

P.E.R.C. NO. 87-114

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF WEST NEW YORK,

Public Employer,

-and-

WEST NEW YORK POLICE SUPERVISORS
ASSOCIATION, INC.,

Docket No. RO-86-12

Petitioner,

-and-

POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL #88,

Intervenor.

SYNOPSIS

The Public Employment Relations Commission severs all police supervisors (sergeant and above) from a negotiations unit which includes patrol officers. The Commission finds that the superior officers' job responsibilities place them in an intolerable conflict of interest prohibited by Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 (1971).

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LOCAL 88,

Intervenor.

Appearances:

For the Public Employer, Krieger, Ferrara, Flynn and
Catalina, Esqs. (Brian N. Flynn, of counsel)

For the Petitioner, Alfred G. Osterweil, Esq.

For the Intervenor, Loccke and Correia, P.A.
(Manuel A. Correia, of counsel)

DECISION AND ORDER

On August 15, 1985 the West New York Police Supervisors Association, Inc. ("Supervisors Association") filed a Petition for Certification of Public Employee Representative. The Supervisors Association seeks to represent all police supervisors (sergeant and above) employed by the Town of West New York ("Town"). These petitioned-for employees are currently represented by the Policemen's Benevolent Association, Local 88 ("PBA") in a negotiations unit including patrol officers. The Supervisors Association contends that

the petitioned-for employees are supervisors under N.J.S.A. 34:13A-5.3 and should be excluded from the existing unit because of a conflict of interest.

The PBA intervened pursuant to N.J.A.C. 19:11-2.7. It contends that the petition should be dismissed because there has been a long history of collective negotiations and the alleged conflict of interest between the superiors and the patrol officers is de minimis.

The Town has declined to take a position concerning the petition.

On October 24, 1985, the Director of Representation issued a Notice of Hearing. On December 16, 1985 and February 5, 1986, Hearing Officer Mark A. Rosenbaum conducted hearings. The parties examined witnesses and introduced exhibits. They also filed post-hearing briefs.

On July 25, 1986, the Hearing Officer recommended the petition be dismissed. H.O. No. 87-2, 12 NJPER 652 (¶17246 1986) (copy attached). He found that the superior officers were supervisors under N.J.S.A. 34:13A-5.3, but that severance from the existing unit was not appropriate given the "established practice" of negotiations and the absence of any actual conflict of interest between the superiors and the patrol officers.^{1/}

^{1/} At the hearing, he denied the PBA's motion to dismiss the petition as untimely under N.J.A.C. 19:11-2.8(c)(2). The PBA did not except to this determination and we need not review it

On August 4, 1986, the petitioner filed exceptions. It contends the Hearing Officer erred in: (1) not finding that the superior officers' authority to impose discipline constitutes an actual conflict of interest; (2) finding that the PBA has responsibly represented the superior officers in view of the PBA's refusal to permit superior officers to vote for its president; (3) attributing significance to the Chief of Police's formal disciplinary role in preferring charges because the discipline is initiated by the superior officer; (4) relying on Borough of Metuchen, D.R. No. 78-27, 3 NJPER 395 (1977) because West New York is a much larger department; and (5) relying on the Town's neutral position as evidence that there is no actual conflict.

On August 26, 1986, after receiving an extension of time, the PBA filed exceptions. It contends the Hearing Officer erred in finding the superior officers to be "supervisors" under the Act.

We have reviewed the record. The Hearing Officer's findings of fact (pp. 1-18) are accurate. We adopt and incorporate them here.

N.J.S.A. 34:13A-5.3 provides in pertinent part that "except where established practice, prior agreement or special circumstances, dictate the contrary, ...any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, [shall

1/ Footnote Continued From Previous Page

under these circumstances because the petitioner has relied on that determination and might have been precluded from filing a timely petition given the time lapse.

not] have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership...." In this case, there has been an established practice of police supervisors being in the same unit as police non-supervisory employees. The issue is whether that practice dictates continuance of this practice in a police department which now consists of a chief of police, two deputy chiefs, six captains, eight lieutenants, 20 sergeants and 77 patrol officers.

The Hearing Officer, in recommending dismissal of the petition, stressed the existence of the "established practice" exception to the general statutory prohibition of mixed units. See N.J.S.A. 34:13A-5.3.^{2/} However, in West Paterson Bd. of Ed., P.E.R.C. No. 77 (1973), we rejected the view that mixed units would automatically continue to be appropriate whenever the "established practice" exception had been met. Relying on Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 at 425-427 (1971),^{3/} we held that our statutory mandate to "decide in each instance which unit of employees

^{2/} He also found the Town's silence "compelling." We disagree. What the public employer, employee organization, or employee desires is not the deciding factor in determining the appropriate negotiations unit. Instead we must determine what will serve the Act's purpose: harmonious employer-employee relations in the public service. Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404, 416 (1971).

^{3/} In that case, our Supreme Court held that public employees who exercise significant power and responsibilities over other personnel should not be included in the same negotiations unit as their subordinates because of the conflict of interest between these employees and their supervisors. Under these circumstances, the requisite "community of interest" is lacking.

is appropriate" required a review of the circumstances of each case to determine whether the requisite community of interest exists even where there was an established practice. This case is also distinguishable from West Paterson because uniformed employees are involved.

In Union City, P.E.R.C. No. 71 (1972), we explained 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

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

In South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977), the Director of Representation said:

Except in very small departments where any conflict of interest between superior officers and rank and file personnel is de minimis in nature, the quasi-military structure of police departments virtually compels that superior officers and patrolmen be placed in separate units. This is so inasmuch as the exercise of significant authority in a chain of command operation produces an inherent conflict of interest within the New Jersey Supreme Court's definition of that concept in Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 (1971). The existence of an inherent conflict of interest in these circumstances must lead to a determination that separates superior officers from rank and file notwithstanding a previous history of collective negotiations in a combined unit. Moreover, the finding of such conflict is not contingent upon a finding that the superior officers are supervisors within the meaning of N.J.S.A. 34:13A-5.3.

We believe that the sergeants, lieutenants and captains should be removed from the existing negotiations unit even though

the record demonstrates that the parties engaged in "give and take" negotiations prior to 1968. The record demonstrates that the superior officers' job responsibilities place them in an intolerable conflict of interest prohibited by Wilton. The Civil Service job specifications, which accurately reflect the duties performed by West New York superior officers, compel this result. Sergeants, lieutenants and captains must take action to assure that police officers are doing their work properly. They must have the ability "to give suitable assignments to police officers and check their work to see that proper procedures are followed; that reasonable standards of workmanship, conduct and output are maintained and that desired police objectives are achieved." The police manual confirms that superior officers' job responsibilities place them in a conflict of interest with patrol officers. It states that "the first rudiment of good police duty is to obey and act properly." It further provides:

Article 5-A - Superior officers are strictly enjoined to require from their subordinates a proper attitude of respect and obedience at all times.

Article 6-A - Upon all occasions when a body of members of the Department is assembled, the ranking officer present shall take command, and will be held responsible for the official action and conduct of those present and for the good condition of everything entrusted to his charge. He shall be familiar with all that concerns his command and he shall exact from his subordinates efficient performance of duty.

Article 7-A - When two or more patrolmen are sent upon any special duty and no ranking officer accompanies them, the patrolman senior in point of service will have command.

Under the rules and regulations, sergeants:

Article 95 - Shall have immediate supervision of Patrolmen on patrol duty, and Patrolmen assigned to special duty. They are strictly enjoined to require from subordinates a proper attitude of respect and obedience at all times, and shall on no occasion indulge in undue familiarities with them.

Article 96 - Shall set an example to all subordinates in sobriety, dignity, courtesy, discretion, diligence, and observation of proper discipline; and shall at all times appear neatly attired, clean in person and equipment. When assigned to Desk Duty, be responsible in the same manner and subject to the same rules as those prescribed for Desk Lieutenants.

Article 102 - Shall constantly scrutinize and follow up the activities of patrolmen under his charge with the view of ascertaining whether police duties are promptly and efficiently performed, and instructions are properly carried out. Interview complainants and see that complaints made receive proper attention; and he shall make a report at the expiration of each tour of duty, outlining the work performed by him, his observations, and results of his investigations on forms provided for that purpose.

The regulations further provide, at Article 113, that:

Article 113 - A patrolman is assigned merely to perfect organization of the Department, and is subject to the orders of any Superior Officer of the Department.... He shall hold himself in readiness at all times to answer the calls and obey the orders of his Superior Officers. When not assigned to regular duty, he will promptly and thoroughly perform such special duty as may be ordered.

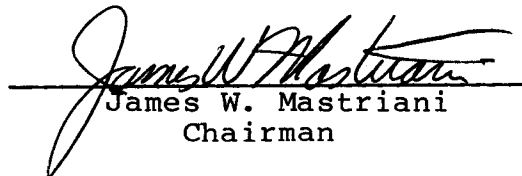
The Hearing Officer recommended dismissal of the petition "in the absence of direct evidence of actual conflict." While there was no specific factual setting where a superior officer was actually torn between his divided loyalties to his employer and his

unit, thus damaging the public interest, such a standard is too exacting and is inconsistent with West Paterson especially when public safety employees are involved. Rather, we believe severance is appropriate for uniformed employees even where there has been an "established practice" where, as here, the employees' job responsibilities place him in a substantial conflict of interest with his subordinates. In this case, the superior officers are placed in such a position every day. Severance is required and the prior negotiations history does not dictate an exception. Wilton; South Plainfield; Union City; West Paterson.^{4/}

ORDER

The matter is remanded to the Director of Representation for proceedings consistent with this opinion.

BY ORDER OF THE COMMISSION


 James W. Mastriani
 Chairman

Chairman Mastriani, Commissioners Johnson, Reid and Wenzler voted in favor of this decision. Commissioner Smith was opposed. Commissioner Bertolino abstained.

DATED: Trenton, New Jersey
 March 23, 1987
 ISSUED: March 24, 1987

^{4/} Borough of Metuchen, D.R. No. 78-27, 3 NJPER 395 (1977) is overruled to the extent it imposes a different standard.

H.O. NO. 87-2

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

In the Matter of

TOWN OF WEST NEW YORK,

Public Employer,

-and-

WEST NEW YORK POLICE SUPERVISORS
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POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL #88,

Intervenor.

SYNOPSIS

A Hearing Officer recommends that the Public Employment Relations Commission dismiss a Petition for Certification of Public Employee Representative filed by the West New York Police Supervisors Association. The Hearing Officer finds that the Intervenor, Policemen's Benevolent Association, Local #88, had an established practice of negotiations with the Town of West New York on behalf of a mixed unit of supervisors and non-supervisors prior to the passage of the New Jersey Employer-Employee Relations Act. In the absence of actual conflicts of interest or grounds for severance of the superior officers from the existing unit, the Hearing Officer recommends that the Petition be dismissed.

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. 87-2

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Appearances:

For the Public Employer
Krieger, Ferrara, Flynn & Catalina, Esqs.
(Brian N. Flynn, Esq.)

For the Petitioner
Alfred G. Osterweil, Esq.

For the Intervenor
Loccke & Correia, P.A.
(Manuel A. Correia, Esq.)

HEARING OFFICER'S REPORT & RECOMMENDATIONS

On August 15, 1985 the West New York Police Supervisors Association, Inc. ("Petitioner") filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission ("Commission"), seeking to represent "[a]ll police supervisors (Sergeant and above) in the employ of the Town of

West New York ("Town"). On September 5, 1985, the Policemen's Benevolent Association, Local #88 ("Local #88") requested to intervene in the matter, relying on a current collective agreement between the Town and Local #88 covering patrolmen, sergeants, lieutenants and captains.

On October 24, 1985, the Commission's Director of Representation issued a Notice of Hearing and granted the requested intervenor status to Local #88. On December 16, 1985^{1/} and February 5, 1986, hearings were held in this matter, at which all parties were given opportunities to examine and cross-examine witnesses, to present evidence and to argue orally. The Petitioner and Local #88 filed their briefs in this matter, the last of which was received on May 8, 1986.^{2/}

Based on the entire record in these proceedings, I make the following:

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- 1/ On the first day of hearing, Local #88 moved to dismiss the petition as untimely filed under Commission rule N.J.A.C. 19:11-2.8(c)(2). I denied the motion finding that the contract bar rule cited was not necessarily applicable when a Petition for Certification of Representative raises the prospect of exclusion of employees from an existing unit to comport with the Act. I also noted that the Director of Representation issued the Notice of Hearing with full knowledge of the existence of the current collective agreement. I will not further treat this issue in my report, but depending upon the Commission rulings upon all issues presented, Local #88's arguments may merit Commission review.
- 2/ The date the briefs were due was established by mutual agreement of the parties.

FINDINGS OF FACT

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

2. The Policemen's Benevolent Association, Local #88, is an employee representative within the Act, is the majority representative of the employees in dispute,^{3/} and is subject to its provisions.

3. The West New York Police Supervisors Association, Inc. is a employee organization within the meaning of the Act and is subject to its provisions.

4. The West New York Police Department has the following employee complement: Chief of Police, two Deputy Chiefs (one position unfilled), six Captains, eight Lieutenants, 20 Sergeants, and 77 Patrolmen. Appointments to these positions are pursuant to Civil Service rules and regulations. (T1 at pp. 13-15; T2 at p. 45)^{4/}

5. Both the Chief and the Deputy Chief work steady shifts from 8 a.m. to 4 p.m. and 4 p.m. to 12 midnight respectively. Most department members work one of three shifts of 8 a.m. to 4 p.m., 4 p.m. to 12 midnight, and 12 midnight to 8 a.m.. A normal shift

^{3/} The current collective agreement between Local #88 and the Town does not cover Deputy Chiefs, while the Petitioner seeks that title in its proposed unit. In view of the conclusions below, I find the issue to be moot.

^{4/} T1 refers to the transcript of December 16, 1986 and T2 refers to the transcript of February 5, 1986.

consists of one lieutenant, one sergeant and eight to ten patrolmen. In addition to these normal shifts, the department has two sergeants who serve as firearms instructors, one sergeant who is the chief secretary to the Chief, one sergeant who administers the license bureau, one sergeant who works exclusively on grants and permits and one sergeant who works exclusively in the records room. The department also has ten detectives, half of whom are patrolmen, who work 12:00 to 8:00 or 8:00 to 4:00 shifts only. (T1 at pp. 16, 25-26, 38-41).

6. The captains serve as tour commanders and are in charge of the police station for their shift. Given the paramilitary structure of the department, in the absence of a captain, a lieutenant fulfills the captain's responsibility, a sergeant fulfills the lieutenant's responsibility, and the senior patrol officer fulfills the sergeant's responsibility (J-6; T1 at pp. 21-22; T2 at pp. 53-59).

7. On a normal shift the lieutenant serves as desk officer. The desk officer has a variety of responsibilities, including department of personnel, assignment of overtime, approval of personal days, and removal of officers from duty. (T1 at pp. 17-22, 45-47).

8. On a normal shift, the sergeant performs roll call, makes assignments to posts in accordance with the directives of the shift lieutenant, assigns radios and cars, and then assists and directs officers in the field as appropriate. The sergeants can

recommend patrolmen for training and can warn and/or write a report on a patrolman for substandard conduct (J-4; T1 at pp. 17-20, 27, 45, 81; T2 at pp. 58-61, 84-85).

9. All superior officers (sergeants and up) can recommend department employees for citations and commendations; all superiors can relieve employees from duty or take corrective action as necessary in the absence of a higher superior officer on duty; all superior officers can recommend discipline; and all superiors are responsible to counsel and/or report officers who are unfit for duty or who are off their assigned post. (T1 at pp. 21-22, 50-52, 57-58).

10. All ranks of superior officers have participated in the hiring process. Candidates eligible for hiring through Civil Service are interviewed by the chief and a superior officer of his choosing. One superior officer testified that he and the Chief evaluated candidates after interviews and then made a joint recommendation which was effectuated by the Director of Public Safety. The other superior officer who testified to involvement in the hiring process indicated that while he attended interviews, he never asked questions and did not have any other role in the interview other than observation. In a recent initiative resulting in the hiring of 17 patrolmen in January, 1986, that officer had also performed background checks on applicants, which the witness characterized as ministerial in nature (T1 at pp. 55-57, 77-78, 86-87; T2 at pp. 99-103).

11. Seven witnesses testified at the hearing and only one discharged employee was referenced throughout all of the testimony. As to that employee the process was as follows: A patrolman was accused of taking money from a citizen. Based on the complaint, a sergeant arrested the patrolman and brought the patrolman to police headquarters. At headquarters the patrolman was read his rights by a lieutenant. The Chief of Police directed that the officer be relieved of duty. In addition to the citizen complaint, departmental charges were filed against the patrolman by the chief of police. The patrolman was subsequently discharged from the department (T1 at pp. 53-55, 75-76, 83-85).

12. Departmental discipline is both informal and formal. Informal discipline occurs when a superior officer detects a problem with the performance of a subordinate and counsels that subordinate. Such discipline is contemporaneous with the conduct in question and does not proceed to any higher level. A superior can also initiate formal discipline by writing a report on a subordinate for an infraction. The report, which may contain a specific recommendation for discipline, is forwarded through the chain of command up to the Chief of Police. Only the Chief can dock days from an officer or suspend an officer or proffer departmental charges. On an emergent basis, any superior officer can remove a subordinate from duty. A lengthy suspension and/or discharge may be appealed to the Director of Public Safety (T1 at pp. 52-54, 57-58, 74-77; T2 at pp. 55-61 and 90-91).

13. There is no formal periodic evaluation process in the West New York Police Department (T1 at pp. 45 and 96).

14. Local #88 has represented patrolmen and superior officers for at least 26 years. During the 1960's and prior to the passage of the Act in 1968, Local #88 selected their representatives for the Police and Fire Council. That Council held discussions with representatives of the Town of West New York. Such discussions led to proposed agreements which were ratified by the Local #88 membership each year from 1961 through 1967. In 1960 and 1968, no agreements were reached, and proposed salary schedules were placed on a public referendum pursuant to N.J.S.A. 40:46-26-28^{5/} and adopted by the electorate. The agreements and/or referendum proposals included both salary and sick day proposals. In 1971, the PBA and the Town executed their first formal contract and have had consecutive agreements since then. (T1 at pp. 64-69; T1 at pp. 6-8).

15. A superior officer may not hold an office within the Local #88 but may serve on its committees. Superior officers have frequently been represented on the negotiations team. Superior officers have not always been allowed to vote for ratification of contracts or otherwise vote in Local #88 meetings on many matters. Local #88 President Ibrahim Jardines testified that voting at PBA meetings depends on whether or not one's rank is affected by the

^{5/} These statutory provisions were repealed in 1971 (L. 1971, c. 200, N.J.S.A. 40A:9-175).

issue presented. He testified that an amendment passed by the membership in December 1985 allows superior officers to vote on matters other than nominations for office or elections in Local #88. He also testified that the Local #88 has represented supervisors in grievance proceedings and that superior officers were represented on the negotiations team for the current collective agreement. Lieutenant Richard Hess confirmed that he has served on the Local #88 negotiations teams, representing superior officers in 1971, and that he has voted on numerous contract proposals placed before the membership. Sergeant William Martin also testified that he has voted on contract proposals as a superior officer (T2 at pp. 22-30, 39-41, 48, 68-69 and 83).

16. The current collective agreement between the Town and Local #88 covers all titles in the Police Department from patrolman through captain. The agreement provides for equal benefits for all titles, except that one receives three more vacation days for each rank up from patrolman. Salary increases throughout the three-year agreement are based upon percentage increases for each year for all employees (Exhibit J-1).

17. The structure of the West New York Police Department is substantially unchanged for the last 33-1/2 years (T2 at pp. 63-64).

18. The Town was represented by counsel throughout these proceedings. Counsel stated on the record that the Town took no position with respect to the petition and would "defer to the decision of PERC." (T2 p. 104).

ANALYSIS

I. Supervisor Issue

N.J.S.A. 34:13A-5.3 provides that supervisors "having the power to hire, discharge, discipline or to effectively recommend the same..." shall not be "represented by an employee organization that admits non-supervisory personnel to membership...." The exceptions to this rule will be discussed in Section II of this decision.

I find that the superior officers employed by the Town of West New York are supervisors within the above definition. While their involvement in the hiring and discharge of personnel is not substantive (see Finding of Fact Numbers 10 and 11--the Chief of Police and the Director of Public Safety are only critical individuals in these processes), most superior officers in West New York have an effective role in the discipline of personnel.^{6/} The patrol sergeants on the force are clearly first level supervisors who exercise considerable discretion in deciding whether to initiate informal (i.e. oral warnings) or formal (i.e. written reports forwarded through the chain of command) discipline of patrolmen (see

^{6/} While a number of superior officers have strictly office functions (see Finding of Fact Number 5) and do not supervise anyone, it would be disruptive in a department of this size to consider splitting representation status amongst superior officers. Thus, since the majority of superiors do have supervisory functions, I recommend that all supervisors be grouped together for representational purposes. Compare Borough of Avalon, P.E.R.C. No. 85-108, 10 NJPER 207 (¶15102 1984), where the Commission split the representational status of a particular title in a small negotiations unit.

Finding of Fact Numbers 8, 9 and 12). These written reports by patrol sergeants can lead to decisions by the Chief to dock time from a patrolman as well as more stringent discipline (Finding of Fact Number 12).

Superior officers above sergeant in the chain of command rarely observe patrolmen in the field, but have the authority to take action on the recommendation of sergeants and/or complaints from the public (Finding of Fact Numbers 7-12). As in other sizeable police departments, the quasi-military structure of the West New York Police Department vests greater disciplinary authority as one proceeds through the chain of command; while only the Chief of Police can proffer changes or take formal discipline, superior officers are key actors in the process leading to (or away from) such action.

II. Established Practice

Having concluded that the superior officers employed by the Town are supervisors within the meaning of the Act, I proceed to consider whether "established practice," under N.J.S.A. 34:13A-5.3, exists which would permit those employees to continue to be represented by Local #88 in a unit with patrolmen.^{7/} In West Paterson Board of Education, P.E.R.C. No. 77 (1973), the Commission

^{7/} While "prior agreement or special circumstances" can also permit supervisors to be included in units with non-supervisors pursuant to N.J.S.A. 34:13A-5.3, neither was asserted or proven at the hearing.

defined established practice as a relationship preceding the passage of the Act in 1968 involving

an 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 call negotiations) with an employer who engaged in the process with an intent to reach agreement.

The requisites of established practice have been demonstrated in this case. Two witnesses testified that the PBA appointed representatives to the Police and Fire Council throughout the 1960's, and that from 1961-68 the Council negotiated agreements for police patrolmen and superior officers which were ratified by the Local #88 membership and implemented by the Town. In 1960 and 1968, when the parties could not reach agreement, the two witnesses testified that salary schedules were voted on through public referenda consistent with statute (see Finding of Fact No. 6).

While no memoranda of agreement or salary ordinances were submitted in support of established practice, the testimony reviewed above was unrebutted and highly credible. One witness was totally unprepared for the topic, answering my questions in the pre-68 area, and the other witness testified to the same facts on a separate day of hearing. Moreover, the use of the statutory public referendum option indicates that the PBA employed the most sophisticated negotiations scheme available to police employees at that time, and did so whenever they could not reach agreement with the Town. Indeed, the record does not indicate a single example of unilateral employer implementation of a salary schedule by the Town during the

1960's.^{8/} Finally, it is undisputed that the structure of the Police Department has not changed in over 30 years, and that superior officers perform similar functions to those performed prior to the passage of the Act (Finding of Fact #16).^{9/} I conclude that the PBA, on the record presented, had an established practice of negotiations with the Town within the meaning of §5.3 of the Act.

III. Conflict of Interest

The principles of conflict of interest were established by the New Jersey Supreme Court in Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971).

In Wilton, the Court held:

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.

The Commission had numerous opportunities to apply these concepts in the police setting shortly after the Wilton decision issued, and noted the unique nature of police services:

8/ Compare City of Camden (Police Officers), P.E.R.C. No. 53 (1971), where evidence of unilateral employer implementation precluded a finding of established practice.

9/ Compare Borough of Metuchen, D.R. No. 84-3, 9 NJPER 524 (¶14212 1983), where, notwithstanding the existence of established practice, the Lieutenant of Operations was clarified out of the unit because his functions had changed significantly from the pre-68 duties.

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 exists 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. City of Union City, P.E.R.C. No. 70 (1972), slip opinion at p. 4. See also City of Camden (Fire Officers), P.E.R.C. No. 52 (1971); City of Camden (Police Officers), P.E.R.C. No. 53 (1971).

Notwithstanding the unique nature of police services, the Commission has allowed superior officers to remain in units with patrolmen where established practice is demonstrated, and no actual substantial conflict of interest is demonstrated at hearing. See Borough of Metuchen, D.R. No. 78-27, 3 NJPER 395 (1977), applying

West Paterson Bd. of Ed., supra, to police employees. It is particularly noteworthy that Metuchen involved a medium size police department of 35 employees, and that the Commission has not limited the established practice exception to small departments as suggested in the Union City dicta. See also Borough of Sayreville, E.D. No. 76-27, 2 NJPER 85 (1976), rev. denied, P.E.R.C. No. 76-35, 2 NJPER 174 (197), aff'd App. Div. Docket No. A-3385 (4/1/77), Pet. for Certif. denied, 75 N.J. 29 (1977) and Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977), where the standards were reiterated but no established practice found. In view of the above precedent, I proceed to consider whether or not the record reveals actual substantial conflict between superior officers and patrolmen in West New York.

I find that the record does not contain a single example of actual substantial conflict. As noted in Finding of Fact No. 11, all seven witnesses could only recall one example of an employee who was discharged from the department. In that situation, a variety of superior officers acted consonant with their responsibilities to the Town, and the employee was ultimately discharged. It is also noteworthy that, as in all cases of serious discipline, charges against the employee were proffered by the Chief of Police. The reservation of that responsibility by the Chief, who is not represented by Local #88, drastically reduces the likelihood of conflict of interest. Moreover, the lack of a formal evaluation system (Finding of Fact No. 13) eliminates another area where the

Commission has previously found conflict of interest to bar continuation of a mixed unit of supervisors and non-supervisors. See e.g. Ridgewood Bd. of Ed. and Ridgewood Ed. Assn., D.R. No. 80-33, 6 NJPER 209 (¶11102 1980); Bd. of Ed. of Paramus and Ed. Assn. of Paramus, NJEA, D.R. No. 82-7, 7 NJPER 556 (¶12247 1981).

Superior officers do initiate discipline against subordinates (see Finding of Fact Numbers 8 and 12), and this certainly creates potential conflict of interest between the obligations of the superior officers to their employer and the obligations of the superior officers to their fellow unit members. In addition, a number of requirements in the Police Department Manual (Exhibit J-2) noted in the Petitioner's brief (at pp. 3-5) suggest potential conflict. However, as noted above, the Commission has consistently held that where established practice has been demonstrated, potential conflict will not preclude a mixed unit: actual conflict must be demonstrated on the record. There is simply no testimony by any witness indicating a compromise of interest or significant detriment to the rights of the Town or Local #88 because of the conduct of a superior officer in a particular disciplinary situation. While the Petitioner raises the possibility of "the difficult situation of initiating discipline with respect to one of the members of the same bargaining unit...", (Petitioner's Brief at p. 12), the Director of Representation has held that "[s]peculation as to future contingencies is not a compelling consideration given the evidence as to the history of the parties'

relationship." City of Trenton, D.R. No. 83-33, 9 NJPER 582 (¶14172 1983).

Indeed, I find the Town's record silence in this area to be extremely compelling. The Town was represented by counsel throughout the hearings and had the opportunity, in an investigatory setting, to present evidence as to conflict of interest. Since the essence of conflict is divided loyalty, I find that, by its failure to present evidence of actual conflict, the Town does not perceive actual conflict of interest here. Given the absence of direct evidence of actual conflict, together with the presence of an employer who does not assert that actual conflict exists, I conclude that no actual conflict of interest exists which would compel the removal of superior officers from the negotiations unit represented by Local #88 given the established practice demonstrated.

IV. Severance

In addition to the positions reviewed above, the Petitioner maintains that superior officers in the Police Department should be removed from the existing negotiations unit under traditional severance standards.^{10/} The Commission established the standard for severance of a group of employees from an established negotiations unit in In re Jefferson Twp. Bd. of Ed., P.E.R.C. No. 61 (1971):

^{10/} While this argument must normally be brought in a timely representation petition under N.J.A.C. 19:11-2.8(c)(2), I allowed testimony and documents at hearing, over objections of Local #88, for reasons of judicial economy (T1 at pp. 30-31). See also Footnote 1, supra.

The underlying question is a policy one: assuming without deciding that a community of interest exists for the unit sought, should that consideration prevail and be permitted to disturb the existing relationship in the absence of a showing that such relationship is unstable or that the incumbent organization has not provided responsible representation. We think not. To hold otherwise would leave every unit open to re-definition simply on a showing that one sub-category of employees enjoyed a community of interest among themselves. Such a course would predictably lead to continuous agitation and uncertainty, would run counter to the statutory objective and would, for that matter, ignore that the existing relationship may also demonstrate its own community of interest.

In applying this standard, the Commission's Director of Representation has consistently declined to sever out groups of employees from existing units where there is an established and stable negotiations relationship between the majority representative and the employer, and the majority representative has responsibly represented the groups of employees sought to be severed. The cases also emphasize the Commission's preference for broad-based units and respect for established, stable bargaining relationships in furtherance of the policy objectives stated in the Act at N.J.S.A. 34:13A-2. See, e.g. County of Morris, D.R. No. 81-23, 7 NJPER 83 (¶12030 1981); Transport of New Jersey, D.R. No. 82-38, 8 NJPER 154 (¶13067 1982); County of Warren, D.R. No. 84-13, 9 NJPER 703 (¶14306 1983); Montville Twp. Bd. of Ed., D.R. No. 84-22, 10 NJPER 367 (¶15171 1984); and County of Morris, D.R. No. 85-8, 11 NJPER 7 (¶16004 1984). See also, County of Warren, H.O. No. 86-2, 12 NJPER 73 (¶17029 1985), petition withdrawn 3/14/86.

There is no record evidence that the negotiations unit represented by Local #88 is in any way unstable. To the contrary, the record reflects consecutive collective agreements from 1971 through 1986 covering all police officers from patrolmen through captains. There is no record evidence of schism or defunctness regarding Local #88. Nor does the record indicate irresponsible representation of the superior officers. The current agreement does not discriminate against superior officers in any way; indeed, it provides for percentage wage increases for all ranks, which result in a greater dollar raise as one proceeds up the ranks. In addition, officers receive more vacation days as they proceed up the ranks, which is also is a greater benefit for superior officers than patrolmen (see Finding of Fact Nos. 14 and 16).

Together with the current and prior contract history, the responsible representation of the superior officers by Local #88 is supported by the following facts noted in Finding of Fact No. 15:

1. Local #88 has repeatedly included superior officers on its collective negotiations team.
2. Local #88 has represented superior officers in grievance proceedings.
3. Local #88 allows superior officers to vote on most matters, including contract ratification votes.

While it is true that superior officers cannot run for office nor vote for candidates for office in Local #88, this fact, when viewed together with other relevant severance criteria reviewed

above, does not compel severance of these employees. In this regard, the Commission has ruled that a majority representative cannot collect agency shop fees from unit members who cannot run for office, but declined to find prohibition from office to be a per se violation of law. City of Jersey City, P.E.R.C. No. 83-32, 8 NJPER 563 (¶13260 1982), App. Div. Docket No. A-768-82T1, appeal dismissed 7/22/83. The Commission held that, absent legislation committing review of such internal union rules to Commission discretion, the Commission would not interfere with the rules and regulations of voluntary organizations. See also Calabrese v. PBA Local 76, 175 N.J. Super. 139 (1978). Based on this precedent, and under the totality of circumstances reviewed above, I find that the Commission's severance standards have not been met.

RECOMMENDATION

Based upon the above recommended Findings of Fact and Conclusions of Law, I recommend that the Commission ORDER that the Petition in this matter be dismissed.



Mark A. Rosenbaum
Hearing Officer

Dated: July 25, 1986
Trenton, New Jersey