

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

In the Matter of

TOWN OF KEARNY,

Public Employer-Petitioner,

-and-

DOCKET NO. CU-77-26

KEARNY P.B.A., LOCAL 21,

Employee Representative.

SYNOPSIS

The Director of Representation, adopting the findings of fact and recommendations of a Hearing Officer, excludes police superior officers from a collective negotiations unit containing rank and file officers. The Director determines that actual and potential conflicts of interest exist between these groups of employees and that the factual record does not demonstrate the existence of exceptional circumstances which would warrant the continued inclusion of superior officers in the unit.

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Appearances:

For the Public Employer-Petitioner
Norman A. Doyle, Jr., Esq.

For the Employee Representative
Schneider, Cohen & Solomon, Esqs.
(David I. Solomon, Of Counsel)

DECISION

Pursuant to a Notice of Hearing to resolve a question concerning the composition of a negotiations unit represented by the Kearny P.B.A. Local 21 (the "PBA"), a hearing was held before Hearing Officer James F. Schwerin on May 16, 1977 in Newark, New Jersey. At the hearing all parties were given an opportunity to examine and cross-examine witnesses, present evidence and argue orally. Briefs were filed by both parties by June 28, 1977. The Hearing Officer issued his Report and Recommendations on July 12, 1977, a copy of which is annexed hereto and made a part hereof. The PBA filed exceptions to the Hearing Officer's Report and Recommendations on July 27, 1977. The Town of Kearny (the "Town") has not filed any exceptions to the Report; nor has it filed an answering brief to the exceptions.

The undersigned has carefully considered the entire record in this proceeding and on the facts in this case finds and determines as follows:

1. The Town of Kearny is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1.1 et seq., as amended (the "Act"), is the employer of the employees who are the subject of this proceeding, and is subject to the provisions of the Act.

2. Kearny P.B.A. Local 21 is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Town has filed a Petition for Clarification of Unit seeking the exclusion of police sergeants, lieutenants and captains from the unit represented by the PBA. The PBA asserts that it represents all policemen employed by the Town, excluding the Chief and Deputy Chiefs, and does not agree to the exclusion of the superior officers from its unit. Accordingly, there is a question concerning the composition of a collective negotiations unit and the matter is appropriately before the undersigned for determination.

The Hearing Officer concluded that the superior officers are supervisors within the meaning of the Act. In the alternative, if the superior officers were not found to be supervisors, the Hearing Officer found that a conflict of interest exists herein sufficient to warrant the exclusion of superior officers from a negotiations unit containing rank and file police officers. Finally, the Hearing Officer found that the PBA's claim of established practice has not been substantiated.

In its exceptions, the PBA disputes the findings of the Hearing Officer and, citing passages from the transcript, contends (1) that the superior officers are not supervisors within the meaning of the Act as they

neither hire, discharge, discipline nor effectively recommend the same; (2) that no conflict of interest has been shown to exist between superior officers and rank and file officers, and if such conflict exists, it is only de minimis in nature; and (3) that there exists an established practice which warrants the continuance of the mixed unit.

There are now numerous Commission decisions which address the issue of whether superior officers, even in the absence of supervisory status, may be included in the same collective negotiations unit with rank and file police officers. ^{1/} The rationale which the Commission has utilized in making such determinations has been analyzed in In re City of Union City, P.E.R.C. No. 70 (1972). This rationale has been applied to all subsequent instances wherein the conflict of interest issue has arisen in the context of police and firefighting departments of a public employer. ^{2/} The Commission has held that in a departmental structure formed along para-military lines there is an inherent conflict of interest between superior officers and rank and file personnel which compels unit separation unless exceptional circumstances dictate a different result.

In a case similar to the instant matter, the undersigned has recently

^{1/} In re City of Camden, P.E.R.C. No. 52, aff'd, App. Div. Docket No. A-2345-70, cert. den., 62 N.J. 70 (1972). In re City of Union City, P.E.R.C. No. 70 (1972). In re Elizabeth, P.E.R.C. No. 71 (1972). In re Township of Hanover, E.D. No. 41 (1971). In re Borough of Sayreville, E.D. No. 76-27, 2 NJPER 85, rev. den. P.E.R.C. No. 76-35, 2 NJPER 174, aff'd., App. Div. Docket No. A-3325-75, cert. den. ___ N.J. ___ (1977).

^{2/} The Union City rationale was utilized by the Commission in a decision recently affirmed by the New Jersey Supreme Court, In re Borough of Sayreville, supra, n. 1.

observed:

"...the exercise of significant authority in a chain of command operation produces an inherent conflict of interest within the New Jersey Supreme Court's definition of that concept in Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971). The existence of an inherent conflict of interest in these circumstances must lead to a determination that separates superior officers from rank and file notwithstanding a previous history of collective negotiations in a combined unit. Moreover, the finding of such conflict is not contingent upon a finding that the superior officers are supervisors within the meaning of N.J.S.A. 34:13A-5.3...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 conflict 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." 3/

After reviewing the entire record in the instant matter, the undersigned adopts the findings of fact and the recommendations of the Hearing Officer and rejects the exceptions filed by the PBA. The record herein shows that the Kearny Police Department is comprised of approximately 130 officers. It is a para-military operation which functions pursuant to a fairly well-defined chain of command. Superior officers exercise significant authority and assume responsibilities which are integral and important factors in the proper functioning of the department. Accordingly, based upon the foregoing discussion and the record in this matter, the undersigned concludes that actual and potential substantial conflicts of interest are generated by the

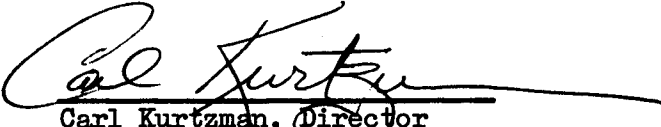
3/ In re Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977).

inclusion of sergeants, lieutenants and captains in the same negotiations unit with rank and file police officers. Further, the undersigned concludes that the record evidence fails to meet the standards adopted by the Commission for a finding of established practice. ^{4/}

Based upon the foregoing conclusions, the undersigned deems it unnecessary to pass upon the issue of supervisory status of the superior officers.

Accordingly, for the aforementioned reasons, the undersigned clarifies the negotiations unit represented by the PBA to exclude sergeants, lieutenants and captains. Inasmuch as the instant Clarification of Unit Petition was filed during the course of negotiations for a successor agreement this determination shall be effective immediately. ^{5/}

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: December 28, 1977
Trenton, New Jersey

^{4/} In re West Paterson Board of Education, P.E.R.C. No. 77 (1973). The Commission stated that for a finding of established practice it would be necessary to find that prior to the establishment of the Act in 1968 there was:

^{5/} "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 called negotiations) with an employer who engaged in the process with an intent to reach agreement." (p. 10)

^{5/} See, In re Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248 (1977).

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Docket No. CU-77-26

KEARNY P.B.A., LOCAL 21,

Employee Representative.

SYNOPSIS

A Commission Hearing Officer recommends that superior officers in the Kearny Police Department be excluded from the PBA negotiations unit containing patrolmen.

The Hearing Officer finds that the superior officers effectively recommend discipline to the Chief and as a result are supervisors within the meaning of the New Jersey Employer-Employee Relations Act. He further finds that even if they are not supervisors, the superior officers have a conflict of interest with patrolmen sufficient to warrant exclusion from the same unit because of the nature of their duties in a quasi-military organization.

The Hearing Officer rejects the PBA's claim of established practice on the basis of a PBA witness' testimony that prior to 1968 the Town would listen to PBA requests and then tell the PBA what it would get.

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Appearances:

For the Petitioner, Norman A. Doyle, Jr., Esq.

For the Employee Representative, Schneider, Cohen &
Solomon
(David I. Solomon, of Counsel)

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

A Petition for Clarification of Unit was filed with the Public Employment Relations Commission (the "Commission") on October 22, 1976, by the Town of Kearny (the "Town") seeking a clarification of a unit of employees represented by the Kearny P.B.A., Local 21 (the "PBA"). The Town seeks a determination which would exclude from the PBA unit all sergeants, lieutenants and captains employed by the Kearny Police Department. Pursuant to a Notice of Hearing, a hearing was held before the undersigned Hearing Officer on May 16, 1977, in Newark, at which all parties were given an opportunity to examine witnesses, present evidence, and argue orally. Briefs were submitted by the parties by June 28, 1977. Upon the entire record in this proceeding, the Hearing Officer finds:

1. The Town of Kearny is a Public Employer within the meaning of the New Jersey Employer-Employee Relations Act (the "Act"), is subject to its provisions, and is the employer of the employees who are the subject of this proceeding.

2. The Kearny P.B.A., Local 21, is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Town has filed a Petition for Clarification of Unit seeking exclusion of sergeants, lieutenants and captains from the unit represented by the PBA. The PBA asserts that it represents all policemen employed by the Town, excluding the Chief and Deputy Chiefs, and will not agree to the exclusion of the Superior Officers from its unit. Accordingly, there is a question concerning the composition of the negotiations unit and it is properly before the Hearing Officer for a Report and Recommendations.

The Kearny Police Department consists of a Chief, two Deputy Chiefs, ten Captains, eight Lieutenants, ten Sergeants, and ninety Patrolmen. All police officers except the Chief and Deputy Chiefs have been represented in a bargaining unit by the PBA in negotiations with the Town and contracts have been signed covering patrolmen and superior officers.

It is now asserted by the Town that the inclusion of superior officers in a unit with patrolmen creates an inherent conflict of interest detracting from the efficient administering of the police department. The Town further claims that the superior officers are supervisors within the meaning of the Act and on that basis must be excluded from the existing unit. The PBA alleges that the unit has been together since negotiations began with the passage of the Act, is an appropriate unit, and should be allowed to continue in its present form.

Supervisors

N.J.S.A. 34:13A-5.3 defines a supervisor as one "having the power to hire, discharge, discipline or to effectively recommend the same." N.J.S.A. 34:13A-6(d) provides in relevant part that "except where dictated by established practice, prior agreement or special circumstances, no unit shall be appropriate which includes 1) both supervisors and nonsupervisors...."

It was the testimony of Chief of Police Chester L. Potter that no one on the force, including the Chief, has any power to hire or discharge, and the record does not reflect any participation by superior officers in the hiring or discharge procedures of the police department.

Both the Chief and Sergeant Anthony Gouveia testified that a sergeant faced with a patrolmen not properly performing his duty will relay this fact to his lieutenant. A sergeant's disciplinary power consists of giving a verbal "chewing out", and in instances where a patrolmen reports for duty improperly attired, may send him home to change.^{1/} A Lieutenant may orally reprimand a patrolmen or if he feels it warranted, refer the matter to a Captain.

Once a matter reaches a Captain he is responsible for investigating the charge, and if he finds merit may fill out a form to initiate Civil Service proceedings against the police officer in question. The Chief has the decision whether to send the matter on to Civil Service or to hear it informally, or even dismiss the matter entirely.^{2/} Serious offenses may be heard by the Mayor and Council and others by the Police Committee which would accept the Chief's recommendation. Chief Potter testified that in his tenure as Chief he had received about half-a-dozen disciplinary reports and had never varied his recommendation from the recommendation in the report.^{3/} He sees not only a captain's report but also reports by lieutenants and sergeants prepared at the direction of their immediate superiors.

Based on the foregoing discussion, the undersigned finds that Kearny police department superior officers are supervisors within the meaning of the Act. The power to directly act by sending men home or issuing verbal reprimands is not disputed. Moreover, while final authority to take more

^{1/} T:45.

^{2/} T:38-9

^{3/} T:43.

serious action may rest with the Police Committee, it accepts the Chief's recommendation, and although he testified that he reserves the right to disagree with a superior officer's recommendation should he feel it unwarranted, he does not actually do so. It seems clear that at least in matters not of the highest level of gravity (which go to the Mayor and Council) the superior officers have been effectively recommending discipline to the Chief and Police Committee.

Conflict of Interest

Absent a finding that the superior officers are supervisors, they still cannot appropriately be in a unit with patrolmen due to the existence of a conflict of interest. As set forth by the New Jersey Supreme Court in Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971), if performance of the duties required of an employee creates an actual or potential substantial conflict of interest with other employees, than the requisite community of interest for their inclusion in the same bargaining unit does not exist.

The Commission set forth its approach to this problem regarding police and fire departments in In re City of Union City, P.E.R.C. No. 70 (1972). Except in cases of very small departments where a Chief may be able to run things alone, and where the duties of superior officers are insignificantly different from patrolmen, the distinction between superior officers and rank and file in quasi-military organizations should be recognized by the separation of these two groups for the purposes of formation of negotiations units.

As noted above, superior officers do play a significant role in the disciplinary procedures of the department, initiating reports of misconduct, conducting investigations of charges raised against patrolmen, issuing reprimands, and sending men home. This distinction begins with the rank of sergeant

as testified by Sergeant Gouveia that he "leads" his men on his tour of duty.^{4/} The Rules and Regulations of the Kearny Police Department give superior officers authority over and responsibility for the men ranking below them and call for discipline and obedience to orders. These are all the kinds of factors that have generally led to the exclusion of superior officers from units with patrolmen.^{5/}

Where the Commission has deviated from the general rule is in the case of very small departments where at most the difference in superior officers' duty from that of patrolmen was in acting in a dispatcher function.^{6/} This contrasts with Kearny force of over 100 men divided into Divisions and squads with separate precincts existing, and the superior officers having specific command responsibilities. Captains or in their absence, lieutenants, may alter the work assignments emanating from the Chief's office.^{7/}

The actual and potential conflicts of interest arising from the above factors can in no way be said to be clearly de minimus and therefore the superior officers must be excluded from the unit containing patrolmen.

One further issue remains. The Act provides that supervisors may not be in a unit with non-supervisors "except where established practice, prior agreement, or special circumstances dictate the contrary..."^{8/} It is asserted by the PBA that such established practice exists in Kearny.

^{4/} T:116.

^{5/} Union City, supra; In re Borough of Sayreville, E.D. No. 76-27, 2 NJPER 85 (1976); review denied, P.E.R.C. No. 76-35, 2 NJPER 174; aff'd. App. Div. Docket No. A-3385-75 (4/1/77); pet.for cert. pending Docket No. 13,906.

^{6/} In re Borough of Rockaway, E.D. No. 43 (1972); In re Twp. of Hanover, E.D. No. 41 (1971).

^{7/} T:121.

^{8/} N.J.S.A. 34:13A-5.3.

This Commission enunciated its standards for evaluation of claims of past practice in In re West Paterson Board of Education, P.E.R.C. No. 77 (1973).^{9/} What is necessary for a finding of established practice is a pre-1968 (the date of enactment of the Act) relationship containing the following requisite ingredients:

"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 called negotiations) with an employer who engaged in the process with an intent to reach agreement." ^{10/}

What was specifically rejected as not constituting established practice was a situation in which an employee organization would request various improvements and the employer would consider such request privately before announcing his decision. This was precisely the pre-1968 situation in Kearny as evidenced by the testimony of Sergeant Gouveia, a member of the PBA negotiating committee since 1965.^{11/} When asked to describe what happened before the Act required negotiations, Sergeant Gouveia stated:

"Generally back then we presented our demands and they came back with what we were getting, that was it. There was really no rap session." ^{12/}

The above testimony definitively demonstrates that there was no established practice within the Commission's definition of that phrase.

Recommendation

Based upon the record and the above-stated findings, the undersigned recommends that sergeants, lieutenants and captains employed in the Kearny

^{9/} In West Paterson, the Commission held that the same exceptions which apply to the general prohibition against mixed supervisor/nonsupervisor units also may be sufficient to outweigh a conflict of interest found under the Wilton standards.

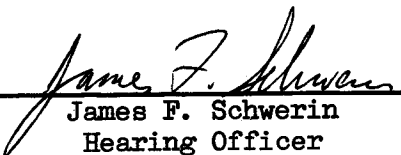
^{10/} P.E.R.C. No. 77 at p. 10.

^{11/} T:107.

^{12/} T:108.

Police Department be excluded from the negotiations unit which includes patrolmen.

RESPECTFULLY SUBMITTED,


James F. Schwerin
Hearing Officer

DATED: July 12, 1977
Trenton, New Jersey