

E. D. No. 76-26

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BERNARDSVILLE,

Public Employer,

- and -

Docket No. RO-944

PATROLMEN'S BENEVOLENT ASSOCIATION,  
LOCAL 139,

Petitioner.

SYNOPSIS

In accordance with the Hearing Officer's Report and Recommendations and in the absence of exceptions to that report, the Executive Director finds that a Captain should not be included in the municipal police unit with other superior officers, finding that there would be an actual or potential substantial conflict of interest if he were to be included with other superior officers.

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**Appearances**

For the Public Employer, Gerald Dorf, Esq.  
(Mr. Thomas Savage, of Counsel)

For the Petitioner, Morris & Hantman, Esqs.  
(Mr. Walter C. Morris, of Counsel)

DECISION

Pursuant to a Notice of Hearing to resolve a question concerning the representation of certain public employees of the Borough of Bernardsville (the "Borough"), a hearing was held September 10 and 24, 1975, before Hearing Officer Leo M. Rose, at which all parties were given the opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. The parties were afforded until November 3, 1975 to submit briefs and briefs were filed by both parties. Thereafter, on March 2, 1976, the Hearing Officer issued his Hearing Officer's Report and Recommendations, a copy of which is attached hereto and made a part hereof. No exceptions

to the Hearing Officer's Report and Recommendations were filed. The undersigned has considered the entire record herein and the Hearing Officer's Report and Recommendations and, on the basis of the facts in this case, finds:

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

2. The Patrolmen's Benevolent Association, Local 139 (the "P.B.A.") is an employee representative within the meaning of the Act and is subject to its provisions.

3. A Petition for Certification of Public Employee Representative was filed by the P.B.A. seeking certification in a unit including patrolmen (8), sergeants (5), lieutenants (1) and captains (1) in the Police Department of the Borough. Subsequently, the parties agreed that there would be two units: one of patrolmen and one of superior officers including sergeants and lieutenants. The Borough agreed to recognize the P.B.A. as the majority representative in those two units. However, there remained a dispute regarding the inclusion of the Captain in the unit with other superior officers and the parties herein are seeking a determination regarding the status of the Captain. There is, in effect, a question concerning the composition of the unit and the matter is properly before the undersigned for determination.

4. The Hearing Officer, citing the Wilton case<sup>1/</sup> and the Camden Fire Officers case<sup>2/</sup> found that the inclusion of the Captain in the unit

<sup>1/</sup> Bd. of Education of West Orange v. Wilton, 57 N.J. 404 (1971).

<sup>2/</sup> In re City of Camden, P.E.R.C. No. 52 (1971).

with other superior officers would constitute a conflict of interest. The undersigned finds that the findings and recommendations<sup>3/</sup> of the Hearing Officer are supported by the record.

Of particular significance, and the undersigned so finds, is the fact that the Captain is directly under the Chief in the chain of command and, in the absence of the Chief, assumes full and complete charge of the Department with the same powers as those possessed by the Chief. Furthermore, the record indicates that since 1969 the Captain has in fact been called upon to assume charge of the Department for several extended periods -- one of two years and several of one or two months duration -- when there was no Chief or when the Chief was ill.

5. The undersigned concludes, on the basis of the above and the record as a whole, that there exists a substantial potential and actual conflict of interest between the Captain as the second in the chain of command who can be and has been called upon to act in the place of Chief during absences or vacancies in that position and the other superior officers.

Accordingly, it is hereby determined that the Captain should not be included in the unit of superior officers including sergeants and lieutenants in the Police Department of the Borough of Bernardsville.

BY ORDER OF THE EXECUTIVE DIRECTOR

  
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Jeffrey B. Tener  
Executive Director

DATED: Trenton, New Jersey  
March 29, 1976

<sup>3/</sup> See N.J.A.C. 19:14A-4.2(b).

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P.B.A. LOCAL 139,  
Petitioner

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

At a hearing held September 10, 1975 and September 24, 1975, in the above-captioned matter, the undersigned duly-designated Hearing Officer of the Commission heard argument on the within petition. Appearances were as follows:

For the Public Employer:

Gerald Dorf, Esquire,  
by Thomas Savage, Esquire

For the Petitioner:

Morris and Hantman, Esquires,  
by Walter C. Morris, Esquire

The within petition was filed by Local 139, Police Benevolent Association (hereinafter "P.B.A.") by agreement to litigate the proper status of the captain. Recognition had been voluntarily granted after a previous petition had been filed, seeking a unit of patrolmen, sergeants, lieutenants and captain. Said recognition was conditioned upon creation of two units: one comprised of patrolmen only, the other comprised of lieutenants and sergeants. It was agreed to submit the placement of the Captain to the Public Employment Relations Commission (hereinafter the Commission) for determination. <sup>1/</sup>Briefs were filed after hearing by both sides. Based on the facts as stipulated for the record, the undersigned finds:

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<sup>1/</sup> Tr. p. 8, l.1 et seq.

1. The Borough of Bernardsville is a public employer within the meaning of the Act and is subject to the provisions thereof;
2. P.B.A. Local 139 is an employee representative within the meaning of the Act;
3. There is a dispute as to the propriety of the captain's inclusion in a unit of superior officers, therefore, the question as to the composition of the negotiating unit is properly before the Commission.

Generally, argument centered on the duties of the Captain, as set forth in "Police Department Rules and Regulations" <sup>2/</sup> versus the "reality" of his duties as claimed by counsel for P.B.A. In other words, P.B.A. asserted that, even though powers and duties of the captain were set forth in the Rules and Regulations, which powers and duties might have assured the captain of a hierarchical position, the withholding of such powers and duties effectively removed the captain from the chain of command and made of him an administrative officer, not a commander. <sup>3/</sup>

Although Exhibit ER2, aforementioned, clearly sets forth the orderly chain of command one would reasonably expect to see in such a policy declaration, the claim of the P.B.A. that all is not practiced as set forth there deserves examination. Whether such examination can remove the onus of the captain's status as de facto second in command, hence the alter ego of the chief, or whether such examination of a written declaration from the governing body can be swayed by oral declaration to the effect that the manual does not reflect actual practice, is the raison d' etre of this hearing. Viva voce protestations contradictory to the printed word have a smack of parol evidence, therefore, carry a formidable gravamen.

Considerable effort was expended in showing inherent differences for coping with the absence of the chief as compared in Petitioners Exhibit 2, (a memorandum to the members of the Police Department dated June 17, 1963) and Petitioners Exhibit 1, (likewise a memorandum to the members of the Police Department dated September 12, 1974). In the former memo, signed by the then Chairman, Public Safety Committee, there is no specific delegation of chief's authority. In the differences in the phraseology of the two

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<sup>2/</sup> Employers Exhibit 2

<sup>3/</sup> Tr. p. 104, L 3 et seq. + L 8-Tr. p 73, L 20 et seq.

exhibits cited above, the Captain sees a difference so extreme as to invalidate Employers Exhibit 2, which clearly defines those circumstances in which the captain acts for the chief automatically. To one not versed in the nuances of the situation and the interplay of personalities, the distinction is not apparent, because nowhere does the offending memorandum repeal, amend or excise the adopted policy contained in the Manual.

Furthermore, even if it was the desire of the Mayor and Council to so restructure the Department as to shelve the captain in terms of the chain of command, absent the chief, it would be quite within their powers to do so, in the opinion of the undersigned. But such will to create a different function for any member of the Department would properly hinge on a revision of the manual. The principal involved is qui est datus gratis est gratis retractus, and it is unquestionable that all of the powers of all the police are derived by delegation from the Mayor and Council, in addition to powers which reside in the police by statute. The latter, however, only have being once the police department is created by action of the governing body.

In order to effect change in the hierarchy of the Department, then, it is not sufficient to decree a change. Without proper notification to those affected creates an in pectore situation and is unacceptable as a practical matter. Therefore, the undersigned, believing that the foregoing is so obvious as to almost warrant going unsaid, finds no basis for assuming a devious plan to by-pass the adopted and published policy of the Mayor and Council as set forth in the Manual. It would be far easier to merely amend the Manual in the same fashion by which it was originally adopted.

The undersigned can find no intent to change the status of the Captain, vis a vis relationships above and below, therefore finds that the captain, Bernardsville Police Department, is automatically Acting Chief in the absence of the Chief, therefore, his presence in a unit of superior officers would constitute a conflict of interest.<sup>4/</sup> Such conflict, based on the landmark Board of Education of the Town of West Orange v. Elizabeth Wilton et al. 57 NJ 404 (1971) provided the judicial guidance regarding "gradations of supervisory authority are to be ignored in determining which supervisors may properly be grouped together for purposes of negotiation".<sup>5/</sup>

4/ PERC 52, City of Camden v. Int. Assn. of Fire Fighters

5/ Ibid, City of Camden v. Camden Fire Officers Association

Finally, the undersigned, in a conclusion based on logic and practicality, buttressed by Camden, above, "...when parties approach the negotiating table, each side requires and is entitled the undivided loyalty and allegiance of its constituents." <sup>6/</sup>

All of the foregoing is premised on the present structure of the Bernardsville Police Department, and necessarily could be subject to revision if or when drastic enlargement or re-organization of said Department were to occur. The undersigned, therefore, recommends that the position of Captain not be included in the unit of superior officers.

RESPECTFULLY SUBMITTED,

Leo M. Rose  
Leo M. Rose  
Hearing Officer

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<sup>6/</sup> Wilton, supra.