severing the patrol officers from the existing all-inclusive unit. Additionally, Local 22 argues that there is a pre-1968 negotiations history whereby Local 22 negotiated on behalf of all police titles with the exception of the deputy chief, which did not exist at that time, and the chief.

On December 19, 1991, the Director of Representation issued a decision directing an election in this matter. Town of Harrison, D.R. No. 92-8, 18 NJPER 29 (¶23008 1991). The Director found "[t]he quasi-military nature of a police force and the inherent authority of superior officers in such a chain of command creates an impermissible conflict of interest that can only be cured by the removal of superior officers from such units" [citations omitted]. Id.

On January 2, 1992, the Town of Harrison requested review of the Director's decision and direction of election. On January 6,

^{1/} Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "P" and "R" refer to the Petitioner's and Respondent's exhibits, respectively. The transcript citation T1 refers to the transcript developed on July 23, 1992, at p. 1.

1992, the Chairman temporarily stayed the scheduled election pending the Commission's review of the merits of the Town's request. On January 31, 1992, the Commission issued an Order which vacated D.R. No. 92-8 and remanded the matter to the Director for further investigation. Town of Harrison, P.E.R.C. No. 92-76, 18 NJPER 86 (¶123038 1992).

Pursuant to the Commission's direction, the Director assigned a staff agent to conduct an administrative investigation. On March 9, 1992, the staff agent conducted an informal conference attended by the parties. Subsequently, the parties submitted additional documents and statements of position regarding this matter.

On April 24, 1992, based on the information gathered through the administrative investigation, the Director advised the parties that he was inclined to direct an election among only patrol officers. On June 5, 1992, on the basis of exceptions filed to his April 24, 1992 letter, the Director issued a Notice of Hearing. On July 23, 1992, I conducted a hearing where the parties examined witnesses and introduced exhibits. All parties waived oral argument and filed post-hearing briefs on or before September 25, 1992, in accordance with extensions I granted. Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Town of Harrison is a public employer within the meaning of the New Jersey Employer-Employee Relations Act and Lodge 116 and Local 22 are employee organizations within the meaning of the Act.

2. The Town's police department consists of approximately 50 police officers including a chief of police, a deputy chief, three captains, four lieutenants, five sergeants and approximately 35 patrol officers.

3. Harrison is an urban industrialized town with a population of approximately 12,000 people in a one square-mile area (T15-T16). Patrol officers perform routine patrol duties in a one-person squad car. Some of the sergeants (Murphy, Ferranti and Wilson), lieutenants (Borkowski, Dohn and Gallagher) and captains (Trucillo) are assigned to patrol duty and perform basically the same functions as patrol officers (T35-T37). Other sergeants, lieutenants and captains and, on occasion, patrol officers are assigned to desk duties (T18).

4. The police department is divided into various special bureaus and six squads (P-4; T130-T131). Squads 1 through 5 are assigned to patrol functions and Squad 6 is assigned to traffic (T131). Each squad is headed by a "commander" who is either a captain or lieutenant (T131). Many squads are assigned a sergeant who serves as the "street supervisor" or "squad supervisor" (T132). Special squads A and B work swing shifts and report to the squad commander on duty during their particular shift. Ultimately, patrol

officers assigned to squads A and B report to the deputy chief (T156-T157). In addition to overseeing squads A and B, the deputy chief serves as acting chief during the chief's absence (P-19; T143).

5. The Town's police department operates pursuant to a typical chain of command established under a para-military organizational structure. The chief of police is the highest ranking officer, then comes the deputy chief, captains, lieutenants, sergeants and patrol officers (T19). This chain of command is set forth in the Town's Rules and Regulations for the police department (P-2; T37).^{2/} The chain of command in Harrison operates no differently from the chain of command found in other towns (T48-T49). In Harrison, the chief drafts written orders and issues them to squad commanders or other superior officers who are responsible to see that the orders are carried out (T54). Current procedure calls for an informal line-up (roll call) by subordinate officers which provides the squad commander an opportunity to make assignments and inform those on the particular shift of important events. Occasionally, the squad commander will delegate this responsibility to the desk officer (T153).

6. Over the last two years, Police Chief Malley has issued a number of special or general department orders and memoranda on a variety of subjects designating superior officers as

^{2/} The police department's Rules and Regulations were adopted in 1923 (P-2; P-3; T128-T129). The title of deputy chief did not exist at that time, consequently, no reference to that title is made in the Rules and Regulations (T37).

procedures in domestic violence cases (P-18; T143). All squad commanders and/or supervisory personnel are responsible to ensure that the new standardized officer's report (investigation report and supplemental investigation report) are completed accurately, factually, concisely and completely. Each report submitted must be reviewed and initialed by the desk officer or superior officer on duty (P-20; T144). The Traffic squad commander or, in his absence, the working squad commander is responsible for ensuring that a patrol officer is assigned to the intersection of Frank E. Rogers Boulevard South and Bergen Street for motor vehicle and pedestrian traffic control (P-21; T145). Similarly, the tour 3 squad commanders and/or supervising officers are responsible to ensure that a patrol officer is assigned to the intersection of Frank E. Rogers Boulevard South and Cape May Road for the purpose of motor vehicle and pedestrian traffic control (P-22; T145). Squad commanders and/or supervisory officers are responsible for ensuring that Patrol Vehicle Check Lists are completed and submitted by patrol officers during the tour of duty. The squad commander and/or supervisory officer must review and sign the check list submitted by the patrol officer (P-23; T146). It is the responsibility of the tour 2 squad commander and/or supervisory officer to ensure that the officer in charge of the cell block area conducts a daily sanitation inspection and completes the appropriate form (P-25; T147). P-26 and P-28 is a special department order concerning personnel transfers. P-26 and P-28 name police officers of various ranks and

having the responsibility to ensure the implementation of such directives. For example, a sergeant is assigned the responsibility to call officers for overtime assignments in order to maintain minimum staffing levels (P-11; T137). All "supervisory personnel" [quotations not in original] are responsible to ensure that the standard operating procedure for processing juveniles in municipal lockup is adhered to and that the personnel under their command are informed and instructed in such procedures (P-13; T139-T140). Squad commanders are responsible for the receipt, review and approval of all requests for compensatory time off (P-14; T140). The deputy chief is assigned the responsibility to authorize the towing of any vehicle by the police department. In the event that the deputy chief is not on duty it is the responsibility of the squad commander and/or supervising officer to ascertain the circumstances surrounding the reasons for the request to tow in order to determine the appropriateness and necessity of towing any vehicle. In the event that no supervisor is readily available and where no emergency conditions exist, the vehicle must remain at the location until such time as a supervisor can authorize the requested tow (P-15; T141). Police personnel using new police vehicles were instructed to notify their squad commanders of any mechanical problems. Squad commanders were directed to forward reports of vehicle malfunctions to the chief (P-17; T142). Squad commanders were responsible for distributing to all of their subordinate officers amendments to a domestic violence statute and guidelines on police response

direct them to report to superior officers for their new assignments. Officers seeking a tour switch, or the use of vacation or earned compensatory time off, make such requests by submitting an appropriate form to the squad commander or, if not available, the deputy chief in charge of the tour. The squad commander or deputy chief reviews the request and either approves or disapproves it (P-29A; P-29C; T149-T151). Patrol Officer Daniel Nankivell has been ordered by various superior officers (sergeants, lieutenants, captains and the superior officer serving as squad commander) not to leave his shift (T152). Sometimes the squad commander has denied Nankivell's request for the use of vacation time or earned compensatory time off (T183). Normally at a crime scene, a patrol officer arrives first, secures the area and notifies a superior officer. The superior officer responds to the scene, takes charge and delegates assignments to subordinates (T153-T154).

7. The chief has the authority to file disciplinary charges against police personnel (T21). The chief is apprised of a possible infraction by reviewing officers' reports submitted either by superior or patrol officers (T21). For example, recently a sergeant directed a citizen to move his vehicle off of the sidewalk. A patrol officer, present at the incident, filed a report with the chief indicating that the manner in which the sergeant handled the incident may have reflected bias against a racial minority (T22). Several years ago, Capt. Sweeney was disciplined based on a report filed by patrol officer Lozo (T23; R-2). In

another incident, patrol officer VanGinneken filed an officer's report concerning the actions of Capt. Trucillo. VanGinneken reported that Trucillo had attended a party in an adjoining town while on duty (T23-T24; R-1). In another incident Sgt. Wilson advised the deputy chief that Capt. Trucillo, who was relieving the desk officer at the time, did not respond promptly to a bank alarm received at the police station. Capt. Trucillo was orally reprimanded as the result of that incident (T52; T67-T68; R-3; R-4).

8. There have also been incidents of superior officers filing reports with the chief concerning improper actions on the part of patrol officers (T63). Capt. Trucillo filed an officer's report against Patrol Officer VanGinneken for leaving a prisoner unattended. VanGinneken was suspended as the result of that incident (T63; T133-T134; P-5). A sergeant filed a officer's report on a patrol officer who called in sick but was later found at a tavern (T63). Lt. Biernacki filed an officer's report with the chief concerning his observation of Patrol Officer Hart, who had been placed on a leave of absence due to injury, selling flowers from his pickup truck at a local shopping mall. Ultimately, Hart was suspended as the result of that incident (T134-T135; P-6). Capt. Biernacki filed an officer's report with the chief advising that Police Officer Nankivell failed to complete any of the necessary reports after Nankivell arrested a runaway juvenile. Ultimately, the chief served Nankivell with a written reprimand regarding this incident (T135; P-7).

9. On August 12, 1981, John Biernacki, then serving in the rank of sergeant, was suspended for failing to properly supervise his subordinate police officers. Biernacki neglected to ensure that his subordinates completed the necessary reports after responding to a domestic disturbance and ensure that an automatic pistol taken from the household for safekeeping was turned over to the desk officer (T136; P-8; P-9).

10. Officer reports are filed with the chief for his review. The chief has authority to impose oral or written reprimands or suspensions of five days or less (T19). Only the mayor and council can impose suspensions greater than five days or terminate employees (T20). A superior officer has imposed an oral reprimand on a subordinate patrol officer at least on a de facto basis.^{3/} Capt. Biernacki may have orally reprimanded Patrol Officer Nankivell for failing to complete the required reports after Nankivell arrested a runaway juvenile (T172). Biernacki told Nankivell at the time the runaway juvenile was arrested that if he

^{3/} Chapter V of the Policy Management Guidelines issued to police departments by the Attorney General recommends that all superiors have the authority to orally reprimand subordinates. The chief is currently reviewing the Chapter V recommendations and will make a recommendation to the mayor and council soon. However, the chief testified that "we're trying to comply with what the Attorney General would like...in this area" (T56).

did something wrong again a more severe situation could occur, and he delineated the penalties for dereliction of duty (T173).^{4/}

11. In all circumstances where conduct on the part of police department personnel may result in discipline, whether that conduct is brought to the chief's attention by a patrol or superior officer or initiated by the chief, himself, the chief directs that an independent investigation be conducted (T64). The same investigation procedure is used whether the incident is raised by a patrol officer against a superior officer or a superior officer against a patrol officer (T65). The chief assigns Lt. Patrick Minutillo, Commander of the Detective and Records Bureaus and Head of Internal Affairs, to conduct the independent investigations and

^{4/} I make a careful distinction between the imposition of an oral reprimand which constitutes the initial step in a progressive discipline system and mere criticism. For example, in P-5 Patrol Officer VanGinneken states in his officer's report that he felt "that Capt. Trucillo was acting in an unprofessional manner, and his actions were demeaning and embarrassing to reprimand me in a public restaurant for a miscommunication that could have been handled in a more professional way." The officer's report goes on to indicate that Trucillo directed VanGinneken to prepare a report regarding the incident and to talk to the chief about it. Nothing in the report indicates that Trucillo told VanGinneken that a continuation of his conduct would result in further negative action or penalties. In VanGinneken's case, Chief Malley reviewed the reports and independently decided to take disciplinary action. Trucillo's comments, while characterized in VanGinneken's report as a reprimand, did not constitute discipline. In contrast, Biernacki told Nankivell that if he continued in the same course of improper conduct, a more severe situation would occur, and he delineated certain penalties for dereliction of duty. The nature of Biernacki's comments may constitute discipline as an oral reprimand because the statements contemplate more severe discipline if improper conduct continues.

act as hearing officer in minor disciplinary appeals (T20-T21; T59-T62). Neither the chief nor the deputy chief is involved in the investigation or hearing process (T38-T39; T75).

12. When the chief is apprised of an incident in which he might determine that disciplinary action is necessary, he assigns the matter to Minutillo to conduct an independent investigation into the facts (T61-T62; T64). Generally, Minutillo conducts the investigation himself, however, on occasion, he has assigned one of the detectives to assist him (T60; T74-T75). Usually, Minutillo's investigation consists of interviewing the complainant, pulling the files, collecting data, making tape recordings, developing witness lists, and obtaining statements (T61-T62; T65). Minutillo submits the information gathered during the investigation to the chief for his review (T62). Thereafter, the chief decides whether to take formal disciplinary action (T62; T65).

13. Any employee who is subject to discipline may demand a hearing on the charges (T20-T21; T38). Minutillo serves as hearing officer (T20-T21; T62; T75). Neither the chief nor the deputy chief are present during the hearing (T38-T39; T75). The hearing is tape recorded (T40). After the conclusion of the hearing, Minutillo either meets with the chief and discusses the information presented and any credibility determinations made by Minutillo, or he prepares a written report. On occasion Minutillo will make suggestions to the chief regarding the discipline. The chief will listen to the tape recording, consider Minutillo's comments or report, and decide

whether to affirm the charges and impose discipline (T39-T42; T75-T77).

14. The grievance procedure contains four steps, the final step culminating in binding arbitration. The first step calls for the grievance to be submitted to the chief, the second step is submitted to the chairperson of the Police Committee and the third step is submitted to the mayor (T49-T50; P-12).

15. New employees are evaluated at six months and again at one year (T132). No evaluation program exists for employees with more than one year's seniority (T133).

16. The chief is involved in the screening of new employees, but the mayor and council serve as the appointing authority under Civil Service and make final hiring decisions (T34-T35).

17. At least since 1947 Harrison patrol officers were able to join Local 22 (T27; T86-T87; T109-T110). In 1953 or 1954, Local 22 established the raise committee (T89; T102). The raise committee would be formed in April or May of each year; meet with union members to decide what improvements would be sought; gather facts, figures and costs; and then seek a meeting with the mayor before the end of the year (T97; T111).^{5/} The raise committee not only sought and received improvements in wages, but also health benefits,

^{5/} Patrol Officer Raymond Graves served on the raise committee in late 1968 and early 1969 (T113). By that time, the raise committee met with the mayor and council members, together (T113-T114).

uniform allowances, pay for court time and vacation days (T107-T108). The meeting with the mayor would last from one-half hour to two and a half hours, depending on the mayor's mood (T92; T114). The mayor always met with the police and fire departments together (T90; T96; T121; I-2). Although the committees representing the police and fire departments might make different requests regarding salary increases and other changes, and ultimately the Town might agree to changes which related only to the individual needs of the fire or police department, the salary increases for the police and fire departments were always the same (T121-T123; T125).

18. After the mayor had his meeting with the raise committees, he would meet with the Town Council (T90; T92). The raise committee would also meet with the Town Council in an attempt to enlist its support for the employees' requests (T92; T113-T114). After some time the mayor would again meet with the raise committees to apprise them of what the Town was willing to grant (T90; T93; T101). The parties did not enter into give-and-take negotiations, rather, the mayor would meet with the raise committee, reduce the committee's initial demands by some degree and make "suggestions" for changes which, in effect, constituted his bottom line (T101; T104; T114). The raise committee took the mayor's "suggestions" back to the membership to vote on whether the Town's proposed modifications were acceptable (T93). While between 1964 and 1968 the membership was told that they could refuse the Town's proposals

and that the raise committee would return to the mayor for further discussions, Local 22's membership always voted to accept the Town's proposals (T120).

19. On one occasion, in 1970 or 1971, Local 22's membership voted to reject the Town's proposals and the raise committee returned to the mayor for further meetings (T116). Local 22 suggested certain alternatives which the mayor and council considered. Ultimately, compromises were reached by all parties -- Local 22, the FMBA and the Town -- and Local 22's membership voted to approve those changes (T93-T94).

20. Prior to 1960, superior officers were allowed to sit as members of Local 22 but were limited to attending only open meetings and did not have the right to vote on Association matters (T88; T98). In or about 1960-61, superior officers formed the Superior Officers Association (T87; T98). Local 22 sent superior officers letters advising him that they must disband their Association or they would be expelled from the PBA (T87; T98). All superior officers resigned from the SOA but demanded a greater voice in Local 22. It was around this time that Local 22 allowed a superior officer to sit on the raise committee (T87-T88; T95; T99). While prior to 1960, superior officers were neither on the raise committee nor voting members of Local 22, they, nonetheless, received the same benefits and improvements as patrol officers, since such improvements were instituted by way of Town ordinance and applied across the board (T46-T47; T99-T100; P-1).

21. The Town and Local 22 had never executed a written collective agreement prior to 1974 (T46; T103).

22. The chief has perceived no problems, administrative or otherwise, resulting from the current all-inclusive unit structure. There has not been a single occurrence where either a patrol officer or a superior officers failed to perform his/her duty because of the extant negotiations unit structure (T25-26). No grievances have been filed resulting from disputes between patrol and superior officers regarding implementation of orders (T55).

ANALYSIS

Whether Superior Officers Are Supervisors Within The Meaning Of the Act

N.J.S.A. 34:13A-5.3 provides, in relevant part, that supervisors "having the power to hire, discharge, discipline, or to effectively recommend the same" shall not be represented by any employee organization which admits non-supervisory personnel to membership, "except where established practice, prior agreement or special circumstances, dictate the contrary." N.J.S.A. 34:13A-6(d) provides, in relevant part, that the Commission is empowered to resolve questions concerning representation of public employees by deciding in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes both supervisors and

nonsupervisors. See Cherry Hill Tp. Dept. of Public Works, P.E.R.C. No. 30, NJPER Supp. 114 (¶30 1970).

The collective negotiations unit found in the Harrison Police Department constitutes a mixed unit comprised of patrol officers and superior officers, sergeant through deputy chief. None of the superior officers, including the chief, are involved in either the hiring or firing process. Only the chief has the authority to impose minor discipline which consists of oral reprimands, written reprimands and suspensions of five days or less. All police officers are required, in accordance with the department's rules and regulations, to report incidences of improper actions. Patrol officers have filed reports detailing breaches of the department's rules and regulations by superior officers and, likewise, superior officers have filed such reports concerning patrol officers. Without exception, for each incident reported to the chief which may result in the application of disciplinary action, the chief, through his designee, has conducted a thorough independent investigation into the reported allegations.

Excluding the chief, none of the police personnel in Harrison are supervisors within the meaning of the Act. They have no authority to hire, discharge or discipline employees. Superior officers do not effectively recommend disciplinary action. Should any police officer, regardless of rank, breach a departmental rule or regulation, all police personnel are required to submit an officer's report relating the incident to the chief. There is no

evidence to show that such reports even contain suggested courses of action or discipline. Upon receipt of any officer's report, the chief conducts an independent investigation to obtain the facts. Subsequent to the conclusion of the investigation, the chief decides whether disciplinary action is appropriate and the form of disciplinary action to impose. The police officer(s) who initially files the officer's report is not involved in the chief's decision whether to take disciplinary action. See State of New Jersey, H.O. No. 80-13, 6 NJPER 144 (¶11072 1980); Somerset County Guidance Center, H.O. No. 77-1, 2 NJPER 258 (1976); Town of West Orange, E.D. No. 6, NJPER Supp. 399 (¶97 1970). The police department does not conduct evaluations on police personnel with one or more years seniority.

There is evidence that in 1981, John Biernacki, then serving as a sergeant, was suspended for failing to properly supervise his subordinate police officers. Biernacki neglected to ensure that his subordinates completed the necessary reports after they responded to a call and ensure that an automatic pistol was turned over to the desk officer for safekeeping. While the suspension may have been characterized as a failure to supervise, there is no evidence that shows that Biernacki had authority to hire, discharge or discipline or effectively recommend the same and, therefore, was a supervisor within the meaning of the Act.

I have found that Capt. Biernacki has at least on a de facto basis issued an oral reprimand to patrol officer Nankivell for

failing to complete the required reports after Nankivell arrested a runaway juvenile. It is unclear whether Biernacki is in fact authorized to take such disciplinary action. Nonetheless, Biernacki's imposition of the oral reprimand represents the only example of disciplinary action taken by a superior officer, other than the chief, against a subordinate. I find that this single example of minor disciplinary action is insufficient to find that superior officers are supervisors within the meaning of the Act. Tp. of Clark, P.E.R.C. No. 85-105, 11 NJPER 283 (¶16104 1985); New Jersey Institute of Technology, D.R. No. 80-37, 6 NJPER 304 (¶11145 1980); Middlesex County, H.O. No. 78-13, 4 NJPER 143 (¶4067 1978), adopted D.R. No. 79-8, 4 NJPER 396 (¶4178 1978).

Pre-Act Negotiations Relationship

As noted above, the Act contains a general prohibition against mixed units of supervisors and nonsupervisors with three narrowly interpreted exceptions. In West Paterson Bd. of Ed., P.E.R.C. No. 79, NJPER Supp. 352, 353 (¶79 1973), the Commission stated:

We view--and we are convinced that the Legislature viewed--mixed units as inherently unworkable and therefore in most cases inappropriate. In order not to disturb those rare relationships involving mixed units which were crystallized prior to Chap. 303, and which managed to succeed despite the heavy odds against success, the exceptions of "established practice" and "prior agreement" were formulated.

The Commission has found an established practice in a number of cases over the years. See, Town of West New York, H.O.

No. 87-2, 12 NJPER 652 (¶17246 1986), adopted P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1987); Watchung Hills Reg. H.S. Bd. of Ed., P.E.R.C. No. 85-116, 11 NJPER 368 (¶16130 1985); Paramus Bd. of Ed., D.R. No. 82-7, 7 NJPER 556 (¶12247 1981); Borough of Metuchen, D.R. No. 78-27, 3 NJPER 395 (1977); River Dell Bd. of Ed., P.E.R.C. No. 77-10, 2 NJPER 286 (1976); West Paterson Bd. of Ed., P.E.R.C. No. 77, NJPER Supp. 333 (¶77 1973); East Paterson Bd. of Ed., P.E.R.C. No. 18, NJPER Supp. 64 (¶18 1969); East Orange Bd. of Ed., E.D. No. 34, NJPER Supp. 498 (¶125 1971); West Paterson Bd. of Ed., E.D. No. 16, NJPER Supp. 442 (¶107 1970); Henry Hudson Reg. School District Bd. of Ed., E.D. No. 12, NJPER Supp. 425 (¶103 1970).

In West Paterson Bd. of Ed., P.E.R.C. No. 77, the Commission defined established practice as a relationship preceding the passage of the Act in 1968 involving

[a]n organization regularly speaking on behalf of a reasonably well-defined group of employees seeking improvement of employee conditions and resolution of differences through dialogue (now called negotiations) with an employer who engaged in the process with an intent to reach agreement. [NJPER Supp. at 336.]

In Middlesex County Coll. Bd. of Trustees, P.E.R.C. No. 29, NJPER Supp. 110 (¶29 1969), the Commission stated:

...that "established practice"...does not mean the solicited or unsolicited submission by the employee representative of wage and fringe benefits demands without more.... There must be the give and take of negotiations including a bilateral relationship rather than a unilateral establishment of terms and conditions of employment.... [Id. at 111.]

The police officers who were members of Local 22 before 1968 were a reasonably well-defined group of employees, and Local 22

constituted an organization regularly speaking on behalf of those employees seeking improvement in their conditions. However, I do not find that the process included an employer which, at that time, entered into a dialogue (negotiations) with an intent to reach agreement. The pre-1968 "negotiations" would take place when Local 22's raise committee would meet with the mayor. The duration of the meeting was unilaterally controlled by the mayor. Thereafter, the mayor would take the raise committee's submission, meet with Town Council, decide upon what would be granted and later meet again with the raise committee to convey the Town's position. The mayor's "suggestions" for changes constituted the Town's bottom line. The mayor's "suggestions" prior to 1968 were always accepted by the Local 22 membership. The "negotiations" were not conducted in an atmosphere of give and take and were not reflective of a bilateral relationship. Although Local 22 achieved a degree of success from these interactions with the Town, the overall process is more indicative of a unilateral establishment of terms and conditions of employment by the Town. Middlesex Cty. Coll; see also Rutgers University, P.E.R.C. No. 90-69, 16 NJPER 135 (¶21053 1990); Tp. of Teaneck, E.D. No. 23, NJPER Supp. 465 (¶114 1971). Salary increases were implemented by Town ordinances. Thus, even assuming arguendo that the superior officers are supervisors within the meaning of the Act, I find no established practice that would warrant maintenance of the unit's structure in its current form.

I also find no "prior agreement." The parties did not enter into a written collective agreement until 1974. In West Paterson, P.E.R.C. No. 79, the Commission stated that the term prior agreement referred to an executed agreement predating the 1968 Act. See Town of Springfield, P.E.R.C. No. 85-88, 11 NJPER 138 (¶16061 1985); Tp. of Teaneck, NJPER Supp. at 468.

Conflict Of Interest

The principles of conflict of interest were established by the New Jersey Supreme Court in West Orange Bd. of Ed. v. Wilton, 57 N.J. 404 (1971). The Court stated the following:

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 supervisors is not present.... While a conflict of interest which is de minimis or peripheral may in certain circumstances be tolerable, any conflict of greater substance must be deemed opposed to the public interest. [57 N.J. at 425-426.]

Quoting City of Union City, P.E.R.C. No. 70, NJPER Supp. 295, 297 (¶70 1972), the Commission stated in Town of West New York, 13 NJPER at 278, why superior officers in police and fire departments ordinarily do not have a community of interest with rank and file employees:

It is readily observable that the military-like approach to organization and administration and the

nature of the service provided (which presumably accounts for that approach) set municipal police and fire departments apart from other governmental services. Normally there exist traditions of discipline regimentation and ritual, and conspicuous reliance on a chain of command all of which tend to accentuate and reinforce the presence of superior-subordinate relationships to a degree not expected to be found in other governmental units and which exist quite apart from the exercise of specific, formal authorities vested at various levels of the organization. When the Commission is asked to draw the boundaries of common interest in this class of cases, it cannot ignore this background as it examines for evidence of whether or not a superior exercises any significant authority over a rank and file subordinate which would or could create a conflict of interest between the two. In our view, where these considerations are real rather than merely apparent, it would be difficult indeed to conclude, in contested cases, that a community of interest exists between the lowest ranking subordinate and his superior, absent exceptional circumstances. We do not intend that this observation extend to those cases where the points of division are so few and so insignificant as to be termed *de minimis*, such as might not unreasonably be expected to exist in a small police or fire department. We are persuaded, however, after almost four years experience with this statute that unless a de minimis situation is clearly established, the distinction between superior officers and the rank and file should be recognized in unit determination by not including the two groups in the same unit.

The Commission recognizes that in cases involving police 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. By way of example, the Commission refers to the small police force as representing an exceptional circumstance where it often allows superior and rank and file officers to be included in the same collective negotiations unit. The Commission reasons that in very small police departments

it is not unusual for superior officers to perform virtually the same duties as patrol officers and that any conflict of interest between the superiors and patrol officers may be de minimis in nature. See South Plainfield Borough, D.R. No. 78-18, 3 NJPER 349 (1977). See also, Audubon Park Borough, D.R. No. 88-6, 13 NJPER 741 (¶18278 1987); Borough of Merchantville, D.R. No. 80-38, 6 NJPER 305 (¶11147 1980).

This record demonstrates that conflicts of interest between superior officers and rank and file personnel have been de minimis over the past two decades. The superior officers are not supervisors within the meaning of the Act. They play no role in the grievance procedure. They conduct no evaluations of subordinate employees. Three of the five sergeants and three of the four lieutenants are assigned to patrol duty and perform essentially the same functions as the rank and file police officers. While superior officers are responsible for ensuring the implementation of various departmental orders and memoranda issued by the chief, such responsibilities are more akin to that of a "lead" or "senior" employee as opposed to a supervisor. The record is devoid of any evidence indicating any dispute or formal grievance arising from a superior officer's efforts to implement a departmental directive. Thus, there has not been a single incident amounting to an actual substantial conflict of interest between a superior and rank and

file police officer.^{6/} While it may be argued that a potential substantial conflict of interest may exist as the result of a superior officer's responsibility to ensure the implementation of directives, the facts in this case do not support such an argument. As already indicated, Local 22 and the Town have had a formal collective negotiations relationship in a chain of command unit structure for nearly 20 years and a labor relations history which extends substantially longer than that. Over the entire time period, only the mere potential for conflict has existed, never has that potential actualized. Thus, what is found in Harrison is a long, stable collective negotiations unit comprised of non-supervisory personnel in a chain of command organizational structure. Petitioner's contention that a potential conflict of interest undermines or eliminates the requisite community of interest which must exist is not supported by the facts in this case and would only serve to modify the administrative behavior of the employer. The Commission has long rejected this argument stating:

Unit determination should not be the vehicle for attempted reform [of administrative behavior]. Community of interest measures conditions as they are, not as they might be. [State of New Jersey, P.E.R.C. No. 50, NJPER Supp. 176, 178 (¶50 1971).]

^{6/} This case is distinguishable from West New York. In West New York the superior officers were supervisors within the meaning of the Act and possessed the authority to initiate informal or formal discipline of subordinate patrol officers. 12 NJPER at 654. The Commission found "that the superior officers' job responsibilities place them in an intolerable conflict of interest..." on a daily basis. 13 NJPER at 279. In Harrison, superior officers are not supervisors and such conflicts of interest do not exist.

See also City of Trenton, D.R. No. 83-33, 9 NJPER 382, 384 (¶14172 1983), where the Director of Representation said that "[s]peculation as to future contingencies is not a compelling consideration given the evidence as to the history of the parties' relationship."

The employer-employee relationship has been stable. Written collective agreements have been executed since 1974, and there is no evidence that this all inclusive unit has resulted in any compromise of any unit employee's statutory right to fair representation during the negotiations and grievance processes.^{7/}

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

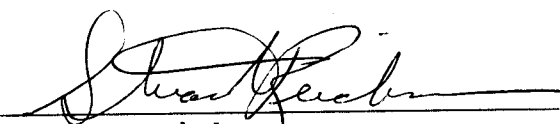
^{7/} See Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61, NJPER Supp. 248 (¶61 1971).

have not been served during the lengthy existence of this negotiations unit.

Consequently, balancing the unique facts present in this case which include a long, stable collective negotiations history with a unit structure inclusive of superior and rank and file officers, no evidence of any breach of loyalty to the Town's interest by either superior or rank and file officers, no evidence of conflict of interest amounting to more than that which is merely de minimis in nature, I find this unit continues to be an appropriate unit of Harrison Township police officers.^{8/} Accordingly, I recommend that the Commission maintain the extant collective negotiations unit.

RECOMMENDATION

I recommend that the Commission dismiss Lodge 116's petition.


Stuart Reichman
Hearing Officer

DATED: December 15, 1992
Trenton, New Jersey

^{8/} Of course, under these circumstances, nothing would preclude an employee representative from filing a timely representation petition for the extant unit.