D.R. NO. 82-42

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

In the Matter of

TOWNSHIP OF EAST BRUNSWICK,

Public Employer-Petitioner,

-and-

DOCKET NO. CU-81-38

EAST BRUNSWICK POLICEMEN'S
BENEVOLENT ASSOCIATION,
LOCAL #145,

Employee Representative.

SYNOPSIS

The Director of Representation, adopting the recommendations of a Hearing Officer, determines that police superior officers (sergeants, lieutenants and captains) be removed from a unit of employees which includes patrolmen. The superior officers exercise significant responsibilities on behalf of the Township which involve substantial authority and control over patrolmen and which create substantial actual or potential conflicts of interest between superior officers and patrolmen. Additionally, the record does not reveal a pre-Act relationship between the PBA and the Township constituting an "established practice" which might constitute a basis for continuing the present unit. The removal of superior officers from the unit is effective immediately.

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BENEVOLENT ASSOCIATION,
LOCAL #145,

Employee Representative.

Appearances:

For the Public Employer-Petitioner
Schwartz & Schiappa, attorneys
(Joseph P. Schiappa of counsel)

For the Employee Representative
Bosco-McDonnell Associates
(William P. McDonnell)

DECISION

Pursuant to a Petition for Clarification of Unit filed on December 3, 1980 with the Public Employment Relations Commission (the "Commission") by the Township of East Brunswick (the "Township"), hearings were conducted before a designated Commission Hearing Officer on the claim raised by the Township that police officers in the rank of sergeant, lieutenant and captain were supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), and therefore should be removed from the collective negotiations unit which also

includes patrolmen. The collective negotiations unit is currently represented by the East Brunswick Policemen's Benevolent Association, Local #145 ("Local 145" or the "PBA").

Hearings were held before Commission Hearing Officer Robert E. Anderson, Jr., on June 29 and 30, 1981 in Trenton, New Jersey, at which time all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Post-hearing briefs were submitted by the parties. Local 145 filed a reply letter and the record was closed October 13, 1981. The Hearing Officer thereafter issued his Report and Recommendations on October 29, 1981, a copy of which is attached hereto and made a part hereof.

Local 145 filed exceptions on November 16, 1981. No reply or exceptions were filed by the Township.

The undersigned has carefully considered the entire record herein, including the Hearing Officer's Report and Recommendations, the transcript, the exhibits, Local 145's exceptions and finds and determines as follows:

1. The Township of East Brunswick is a public employer within the meaning of the Act, is the employer of the employees who are the subject of this Petition, and is subject to its provisions.

2. The East Brunswick Policemen's Benevolent Association, Local #145, is an employee representative within the meaning of the Act and is subject to its provisions. Local 145 is the recognized representative of a unit comprised of patrolmen,

sergeants, lieutenants and captains in the East Brunswick Department of Public Safety.

3. The Township argues that sergeants, lieutenants and captains are supervisors within the meaning of the Act and must be excluded from the collective negotiations unit pursuant to N.J.S.A. 34:13A-5.3; that there is no established practice, prior agreement or special circumstances which would sanction the continuation of a mixed supervisor/nonsupervisor unit; [1/] that there has been considerable growth in the Police Department and consequently the scope of supervisory duties performed by superior officers drastically expanded between 1960 and 1981; and that there is an actual, or potential substantial conflict of interest between superior officers and patrolmen in the unit.

4. Local 145 argues that: (1) the current collective agreement between the parties which recognizes Local 145 as the majority representative of patrolmen, sergeants, lieutenants, and captains bars the consideration of the Petition at this time; (2) superior officers are not supervisors within the meaning of the Act. Alternatively, if they are found to be supervisors, the statutory exceptions of "established practice" and "prior agreement"

1/ N.J.S.A. 34:13A-5.3, in relevant part provides:

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

are applicable to preserve this mixed unit; 2/ (3) there is no substantial actual or potential conflict of interest between superior officers and patrolmen as defined in Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 (1971); and (4) if the unit is to be disturbed, superior officers should not be removed until the current contract expires in December 1983.

5. The Hearing Officer found the following:

(a) the Township was not precluded from seeking the removal of superior officers from the unit by reason of its past recognition of the unit, and therefore the Hearing Officer denied Local 145's Motion for Dismissal;

(b) the superior officers should be removed from the collective negotiations unit because they exercise significant authority in a quasi-military chain of command operation which produces an inherent conflict of interest. Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977), In re City of Union City, P.E.R.C. No. 70 (1972). In this regard, each of the four sections of the Public Safety Department operates pursuant to a strict chain of command headed by either a captain, a lieutenant, or a sergeant. The superior officers assign and directly supervise the patrolmen in the performance of their daily duties, report infractions of rules, impose discipline for minor violations and institute investigations and other disciplinary proceedings.

2/ The Commission has determined that the statutory exceptions of established practice and prior agreement, supra, n.1, relate to negotiations relationships which pre-date the Act. See, In re West Paterson Bd. of Ed., P.E.R.C. No. 79 (1973). July 1, 1968 is the effective date of Chapter 303, Laws of 1968, which provided the initial statutory framework for public sector collective negotiations.

The Hearing Officer thus concluded that the role of superior officers in making recommendations affecting the careers of patrolmen confirms the existence of a substantial actual or potential conflict of interest between them which requires removal of superior officers from the unit.

(c) none of the exceptions to the rule of South Plainfield, supra, exist in this case. The department is large and the superior officers perform duties distinctly different from those of the patrolmen. Moreover, there is no established practice, prior agreement or special circumstance which would dictate the continued inclusion of superior officers in a unit which includes patrolmen. 3/

(d) Lastly, sergeants, lieutenants, and captains should be removed from the collective negotiations unit represented by Local 145 immediately.

6. Local 145 excepts to certain of the Hearing Officer's findings of fact. Specifically, it argues that the Hearing Officer, in crediting or not crediting certain testimony, or in improperly weighing certain testimony, engaged in "selective credibility" judgments. Local 145 excepts to the manner in which

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3/ The exceptions in South Plainfield allow for the continued inclusion of superior officers in units with rank and file under extraordinary circumstances. In Union City, the Commission determined that the rule against inclusion of superior officers in such units did not necessarily extend to 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." At pp. 349-350. The Hearing Officer found the de minimis exception had not been applied by the Commission to Police Department units similar in size to the Township's police department. South Plainfield also allows for the continuted existence of mixed units where the statutory exceptions of § 5.3 are applicable.

the Hearing Officer credited Lieutenant Carroll's testimony concerning the collective negotiations relationship between the parties, while at the same time not crediting his testimony about the role of superior officers in the discipline of patrolmen. Additionally, Local 145 excepts to the weight given the testimony of the Director of the Police Department concerning the authority of superior officers in personnel matters while not crediting his testimony regarding an alleged sick-out in 1973-74. Also, the Local excepts to the finding of conflict within the meaning of the Act based on what is alleged to be the uncorroborated testimony of the Township Administrator. Further, the Local excepts to the Hearing Officer's determination that the clarification of unit petition was timely filed and his recommendation that superior officers be immediately removed from the unit.

For the reasons which follow, the undersigned adopts the Hearing Officer's findings and conclusions as set forth in his Report and Recommendations.

Initially, the undersigned observes that the filing of the Petition for Clarification of Unit by the Township was not restricted by the existence of a collective negotiations agreement between the parties. In re Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977), makes clear the Commission's policy of accepting a clarification of unit petition for processing at any time. The Commission's "contract bar" rule, N.J.A.C. 19:11-2.8, is applicable solely to petitions which raise a

"question concerning representation." [4/] Accordingly, the undersigned rejects the PBA's argument that the instant Petition was not timely filed.

Second, the Township is not estopped from seeking the removal of superior officers from the unit because of its earlier recognitions since the Act's mandates regarding appropriate unit structure are controlling.

TThe analysis which controls the substantive merits of the instant dispute -- *i.e.*, conflict of interest between police superior officers and rank and file officers -- has been set forth by the undersigned in the *South Plainfield* matter, *supra*. In *South Plainfield*, the undersigned reviewed the Commission precedent concerning this issue, and held:

> There is now a long line of Commission decisions on the question of whether superior officers may be included in negotiations units with patrolmen. The standards utilized by the Commission in reaching these determinations are presented in *In re City of Elizabeth*, P.E.R.C. No. 71 (1972); *In re City of Union City*, P.E.R.C. No. 70 (1972); and *In re City of Camden*, P.E.R.C. No. 52 (1971). Generally these decisions provide that, 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 patrolmen and superior officers 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 Milford v. Wilton*, 57 *N.J.* 404 (1971). The existence of an inherent

4/ These petitions include Petitions for Certification of Public Employee Representative and Petitions for Decertification of Public Employee Representative.

> 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.

Moreover, in the South Plainfield matter, the undersigned went on to express the standard by which all such future cases would be determined; namely, that:

> ... in all cases involving police departments, 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 circum--stances dictate the continued inclusion of superior officers in a unit of rank and file personnel.

During the initial processing of the instant matter, the parties were apprised of the South Plainfield decision. The PBA was given an opportunity to present the Commission with an evidentiary proffer indicating the presence of "exceptional circumstances" which would warrant the continued inclusion of superior officers in the negotiations unit. In its response to this inquiry the PBA asserted that a negotiations relationship predating the passage of the Act existed between the parties.

Therefore, the undersigned directed that a hearing be convened to explore the claim that exceptional circumstances existed under the "established practice" exception embodied in the Act. N.J.S.A. 34:13A-5.3.

The record evidence as to this issue supports the Hearing Officer's conclusion that an "established practice" has not been demonstrated. In In re West Paterson Bd. of Ed., P.E.R.C. No. 77 (1973), the Commission stated that a relationship evidencing an "established practice" would necessarily require the following minimum 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 an agreement.

In the instant matter, the record reveals sporadic encounters between PBA representatives and various township officials in 1964 and in 1967. PBA witnesses indicated that the Township officals would hear a PBA presentation concerning pay raises or a particular grievance, but would thereafter announce a decision at a Township meeting without further discussion. The circumstances described in the record parallel many of the circumstances described by the Commission in West Paterson, supra, as typical of a pre-1968 relationship which could not be described as coming within the parameters of the term "established practice":

> ... Based on the Commission's experience, it appeared that many, perhaps most, employer-employee relationships prior to 1968 were

> characterized by an organization's request for improvement of a particular condition or resolution of a particular grievance. Upon submission the matter was considered privately by the employer and his decision was later announced. There was seldom evidenced a sense of a mutual undertaking for the resolution of differences or an intent to achieve common agreement ... .

The undersigned has further examined the parties' relationship of 1968 in which discussions commencing with a meeting on June 12 led to negotiations which concluded in October with a written agreement. The Hearing Officer has noted that only the June meeting predated the effective date of the Act.

Based upon the totality of the evidence, the undersigned concludes that the relationship between the PBA and the Township prior to the effective date of the Act cannot be described as evidencing an "established practice" as defined by the Act. The undersigned, in this regard, has considered the PBA's exception that the Hearing Officer did not provide the necessary "latitude" to the testimony of Lieutenant Carroll. The undersigned is satisfied that the Hearing Officer fairly and properly anlayzed the testimony offered by this witness.

The parties have thoroughly argued the issue of conflict of interest and have presented testimony in support of their respective positions. Since the Notice of Hearing in the instant matter was issued for the purpose of examining the applicability of the statutory exceptional circumstances to this matter, the examination of whether there exists a conflict of interest between

superior officers and rank and file -- which was a presumption applied to this matter under the South Plainfield doctrine -- would appear to have been outside the scope of the investigatory hearing. Nevertheless, as the parties and the Hearing Officer addressed this issue, the undersigned shall consider the merits.

In Bd. of Ed. of West Orange v. Wilton, supra, the Supreme Court held that those public employees who exercise significant responsibilities on behalf of an employer are placed in a position of substantial actual or potential conflict of interest with other personnel and therefore may not be included in negotiations units with the employees with whom they have a conflict. In In re City of Camden, supra, the Commission first applied Wilton to units of police and fire personnel. Later, In In re City of Union City, P.E.R.C. No. 70 (1972), the Commission stated:

> 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 record herein confirms the Commission's remarks in Union City and clearly reinforces the presumption applied to this class of case in South Plainfield.

The facts establish that superior officers have been entrusted with the task of exercising significant responsibilities on behalf of the Township in providing police services to the community. These responsibilities involve substantial authority and control over patrolmen. The superior officers assign, direct and generally supervise patrolmen on a daily basis. Superior officers report rule infractions, place written reprimands in the files of their subordinates, mete out discipline for minor violations, and institute disciplinary proceedings in more serious matters. On two occasions, superior officers have been responsible for eliciting resignations from subordinates, without the involvement of the Director or other Township officials, where officers were allegedly engaged in flagrant misconduct. Moreover, superior

officers have investigated complaints concerning other officers, which have originated from within and from outside the department. The record indicates that patrolmen have approached the Township Administrator complaining about the manner in which superior officers proceeded in these investigations. Additionally, the PBA has embodied its concerns in negotiations proposals which seek increased procedural protections relative to disciplinary investigations. Based upon the above, the undersigned concludes that the instant record points to substantial actual and potential conflicts of interest which require the removal of superior officers from the unit.

As noted above, the PBA has excepted to the Hearing Officer's factual findings in which he sometimes discounted and sometimes credited certain testimony offered by the witnesses. The PBA claims that this has resulted in "selective credibility" determinations. The PBA's exceptions, however, are misplaced. Essential to the Hearing Officer's fact finding mission was the resolution of conflicting record testimony. In so doing, the Hearing Officer accepted certain testimony as factual and rejected certain contradicted testimony. The undersigned's independent review of the record confirms that the Hearing Officer correctly reviewed the record and made the appropriate factual findings. The Hearing Officer did not make credibility judgments as that term normally connotes. His findings were based upon the totality of the testimony presented. After thoroughly reviewing the record, the undersigned concludes that the PBA's characterization of the

Hearing Officer's determinations misconstrues the nature of his examination.

Finally, the undersigned agrees with the Hearing Officer that, under Clearview, supra, removal of the superior officers from the unit shall be accomplished with the issuance of the within decision. Clearview provides:

> In all cases where the clarification of unit question is raised before the Commission prior to the execution of the parties' most recent contract, or where the dispute is reserved and referred to the Commission in the parties' negotiations agreement or other joint written agreement, the clarification of unit determination shall be effective immediately.

Clearview thus applies the equitable principle that where one party has properly noticed the other party of a unit composition dispute prior to the execution of a collective negotiations agreement, the appropriate unit configuration may be obtained during the life of the contract. If the dispute is not raised, equitable principles will preclude a party from seeking such alteration during the life of the agreement.

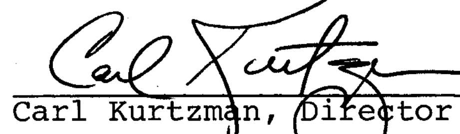
Nothing in In re Middlesex County, P.E.R.C. No. 81-129, 7 NJPER 266 (¶ 12118 1981) suggests a result that a party waives the right to obtain proper unit structure by consumating a contract before the dispute over unit composition is resolved. Middlesex provides that when a valid question concerning representation is raised by a challenging union, during an appropriate election period, the employer and incumbent representative must cease negotiating. The laboratory conditions essential for a fair election are thus

maintained and the Act's policies are thereby furthered. Were Middlesex applied to the present situation, a question concerning the composition of a collective negotiations unit, the parties would unnecessarily be required to choose between achieving the stability of a collective negotiations agreement or obtaining proper unit structure. Nothing in the Act, however provides that these twin goals may not be contemporaneously sought. The application of Clearview actually facilitates negotiations during a period when a dispute over partial unit composition might otherwise result in a complete breakdown of negotiations.

The Clearview policy was established precedent when the parties raised and reserved the clarification of unit dispute in their present agreement. 5/ Accordingly, since PBA was on notice that the Township reserved its right to seek a unit clarification with the Commission, the within determination is effective immediately.

The undersigned therefore determines that the sergeants, lieutenants and captains be removed from the PBA unit at this time.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Carl Kurtzman, Director

DATED: February 26, 1982
Trenton, New Jersey

5/ Article I Section B of the existing contract provides: "(t)he Administration reserves the right to seek clarification of the bargaining unit during the term of this contract."

H.O. NO. 82-9

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

In the Matter of

TOWNSHIP OF EAST BRUNSWICK,

Petitioner,

- and -

Docket No. CU-81-38

EAST BRUNSWICK POLICEMENS' BENEVOLENT ASSOCIATION, LOCAL #145,

Respondent.

SYNOPSIS

A Hearing Officer of the New Jersey Public Employment Relations Commission, considering a clarification of unit petition filed by the Township of East Brunswick, recommends that superior officers -- captains, lieutenants, and sergeants -- be removed from a unit including patrolmen. The Hearing Officer concludes that a substantial and impermissible conflict of interest arises as the result of including superior officers and the patrolmen they command and evaluate in the same unit. Further, the Hearing Officer finds that there is insufficient evidence to establish a pre-Act established practice, prior agreement, or special circumstance dictating the continued inclusion of superior officers in the same unit as patrolmen.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The report is submitted to the Director of Representation who reviews the Report, any exceptions 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. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

H. O. NO. 82-9

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

In the Matter of

TOWNSHIP OF EAST BRUNSWICK,

Petitioner-Public Employer

-and-

Docket No. CU-81-38

EAST BRUNSWICK POLICEMEN'S
BENEVOLENT ASSOCIATION,
LOCAL #145,

Employee Representative

Appearances:

For the Public Employer
Schwartz & Schiappa, Esqs.
(Joseph P. Schiappa, Esq.)

For the Employee Representative
Bosco-McDonnell Associates
(William P. McDonnell)

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

On December 3, 1980, the Township of East Brunswick ("Township") filed a clarification of unit petition in which it sought the removal of all police officers of the rank of sergeant, lieutenant, or captain in the Township's Department of Public Safety from a unit also including all police officers of the rank of patrolman in that department. The petition named the East Brunswick Policemen's Benevolent Association, Local #145 ("Local 145") as the current employee representative of this unit. The petition alleged that sergeants, lieutenants, and captains are supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A.

34:13A-1.1 et seq. (the "Act"), and therefore could not properly remain in the same unit as patrolmen (A-1A).

On June 19, 1981, the Director of Representation issued a Notice of Hearing (A-1B).

On July 22, 1981, Local 145 filed a Motion for Dismissal pursuant to N.J.A.C. 19:11-6.9 (A-2A). The motion asserted that the Township could not seek to exclude sergeants, lieutenants, and captains from an existing unit of police officers because it had expressly and consistently recognized the unit inclusion of these titles in past collective agreements.

On July 23, 1981, the Township filed a response which stated that the motion was untimely, that the current collective agreement expressly reserved the Township's right to seek unit clarification, and that a clarification of unit petition was the proper way to proceed to achieve its goal (A-2B).

On July 29 and 30, 1981, the undersigned conducted a hearing. After reserving his decision on Local 145's motion until the issuance of the instant report (Tr. I, p. 13-14), 1/ the undersigned afforded all parties an opportunity to examine witnesses, present evidence, and argue orally.

On October 7, 1981, Local 145 filed its post-hearing brief. On October 14, 1981, the Township filed its brief. 2/ On October 21, 1981, Local 145 filed a reply letter.

1/ References to the transcript of the first day of hearing will be marked Tr. I, p. __, to the second day Tr. II, p. __, to Commission exhibits A-__, to Joint exhibits J-__, to Petitioner's exhibits P-__, and to Respondent's exhibits R-__.

2/ Because the stenographer for the July 29, 1981 session inadvertently destroyed her tape recording of the testimony, she did not make a transcript available until September 24, 1981. The undersigned then afforded the parties a two week period to file briefs. The Township requested and received an additional week in which to file its brief.

(e) assuming that (a), (b) and (d) are answered in the affirmative and (c) in the negative, is there a conflict of interest within the reasoning of Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971) which would nevertheless dictate the exclusion of sergeants, lieutenants, and captains from a unit containing patrolmen (Tr. I, pp. 10-12).

4. The Township takes the following positions with respect to the issues identified in Finding of Fact No. 3:

(a) the Township's sergeants, lieutenants, and captains are supervisors within the meaning of the Act because they have the effective power to recommend hiring, discipline, and discharge and other personnel actions affecting non-supervisory unit personnel;

(b) there is no established practice, prior agreement, or special circumstance which might sanction the continuation of a mixed supervisory, non-supervisory unit;

(c) and (d) there has been considerable growth in the Township Police Department and a concomitant tightening of the supervisory hierarchy since the enactment of our Act; and

(e) the present unit composition is fraught with actual or potential conflicts of interest requiring the separation of superior officers from Local 145's unit (Tr. I, pp. 15-17; Post-hearing brief).

5. Local 145 takes the following positions with respect to the issues identified in Finding of Fact No. 3:

(a) and (d) the Township's sergeants, lieutenants, and captains are not and were not supervisors within the meaning of our Act;

(b) there has been an established practice and agreement preceding the effective date of our Act pursuant to which Local 145 has successfully represented both superior officers and patrolmen in the same unit;

(c) superior officers perform the same functions and discharge the same responsibilities today as they did before the enactment of our Act; and

(e) there is no conflict of interest between superior officers and patrolmen (Tr. I, pp. 13, 17-18; Post-hearing brief).

6. The Township and Local 145 have a collective agreement effective from January 1, 1981 through December 31, 1983 (J-1). The recognition clause contains the following unit description: "Included in the negotiating unit shall be those Employees of the Township within the Department of Public Safety whose job titles are Captain, Lieutenant, Sergeant and Patrolman." The clause also states that "[t]he Administration reserves the right to seek clarification of the bargaining unit during the term of this Agreement." During negotiations, the parties discussed and understood the possibility that the Township might file a Clarification of Unit petition to remove sergeants, lieutenants, and captains from the unit Local 145 represents (Tr. I, pp. 182-183; Tr. II, pp. 243-245).

7. Collective agreements covering the periods January 1, 1978-December 31, 1980 (J-2), January 1, 1977-December 31, 1977 (J-3), and January 1, 1975-December 31, 1976 (J-4) contained identical unit descriptions and reservation of right clauses. Previous collective agreements covering the periods of January 1, 1974-

Findings of Fact

Based on the entire record in this proceeding, the Hearing Officer makes the following findings of fact:

1. The Township of East Brunswick is a public employer within the meaning of the Act, is subject to its provisions, and is the employer of the employees who are subject to this proceeding (Tr. I, p. 9).

2. The East Brunswick Policemen's Benevolent Association, Local #145 is an employee representative within the meaning of the Act and is subject to its provisions (Tr. I, pp. 9-10, 20).

3. The parties have stipulated that the following issues, in addition to the procedural questions raised in Local 145's Motion to Dismiss, exist in the instant case:

(a) are the Township's sergeants, lieutenants, and captains supervisors within the meaning of the Act;

(b) if the answer to (a) is affirmative, is there an established practice, prior agreement, or special circumstance dictating to the contrary of our Act's proscription against supervisors being in the same negotiations unit as employees they supervise;

(c) if the answers to (a) and (b) are both affirmative, has the scope of supervisory duties and responsibilities changed substantially since the Act's enactment;

(d) if the answers to (a) and (b) are both affirmative, were sergeants, lieutenants, and captains supervisors within the meaning of the Act prior to its enactment; 3/ and

3/ Subpart (d) is only a slightly different way of asking the question posed in subpart (c).

December 31, 1974 (J-5) and January 1, 1973-December 31, 1974 (J-6) contained identical unit description clauses, but no reservation of right clause sanctioning the filing of a clarification of unit petition. A contract effective from January 1, 1971-December 31, 1972 (J-7) did not contain either an explicit unit description or a reservation of right clause, but did spell out salary schedules for patrolmen, sergeants, lieutenants, and captains. The parties' first contract, a "Memorandum of Record" entered into October 3, 1968, and effective during 1969 and 1970, did not contain either an explicit unit description or a reservation of right clause, but did spell out salary schedules for patrolmen, sergeants, lieutenants and chief. The position of captain did not exist when this agreement was executed (Tr. II, p. 93).

8. In 1955, the Township's police department consisted entirely of about 24 part-time employees; the only superior officers were one chief and two sergeants (Tr. II, pp. 124-126). In 1960, the police force became full time. Of the 15 officers, there were one chief and four sergeants (Tr. II, p. 126). In 1964 and 1965, the first two lieutenants were named and one year later the force totalled about 30 officers (Tr. II, pp. 128-129). In 1969, four more lieutenants and, for the first time, two captains were named (Tr. II, pp. 119-120). In 1970, when the present Director of Public Safety and acting Chief of Police assumed his position (Tr. I, p. 45), the police force consisted of approximately 53 officers (Tr. II, p. 52); the Director immediately promoted several officers to lieutenant and sergeant, but since that time has not increased the number of superior officers (Tr. II, pp. 59-60). The size of the force today

totals 79 officers (Tr. II, p. 52); there are currently eight sergeants, nine lieutenants, and two captains (J-15). The growth of the Police Division's size parallels the growth in the Township's population and commercial development (Tr. II, pp. 54-55). According to the Township Administrator, the number of police personnel should stabilize shortly after a little more growth (Tr. II, p. 14).

9. The Director of Public Safety and acting Chief of Police described the present organizational structure of his department. The department has three divisions: (1) Police, (2) Fire Prevention, and (3) Code Enforcement (Tr. I. p. 45). The Division of Police, the only division directly involved in this case, is in turn divided into the following sections: (1) patrol, (2) traffic safety, (3) administration, and (4) criminal investigation (Tr. I, pp. 46-49; J-14, J-15). All heads of these sections report to the Director, serve on his staff, and meet with him to discuss department matters including personnel policies and decisions (Tr. I, pp. 46, 133-135; J-14, J-15).

The patrol division is under the command of a patrol commander who has the rank of captain. Underneath the patrol commander serve four lieutenants and four sergeants who supervise nine squads comprising 41 patrolmen (Tr. I, pp. 46-47; Tr. II, p. 141-142; J-14, J-15). The patrol commander also supervises 38 special police officers who work part time (Tr. I, p. 50; J-14). Under a shift schedule adopted in February, 1981 which increased the number of squads from four to nine, sergeants and lieutenants are not responsible for particular squads, but instead command different squads on a rotating basis. The Director anticipates that imminent promotions will result in a single sergeant being placed in permanent charge of a single squad (Tr. I, pp. 54-55; Tr. II, p. 53). Daily orders governing the patrol section

emanate from the Director and proceed down the chain of command from patrol commander to lieutenant to sergeant before being implemented by the patrolmen (Tr. I, pp. 53-54).

The traffic safety section operates under the command of one lieutenant and one sergeant. [4/] The superior officers direct a traffic control device bureau consisting of three civilians, a field operations unit consisting of four patrolmen, and a school safety patrol consisting of one patrolman and 39 school crossing guards (Tr. I, p. 47; J-14, J-15).

The administrative section operates under one lieutenant and one sergeant. These superior officers command a record bureau consisting of four civilian employees, a communications bureau consisting of one civilian and two patrolmen, and one civilian public safety specialist (Tr. I, p. 48; J-14, J-15).

The criminal investigation section is commanded by one captain who oversees several bureaus. In the major crime investigative bureau, a lieutenant has responsibility for one detective. In the identification bureau, one sergeant has responsibility for one detective. In the juvenile aid bureau, one lieutenant and one sergeant have responsibility for four detectives. In the criminal investigation unit, one lieutenant and one sergeant have responsibility for five detectives and one administrative clerk (Tr. I, p. 48; J-14, J-15).

4/ The Director testified that the only change he had made in the organizational structure of the Police Division since 1970 was the addition of a ranked police officer to the traffic safety section so that all sections would have at least two officers of rank in charge (Tr. I, pp. 137-138).

10. Current and detailed job descriptions for the positions of patrolman, sergeant, lieutenant, investigative section captain and patrol section captain (J-9, 10, 11, 12, 13 respectively) exist. Sergeants serve as the first line superior during a tour of duty and exercise supervision over patrolmen assigned to a shift as detectives and may supervise some civilian personnel. Lieutenants supervise and coordinate activities of a squad, bureau, or section and exercise working supervision over sergeants and patrolmen. The captains direct and coordinate their respective sections and each has supervisory authority over 30 or more officers and civilian employees. 5/ The hierarchical structure has remained essentially intact during the tenure of the present Director of Public Safety, and there has been no significant change in the duties, responsibilities and workload of sergeants, lieutenants, and captains during this period (Tr. I, 13-14; Tr. II, pp. 54-56).

11. Vacant positions in the Township's police force are filled in accordance with a multi-step procedure described by the Director of Public Safety and set forth in a document given to all applicants (Tr. I , pp. 58-70, 138-155; J-21). Candidates first take a written examination consisting of 120 general knowledge questions. The candidate must obtain a grade of 70% or better in order to remain in the job competition. A successful candidate then undergoes a pass-fail pre-medical examination, a physical agility test on which the candidate must again obtain a grade of 70% or better, and a psychological test. If the candidate has

5/ For a further description of the supervisory authority of various ranks and the chain of command, see the Rules and Regulations of the Division of Police (J-16). These rules were issued in 1966 and consequently provide material relevant to sergeants (¶¶ 108-125) and lieutenants (¶¶ 50-61), but not captains.

passed the previous steps successfully, a sergeant and lieutenant in the administrative section direct patrol officers in conducting a backgound investigation of approximately 40 hours (Tr. I, pp. 61-63). If no problems are detected during the investigation, the candidate is invited to appear before an oral interview board consisting, ordinarily, of a captain, who is the chairman, two lieutenants, a sergeant, and a psychologist. No Township patrolmen have participated since 1970 (Tr. I, pp. 64-65, 152). 6/ Each member of the board gives a numerical rating and fills out a form with subratings (Tr. I, 67-68; P-3-5; P-7; P-9-20). 7/ The grades are then averaged and the board decides whether to give the candidate a positive recommendation; a candidate must obtain an average grade of 70% or better and a positive recommendation in order to pass this part of the interview process. An administrative officer then ranks each candidate who has passed all phases of the interview process on the basis of his combined numerical ratings on the written examination and oral interview (Tr. I, pp. 65-66, 147, 151-152). The officer does not make a recommendation, but merely transfers these ratings and the material accumulated on each candidate to the Director of the Department of Public Safety (Tr. I, pp. 65-66, 71). The Director reviews the files, but does not interview the candidates (Tr. I, p. 72, 149-151). He is the appointing authority and in the past has always appointed the candidate at the top of the numerical ratings (Tr. I, pp. 72, 78-80). The Director does not know of any instances in which he appointed a

6/ A female police officer from another jurisdiction has sat on recent oral interview boards in order to ensure against sexual bias (Tr. I, pp. 64-65).

7/ Exhibits P-1 through P-20 are a sampling of personnel forms completed by each of the Township's superior officers in connection with various personnel action recommendations (Tr. II, pp. 8-11). (Continues)

candidate who did not receive the highest score before the oral interview board (Tr. I, pp. 77-78). 8/

12. A candidate who has been appointed must still hurdle two more obstacles: a medical examination and a one-year probationary training period at the State Police Academy at Sea Girt (Tr. I, p. 70; J-21). Every four months a sergeant or a lieutenant fills out a report on how the trainee is doing; the form is sent to the patrol commander. On one occasion, a mid-year investigation by two lieutenants revealed that a trainee had lied when he claimed he was sick; the lieutenant discharged the trainee and then notified the Director who agreed. On another occasion, a captain secured the resignation of a trainee with marijuana in his car; the Director accepted the resignation (Tr. I, pp. 106-107). At the end of the year, a formal report and recommendations are submitted to the Director P-1; P-4-7; P-10-13; P-17; P-20). The Director has always accepted a recommendation that a trainee be given permanent status. On one occasion, after discussing the matter with the captain, he gave a trainee an extended probationary period despite the belief of some of the officers that the trainee would never perform satisfactorily. This officer was recently made permanent (Tr. I, p. 105; p-20). 9/ The mayor and business administrator have never sought to interfere with the Director's decisions on hiring and permanent appointments (Tr. I, pp. 105-106, 215, P-6, P-8).

7/ (Continuation)...The Township Administrator selected one example of each type of personnel recommendation made by each superior officer (Tr. II, pp. 10-11). The cover sheets for Exhibits P-1 through P-20 are, of course, not evidence and have not been considered

8/ Of course, it is possible that the Director may appoint a candidate who did not receive the highest rating or a favorable recommendation from an individual interviewer on the board. One lieutenant testified that on a couple of occasions he had not approved of a candidate ultimately appointed (Tr. II, pp. 147-148).

9/ A lieutenant described another occasion in 1973 or earlier when the Director gave a trainee an extended probationary period and then made him permanent, despite the lieutenant's disagreement with both decisions (Tr. II, pp. 152-153).

13. The head of a section within the Police Division has authority to determine work schedules (Tr. I, p. 177; J-12; J-13). Sergeants or lieutenants who are not the head of a section, but who are in charge of squads will have some input into shift or works assignments necessary to meet the circumstances of a particular day (Tr. I, pp. 177-178). For example, the sergeant assigns complaints to detectives and officers and dispatches patrol cars. He monitors work progress to ensure the following of procedures and the completion of assignments (J-10). Lieutenants prepare duty and vacation schedules and maintain attendance and leave records (J-11).

14. At present, once an employee completes the probationary period, there are no formal, periodic performance evaluations. Instead, the superior officer in charge of a section must keep tabs on an employee's performance and, if it is unsatisfactory, submit a report to the Director (Tr. I, pp. 108-109). 10/

15. According to the Director, there is no standard operating procedure governing promotions. An ordinance affords him the option of basing promotions on a written test, an oral test, or a combination of both. In the past, the Director has followed the third option. Thus, a candidate for promotion must appear before an oral interview board specially set up for each opening. The board consists of five superior officers, all of whom must be of a rank equal to or higher than the vacant rank. The board takes

10/ Previously, evaluations of patrolmen had to be submitted every six months (Tr. I, p. 108). For examples of performance evaluation forms submitted by sergeants, lieutenants, and captains, see P-4-6; P-8; P-10-14; P-17-20.

into consideration the candidate's personnel file and past job performance and each member evaluates the candidates and assigns a numerical score. The high and low scores given by board members are struck, and the remaining three scores averaged in order to rank the candidates. The Director has always promoted the person or persons ranked highest by the Board. His decision is final, although he discusses it with the mayor and business administrator (Tr. I, pp. 90-94, 215; P-2; P-6). 11/

16. The Director also described the procedures used to handle discipline charges. Two different types of cases exist: complaints originating outside the department and complaints originating inside the department (Tr. I, pp. 94-102; Tr. II, pp. 72-77).

When the Director receives a complaint from outside the Police Division, he refers the matter to the commander of the particular section involved (either a captain or a lieutenant) or, in some cases, the internal affairs officer (either a lieutenant or a sergeant, but never a patrolman) for investigation (Tr. I, pp. 94-95). The commanding officer of the section then determines whether the complaint is justified. If the commanding officer believes the complaint has merit, he refers the matter back to the Director who then holds a hearing, makes the final decision, and establishes the penalty (Tr. I, pp. 95-96; Tr. II, p. 74).

When a complaint originates within the department (e.g. one superior officer accuses a patrolman of a rule infraction), the

11/ One lieutenant testified that in 1966 or 1967, he recommended that one patrolman not be promoted to sergeant; the then Director made the promotion. Since the present Director assumed his position, this lieutenant has not been involved in the promotion process (Tr. II, pp. 145-146).

Director does not become involved until after the commanding officer of the unit involved investigates the matter and decides to lodge charges. At that point, the Director holds a hearing, makes a final decision, and establishes a penalty. (Tr. I, p. 96). [12/]

Sergeants, lieutenants, and captains also possess limited authority to discipline patrolmen without first obtaining the Director's review or approval. These officers can issue suspensions with pay and oral or written reprimands. [13/] They can also place a letter in an officer's personnel file (Tr. I, pp. 99, 101-102; P-12; P-16; P-17). No written right of appeal of these actions exists, although the Director would review the matter if a dissatisfied party so requested (Tr. I, p. 102).

17. The Director testified that since 1970, there have been no instances in which a permanent police officer has been discharged. However, individual officers have been given, and have accepted, the option of resigning rather than experience formal discharge (Tr. I, p. 110). Thus on one occasion, a captain, confronting a sergeant caught in a gambling raid, accepted an offer of resignation without first contacting the Director who was than on sick leave (Tr. I, p. 111). On another occasion, a captain told a patrolman who had cut a woman's face to resign and the officer

12/ The Director gave examples of discipline cases originating both inside and outside the Police Division (Tr. I, pp. 96-99). In addition, the Township submitted several documents evidencing the role of superior officers in the discipline process (P-1; P-3; P-5; P-6; P-10-14; P-16; P-17; P-19; P-10; P-23; P-24). Each year, the Director is advised of about two or three disciplinary incidents. (Tr. II, pp. 67-70).

13/ One lieutenant testified that he did not believe that a written reprimand, as opposed to an oral reprimand subsequently recorded, could be entered in an officer's file without the Director's approval (Tr. II, pp. 143-144). The undersigned credits the Director's testimony that written reprimands do not require his approval.

did so; again, the captain did not secure the prior consent of the Director who was on vacation (Tr. I, pp. 112-113) nor did the captain consult the mayor or business administrator before delivering the ultimatum (Tr. I, p. 113).

18. This finding of fact concerns the relationship between Local 145 and the Township up to and including the execution of the first Memorandum of Record on October 3, 1968 (J-8).

According to a lieutenant who has been on the Township police force since 1955, Local 145 was chartered in late 1960 or 1961 (Tr. II, pp. 85; 126-127).

Local 145 introduced minutes of meetings held June 4, July 31, and August 19, 1964, which evidence its structure and some interreactions with Township officials in 1964 (R-6; R-5; R-4 respectively). According to the June 4, 1964 minutes, a Pay Raise Committee existed and met with the Police Commissioner and Township Administrator; the Township Adminitrator responded that he could not discuss a pay raise until the salary guide was completed. Also discussed were a false arrest insurance plan and a clothing allowance raise. At the meeting on July 31, 1964, the Pay Raise Committee reported that the Township Administrator did not know what the pay raise would be and stated that the police would find out at the upcoming Township meeting. The minutes also evidence the existence, but not the functioning, of a Grievance Committee. At the August 19, 1964 meeting, the Pay Raise Committee reported that its overtures had once more been frustrated; the Township Administrator refused to state what the new raise would be and the Police Commissioner, contacted by phone

during the meeting, stated that there would be "no negotiations" on a pay raise.

Local 145 also introduced minutes of meetings held on March 20 and August 16, 1967 (R-3 and R-7 respectively). The former minutes once more reflect the existence, but not functioning, of a Grievance Committee. The latter minutes indicate that committees on health and welfare, insurance problems, pay raises, and benefits, among others, existed, but do not shed any light on what these committees did and if and how they approached Township officials.

Lieutenant Carroll, a sergeant and an active member of some Pay Raise Committees before 1968 (Tr. II, pp. 91-92, 104), described the tenor and nature of the relationship which existed between the Township Committee and Local 145 during the period of 1964 to 1968:

> We had very informal negotiating per se. It would be any person in the sense that felt we weren't receiving enough wages or there was some benefit that we needed. [A police officer, any police officer] would contact or just happen to run across either the mayor, the police commissioner...[and would] say, well, I think it is about time we had a raise or another holiday or something....
>
> You would even catch [the business administrator] into a conversation because of the fact that the municipal building and everything is altogether...We would sit down and talk, and sometimes they would give an answer directly or they would talk about it in "we'll see at the Township meeting," which was a committee meeting and not a council meeting. They, in turn, may give an answer or give it to one of the officers (Tr. II, pp. 86-87).

He contrasted that description with the more formal negotiations relationship existing today (Tr. II, pp. 87-88) and emphasized that before 1968 there were no "demands", only "requests". (Tr. II, p. 111) Lieutenant

Carroll also stated:

> I know there was no such counter proposals like we have today. This was not done. This was very, very informal. Either you got it or you didn't get it, and the answer was there and not much explanation. (Tr. II, p. 122).

Local 145 did initiate some requests and did appoint committees and representatives to talk with the mayor and police commissioner (Tr. II, pp. 87-88). The Pay Raise Committee mostly handled requests for additional holidays, clothing allowances and other benefits (Tr. II, p. 106); the Committee also attempted to maneuver pay raises around a step system applicable to all Township employees which the Township had instituted without any negotiations in 1964 and which remained in effect with regard to police employees until the past few years (Tr. II, pp. 105-108; R-6). Sometimes Local 145 representatives would seek follow-up meetings (Tr. II, p. 110). Prior to 1968, there were no written proposals or counterproposals (Tr. II, pp. 121-122) nor did Local 145 use any job actions as a lever to obtain concessions (Tr. II, pp. 117-118). While Township officials sometimes acceded to Local 145's requests (Tr. II, pp. 112-113), Township officials announced their decisions subsequent to any presentation rather than reaching them through and at the negotiations table (Tr. II, pp. 110, 122; R-4).

Sergeant Choborda, in 1967 a patrolman and a member of the Grievance Committee, was asked what the pre-1968 Grievance Committee did. He responded:

> "Not very much. I don't recall any action taken by that committee at that time. I really don't." (Tr. II, p. 167)

Further, he did not recall any grievances being filed with the committee or any contact with Township officials (Tr. II, p. 167). 14/

14/ Lieutenant Carroll testified that he did not recall any grievances between 1964 and 1968 nor did he believe there was a system for arbitration or hearing (Tr. II, pp. 122-123). He did confirm the existence of the Grievance Committee and its willingness to contact Township officials concerning employee problems (Tr. II, p. 90).

There was no formal grievance procedure; instead, problems were taken directly to the chief, the director, or the immediate supervisor (Tr. II, p. 168).

Patrolman Robert Zygmund, also a member of the 1967 Grievance Committee, testified that there was no formal grievance procedure before 1974 and that the word "grievance" was not even used (Tr. II, pp. 171, 190, 192). He did recall three occasions on which Local 145 representatives complained about terms and conditions of employment. On the first occasion, the Director was asked about long-sleeved shirts, car radios, and air conditioning; on the second occasion in the summer of 1967, the president of Local 145 sought to have intoxication tests administered to a patrol officer accused of drinking; and on the third occasion, Local 145 sided with an officer accused of improper parking (Tr. II, pp. 190-194, 223-224). Zygmund did not further describe the methods Local 145 used or the success it achieved with respect to these three problems. Finally, he testified that the Grievance Committee told Township officials that the police officers wanted to get out of the Public Employees' Retirement System (Tr. II, pp. 194-196).

The relationship between the Township and Local 145 during the period of June through October, 1968, differed in formality and results from the relationship in previous years. At a meeting on June 12, 1968, the Mayor, Township Administrator, a councilman and various representatives of Local 145 held a two-hour discussion of a number of different terms and conditions of employment (R-1; R-2; R-3). This meeting kicked off a series of

negotiations meetings which resulted, on October 3, 1968, in the parties' execution of their first collective negotiations agreement (Tr. I, p. 100; Tr. II, pp. 185-190; J-8). The agreement did not contain provisions on annuity plans, court attendance, retirement funds, sick leave, false arrest issurance and police headquarters, all subjects discussed at the June 12, 1968 meeting (compare R-1 and J-8). This agreement provided, inter alia, that effective January 1, 1969, patrolmen, sergeants, lieutenants, and the chief would receive certain salary schedule adjustments and longevity increases, certain changes would be made in the detective allowance given police officers, and a certain amount of money would be put in the 1969 overtime budget. 15/ Patrolman Zygmund testified that he

> "...was amazed that we got [the 1968 contract]. I don't know why. Nobody even told us why. We just got the contract." (Tr. II, p. 219)

19. The undersigned has already reviewed the history of contractual relations between the parties since October 3, 1968 (Findings of Fact Nos. 6-7). The Township contends that negotiations since 1968 have become increasingly tense and difficult because of the inclusion of supervisors and non-supervisors in the same unit and an emerging rift between the competing interests of these two groups (Tr. I, pp. 183-187; Tr. II, pp. 47-48). This Finding of Fact will consider the negotiations for the 1978-1980 contract (J-2) and the 1981-1983 contract (J-1).

The present Township Administrator has negotiated every contract since 1974 (Tr. I, p. 170). He testified that the following problems indicating a split between superior officers and

15/ The agreement also stated that the question of salary increases would be taken off the 1968 general election ballot. Apparently, if its request for salary increases had been turned down, Local 145 was prepared to "end run" the Township officials (Tr. II, pp. 224-225; R-8).

patrolmen arose during the 1978 negotiations: (1) the patrolmen complained that their supervisors were changing work schedules without giving adequate notification (Tr. I, p. 176), (2) superior officers complained that they were not receiving compensation for overtime and other benefits comparable to what the patrolmen received (Tr. I, p. 180), (3) patrolmen complained about the way superior officers managed the department (Tr. I, p. 183), and (4) superior officers complained that past contractual concessions had undermined their ability to manage effectively (Tr. I, p. 185). The Township Administrator also testified that, despite a few grievances, he encountered no substantial problems in the management of the 1978-1980 contract (Tr. II, pp. 27-28).

The Township Administrator identified a number of different areas of conflict in negotiating and implementing the present collective agreement. First, and most importantly, patrolmen complained extensively about the need for formal procedural protections during disciplinary investigations conducted by superior officers (Tr. I, pp. 187-188, 211-213; Tr. II, pp. 3-5). 16/ Second, the Township Administrator questioned the propriety of having superior officers responsible for handling and resolving first-step grievances involving felllow Association members (Tr. I, p. 196; J-1, Article III). Third, during negotiations, concerns and complaints arose that superior officers were changing schedules of patrolmen to deny them premium pay on holidays (Tr. I, pp. 196-197), superior officers were arbitrarily making and denying light-duty assignments (Tr. I, pp. 198-199), superior officers were arbitrarily making hire-back determinations

16/ In February, 1981, the president of Local 145 wrote the captain in charge of the investigation section (who was also serving as Acting Director of Police Chief while the Director was on vacation) and criticized a lieutenant's allegedly unfair handling of an investigation into a patrolman's conduct; the lieutenant responded with a mutually critical letter and asked the State PBA to reprimand Local 145's president (Tr. I, pp. 117-121, 188-189; P-23; P-24). In another incident, a patrolman accused a captain of denying him PBA representation during a disciplinary interview (Tr. I, pp. 189-190).

(Tr. I, pp. 200-201), superior officers were making excessive telephone calls to patrolmen's homes (Tr. I, pp. 201-202), and superior officers wanted stricter grooming standards than patrolmen (Tr. I, pp. 208-210).

The Township Administrator felt particularly hampered during the recent negotiations because he could not consult with superior officers directly in order to obtain their side of the story (Tr. I, pp. 178-179, 203). The present contract contains many provisions which entrust management with the responsibility of setting standard operating procedures (see, e.g., J-1, Article IX, section F and Article X, sections D and E). These procedures will be determined by the Director and his staff of superior officers (Tr. I, pp. 202-203).

The Township Administrator testified that some grievances affecting the relationship between superior officers and patrolmen have been filed and he believes will be filed under the present contract Tr. II, pp. 28, 30). He pointed to a grievance in which superior officers are claiming the same overtime compensation as patrolmen (Tr. I, p. 28). 17/ He also points to a grievance which he believes is going to be taken, but has not yet been taken, with respect to the alleged failure of a superior officer to afford union representation during a disciplinary interview (Tr. II, pp. 30, 67).

In refuting the conflicts perceived by the Township Administrator during the negotiations for the 1978-1980 and 1981-1983 contracts, Local 145 emphasizes that superior officers have always served on the negotiating committees (Tr. II, pp. 26-17; 197) and their salary interests vis-a-vis patrolmen have always, with the

17/ Local 145 is currently processing this grievance (Tr. II, p. 33). On its face, it raises no conflict of interest between superior officers and patrolmen (Tr. II, p. 30).

exception of 1974 or 1975, been protected by an across-the-board percentage increase rather than a lump sum payment (Tr. II, pp. 44, 197). Further, Local 145 has processed and continues to process grievances on behalf of superior officers (Tr. I, pp. 158, 162 199-201).

20. In 1973 or 1974, some police officers apparently engaged in a sickout in connection with ongoing negotiations covering police and certain other municipal employees (Tr. II, pp. 19-20, 118). No evidence suggests that the interests or activities or superior officers and patrolmen were not congruent with respect to this incident. In 1980, some police officers apparently engaged in a slowdown in the issuance of summonses (Tr. I, pp. 127-130). Again, there is no evidentiary basis for distinguishing between superior officers and patrolmen with respect to that incident. The Township Administrator could identify no occasions when the strain he detected from negotiations with a mixed unit had spilled over into picketing or a job action (Tr. I, pp. 216-217).

21. The Director has not perceived any increase in tension or difficulties in relationships between superior officers and patrolmen since 1974 (Tr. II, p. 65-66). His superior officers continue to do the job and direct the men pursuant to his orders (Tr. II, p. 66). The Director does not believe that the personnel recommendations of superior officers concerning patrolmen have been colored or made unreliable by common membership in an employee organization (Tr. I, pp. 156-158). Specifically, he cannot cite any incident in which superior officers have been reluctant to bring disciplinary charges or less than thorough in their investigation

as a result of membership in the same negotiations unit as the patrolmen (Tr. II, pp. 73, 76-77). 18/ In short, superior officers "...do the job. When they feel that charges should be made, they make the charges regardless of membership or anything else." (Tr. II, p. 73)

22. Superior officers are barred from holding office or nominating candidates for office in Local 145 or the State PBA (Tr. II, pp. 222-223; J-18, p. 4). The minutes of the June 21, 1968 Local 145 meeting indicate that superior officers are not to be allowed to vote on any matter that pertains to a patrolman and departmental action (R-8). The same limitation applies today (Tr. II, p. 230). Nevertheless, it appears that the restriction has not been invoked to restrict the voting of superior officers; they have even been allowed to vote on whether an officer brought up on charges should have a PBA-retained attorney (Tr. II, p. 222). In particular, the superior officers have always participated in contract ratification votes (Tr. II, p. 223).

23. The Township Administrator testified that he delayed filing the clarification of unit petition because it appeared that the superior officers might file a representation petition or otherwise seek to remove themselves from Local 145's unit (Tr. I, pp. 191-192; Tr. II, p. 38). The superior officers apparently met separately and voted on at least two, and perhaps three, occasions on the question of separation (Tr. II, pp. 11-12, 38-39, 159-150, 208-209, 245-250). While the precise number of votes at each meeting for and against separation

18/ In response to a markedly leading question, the Director found some room for favoritism in disciplinary matters as a result of common membership; in light of the leading nature of the question, the Director's previous testimony, and his failure to give any specific illustrations, the undersigned discounts this testimony (Tr. II, pp. 75-76).

is not known (Tr. II, pp. 39, 49-40, 161-162), the upshot was that the superior officers as a group took no action. When the Township Administrator heard of the decision not to act, he proceeded with the instant petition (Tr. I, pp. 192-195; Tr. II, p. 40).

Legal Analysis and Conclusions of Law

1. The Hearing Officer first considers Local 145's motion for Dismissal. Local 145 argues that a "contract bar" exists because the Township has entered into a series of collective agreements, including one after filing the instant petition, which specifically include captains, lieutenants, and sergeants in an overall unit of police officers. Local 145 insists that the Township's only recourse in order to remove superior officers from the overall unit is to file a public employer petition 90 to 120 days prior to the expiration of the current agreement. The undersigned finds that a clarification of unit petition is a proper vehicle to secure the removal of superior police officers from a unit including patrolmen and consequently denies Local 145's Motion for Dismissal.

In Clearview Regional High School Board of Education and Clearview Education Association, D.R. No. 78-2, 3 NJPER 248 (¶10229 1979)("Clearview"), the Director of Representation spelled out in detail the functions, mechanics, and propriety of a clarification of unit petition as opposed to a representation petition in certain contexts. In particular, the Director stated:

> The purpose of a clarification of unit petition is to resolve questions concerning the scope of a collective negotiations unit within the framework of the provisions of the Act, the unit definition contained in a Commission certification, or as set forth in the

> parties' recognition agreement. Normally, it is inappropriate to utilize a clarification of unit petition to enlarge or to diminish the scope of the negotiations unit for reasons other than the above. Typically, a clarification is sought as to whether a particular title is contemplated within the scope of the unit definition and the matter relates primarily to identification....
>
> Occasionally a change in circumstances has occurred which alters an employee's job functions and may result in the inclusion of such function within the intent of the unit description. Alternatively, a new title may have been created by the employer entailing job functions similar to functions already covered by the unit and therefore warranting inclusion in the unit. In a similar vein, the employer may have created a new operation or opened a new facility, and then staffed the operation or facility with employees who function similarly to currently represented employees. In these circumstances, a clarification of unit proceeding is appropriate.
>
> In other situations, a clarification of unit may result in persons being removed from the unit. This is so because the statutory framework of the Act renders certain negotiations relationships improper. Persons identified as managerial executives and confidential employees are not employees under the Act. In addition, the Act provides that, unless certain exceptions are present, supervisors cannot be in units with non-supervisors; nor may police be in units with non-police employees. The Act, moreover, inherently embodies restrictions on the inclusion of personnel with conflicts of interests with other personnel. See Wilton, supra, footnote 3. Therefore, clarification of unit petitions are appropriately utilized to seek the exclusion of classifications which may have been included in an existing unit contrary to statutory provisions. (Emphasis supplied) Supra at p. 251.

Our Commission does not require clarification of unit petitions to be filed at any particular time upon penalty of waiving the right to file such a petition. N.J.A.C. 19:11-1.5 and 19:11-2.8; Clearview, supra; contrast, e.g., Credit Union National Assn., 199

NLRB No. 22, 81 LRRM 1295 (1972); Northwest Publications Inc., 197 NLRB No. 32, 80 LRRM 1296 (1972); Northwest Publications, Inc., 200 NLRB No. 20, 81 LRRM 1448 (1972). Thus, Clearview rejects the application of contract bar rules to dismiss outright clarification of unit petitions. See also City of Newark and PBA, Local No. 3, D. R. No. 81-18, 7 NJPER 3 (¶12002 1980). However, under Clearview, the Commission will strive to implement its clarification of unit determinations in a manner consistent with the parties' contractual undertakings. See also River Dell Board of Education and River Dell Education Assoc., H.O. No. 78-15, 4 NJPER 172 (¶4085 1978). For example, assume the parties unreservedly agree in a recognition clause that certain personnel are within a unit of supervisory personnel, and that the employer later files a clarification of unit petition claiming that these personnel are statutory supervisors. In this situation, the Commission will process the petition, but, assuming it finds the personnel are statutory supervisors, will make its determination to exclude such personnel effective only upon the expiration of the contract. If the parties' agreement reserves the right to file a clarification of unit petition over a certain job title, the Commission's determination will be effective immediately.

In the instant case, a clarification of unit petition is proper because the Township contends that a negotiations relationship -- a unit including superior officers and patrolmen -- violates our statutory proscription against mixed units of supervisory and non-supervisory personnel. Under Clearview, the Township was

not required to file this petition at any particular time or have it dismissed.

Further, the undersigned believes that the decision to exclude or include the disputed job titles should be effective immediately. The parties' current agreement, as well as each of the three previous agreements, contains a clause explicity reserving the Township's right to seek clarification of the unit during the life of the contract. Testimony concerning the parties' negotiations history confirms that both parties understood this reserved right to refer to the Township's doubts and concerns about the contractual unit inclusion of superior officers. Clearview contemplates that clarification of unit determinations under such circumstances should be effective immediately.

2. The Hearing Officer next considers whether the Township's superior police officers -- sergeants, lieutenants, and captains -- should be removed from the unit which Local 145 represents. In re Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977), sets forth the governing principles:

> There is now a long line of Commission decisions on the question of whether superior officers may be included in negotiations units with patrolmen. The standards utilized by the Commission in reaching these determinations are presented in In re City of Elizabeth, P.E.R.C. No. 71 (1972), In re City of Union City, P.E.R.C. No. 70 (1972), and In re City of Camden, P.E.R.C. No. 52 (1971). Generally, these decisions provide that, 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 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.

In the Union City matter, supra, the Commission stated the above most cogently:

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." [See also In re Borough of

> Sayreville, E.D. No. 76-27, 2 NJPER 85 (1976), rev. denied, P.E.R.C. No. 76-35, 2 NJPER 174 (1976), aff'd, App. Div. Docket No. A-3325-75 (4/1/77), Pet. for Certif. denied, ___ N.J. ___ (7/20/77).]
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> ...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 dictates the continued inclusion of superior officers in a unit of rank and file personnel. Supra at 349-350 (footnotes omitted)

Given these standards, the undersigned will first consider whether a South Plainfield conflict of interest exists between superior officers and patrolmen and then discuss whether either of the exceptional circumstances noted in South Plainfield is present.

3. The Township's Police Division has a quasi-military structure which creates an inherent and substantial conflict of interest between superior officers and the patrolmen they direct. Each of the four sections operates pursuant to a strict chain of command; within each section, this chain commences with either a captain, a lieutenant, or a sergeant. The superior officers assign, direct, and supervise the patrolmen in the performance of their daily duties (Findings of Fact Nos. 9 and 10).

The quasi - military structure of the Township's Police Division depends upon the willingness of the superior officers to report rule infractions, mete out discipline for minor violations, and institute disciplinary proceedings in more serious matters. While the Director has ultimate responsibility for determining the truth of misconduct charges and the extent of punishment to inflict, he must rely on superior officers to investigate and initiate disciplinary charges. The superior officers have faithfully fulfilled this responsibility, as evidenced by the number of documented disciplinary incidents and the Director's testimony (Findings of Fact 16 and 21). Nevertheless, the nature of the disciplinary system, its reliance on superior officers to investigate and report offenders, and the number of incidents illustrate the tensions inherent in the structure of the Police Division. Indeed, these tensions have occasionally boiled over into patrolmen's protests concerning the investigatory techniques of superior officers and into negotiations proposals seeking to increase formal procedural protections during disciplinary investigations (Finding of Fact 19).

The role of superior officers in making recommendations affecting the careers of patrolmen confirms the existence of a substantial conflict of interest between superior officers and patrolmen. See Board of Education of West Orange v. Wilton, supra at 418, 420. Again, the nature and operation of the disciplinary system best demonstrate, this conflict. A closely related consideration is the role of superior officers in recommending that an employee be discharged or given an opportunity to resign. Here, captains have actually demanded and accepted resignations without securing the Director's approval or even input (Finding of Fact 17). In addition, superior officers play

a critical role in determining promotions since, by definition, the oral interview boards must always consist solely of superior officers and, by past practice, the Director has always promoted the candidate ranked highest by the Board. (Finding of Fact 15). 19/ Finally, superior officers make recommendations concerning the granting or denying of permanent status to probationary patrol officers; the Director almost always follows these recommendations (Finding of Fact No. 12).

Accordingly, the undersigned concludes, based on his assessment of the quasi-military structure of the Township's Police Division and the substantial ability of superior officers to affect the career opportunities of patrolmen, that a South Plainfield conflict of interest pervades the instant case. See also In re Borough of Sayreville, E.D. No. 76-27, 2 NJPER 85 (1980); In re City of Trenton, D.R. No. 77-10, 3 NJPER 76 (1977); In re Town of Kearney, D.R. No. 78-30, 4 NJPER 54 (¶ 4025 1977); In re Borough of Fairlawn, D.R. No. 79-30, 5 NJPER 165 (¶ 10091 1989); In re Town of Boonton, D.R. No. 81-16, 6 NJPER 604 (¶ 11299 1980); In re Metuchen Borough, D.R. No. 78-27, 3 NJPER 395 (1977).

4. South Plainfield states that severance of superior officers from a unit containing rank and file officers is not necessary if the police department is very small, superior officers perform virtually the same duties as patrolmen, and any conflict of interest is de minimis. This exception is not applicable. The size of the Police Division (Finding of Fact No. 8) is much larger than those departments which

19/ Contrary to Local 145's reading of various promotion and hiring forms, a "recommendation" need not be made in words; it can equally well be made and followed through the assignment of numerical ratings.

have come within the exception. Contrast South Plainfield and In re Borough of Sayreville, E.D. No. 76-77, 2 NJPER 85 (1976) (exception inapplicable in, respectively, 60 and 62 officer departments) with In re Township of Hanover, supra; In re Borough of Rockaway, E.D. No. 43 (1972); In re Borough of Avalon, E.D. No. 76-23, 2 NJPER 59 (1976); and In re Borough of Merchantville, D.R. No. 80-38, 6 NJPER 305 (¶ 11147 1980) (exception applicable in, respectively, 25, 10, 16, and 10 officer departments). The distinctions in duties, responsibilities, and power between the "brass" and the "rank and file" are sharp and ever present. As discussed above, these distinctions and the Division's structure give rise to a substantial conflict of interest.

5. South Plainfield also states that severance of superior officers is not necessary if the existence of an established practice, prior agreement, or special circumstance dictates their continued inclusion in a unit containing rank and file personnel. The original decision in In re West Paterson Board of Education, P.E.R.C. No. 77 (1973) ("West Paterson I") articulates the applicable guidelines in determining whether an established practice or prior agreement exists:

> The Commission has consistently given a narrow interpretation to these terms [and] has generally refused to find that either condition existed because the evidence failed to establish that the process of negotiation was the method whereby significant employee conditions were determined. Based on the Commission's experience, it appeared that many, perhaps most, employer-employee relationships prior to 1968 were characterized by an organization's request for improvement of a particular condition or resolution of a particular grievance. Upon submission the matter was considered privately by the employer and his decision was later announced. There was seldom evidenced a sense of a mutual undertaking for the resolution of differences or an intent to achieve common agreement. The Commission was reluctant to equate this pattern of behavior with "established practice" or "prior agreement" for several reasons. First, these provisions were stated

as exceptions to what the Legislature declared to be the norm; if the statutory exceptions came to embrace the typical pre-1968 relationship, the exceptions might have wider application than the norm. Second, and of greater significance, a history of this kind of relationship has little value as an indicator or whether a mixed unit would meet the statute's objectives when after 1968 the parties became subject to Chapter 303 and their relationship escalated to a process of negotiations.

Consequently, in the early cases examined where one party sought to protect an existing unit by invoking the exceptions, the Commission seldom found that a pre-1968 relationship evidenced what it considered to be the minimum 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.

West Paterson I, supra, at pp. 9-10.[20/]

20/ On reconsideration of West Paterson I, see P.E.R.C. No. 79 (1973) "West Paterson II"), the Commission further stated:

> Upon careful analysis, we have concluded that ["established practice" and "prior agreement"] were intended to apply solely to circumstances in existence prior to the arrival of Chapter 303. 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 crystalized prior to Chapter 303, and which managed to succeed despite the heavy odds against success, the exceptions of "established practice" and "prior agreement" were formulated. West Paterson II, supra, at p. 4.

The analysis in West Paterson II, also precludes attempting to rely on a long, but not pre-Act negotiations relationship, as a "special circumstance".

The effective date of Chapter 303 was July 1, 1968. N.J.S.A. 34:13A-1; L. 1968, c. 303, §15. Local 145 concedes in its post-hearing brief (p. 8) that the statute so indicates, but cites two other sources as suggesting different effective dates. See Gasworth et al. Administering the Negotiated Agreement (1980) (September 13, 1968 is effective date) and BNA, Government Employment Relations Report, Vol. 54:3911, RE-92 (12/16/74) (April 1, 1969). The undersigned rejects these alternative dates as without foundation.

In re Borough of South Plainfield, H.O. No. 78-1, 3 NJPER 212 (1977) further clarifies the nature of proof needed to demonstrate an established practice:

> To substantiate a claim of established practice, there must be clear and convincing evidence in the record which shows that such a negotiations relationship had timely existed. The mere labeling of an event as negotiations or calling a document a demand or proposal will not suffice to demonstrate the substantive nature of the offered item. It must be demonstrated in the record that there exists a consistent and exclusive bilateral negotiations relationship between the parties such as is evidenced by an exchange of negotiations proposals on substantive term and conditions of employment such as salary, method of payment, and various other economic and non-economic fringe items. Further, it must be shown that both parties entered the give-and-take relationship with an intent to consummate a mutually acceptable agreement.
>
> Such a bilaterial relationship -- a sort of "economic equilibrium" between the parties -- may be contrasted with circumstances wherein terms and condition of employment are unilaterally determined by the public employer after consultations with public employees or their representatives. In the latter situation, a bilaterial exchange or flow of ideas and proposals between the parties is lacking; it is essentially a static system. Supra at p. 215. (Footnotes omitted).

See also, In re City of Camden, P.E.R.C. No. 52 (1981); In re City of Union City, P.E.R.C. No. 70 (1972); In re Township of Teaneck, E.D. No. 23 (1971); In re Ridgewood Board of Education, D.R. No. 80-33, 6 NJPER 209 (¶ 11102 1980); compare In re River Dell Board of Education, P.E.R.C. No. 77-10, 2 NJPER 286 (1976).

In the instant case, the Township and Local 145 did not enter into their first written agreement until October 3, 1968, and the pivotal terms of this agreement did not become effective until January 1, 1969.

(Finding of Fact No. 7). Thus, there is no "prior agreement" (before July 1, 1968) within the meaning of West Paterson I and II.

Further, none of the parties' interreactions before June, 1968 evidenced a bilateral negotiations relationship entered into by both sides with intent to reach agreement. To the contrary, Local 145 representatives made informal requests which the Township unilaterally determined, frequently without explanation, to accept or reject. No written proposals or counterproposals changed hands. The Grievance Committee was practically moribund. (Finding of Fact No. 18).

The undersigned acknowledges that starting in June, 1968, the contours of a bilateral negotiations relationship started to emerge. For the first time, Township officials, perhaps motivated by a desire to avoid a referendum on police salaries, engaged in meetings with Local 145 representatives with an intent to reach a mutually binding agreement (Finding of Fact No. 18). Nevertheless, the undersigned concludes that the parties did not have an established negotiations relationship prior to July 1, 1968. Instead, far from being established, their relationship had just commenced (only one pre-July 1, 1968 meeting was held) and was still in the incubation stage. The testimony of Local 145's current president best captured the tenuous nature of the relationship prior to its consumation in the October, 1968 agreement when he testified that the Township's willingness to enter a contract amazed him and was inexplicable. In short, the negotiations

relationship had not crystallized prior to July 1, 1968, and therefore did not qualify for the Act's grandfathering of entrenched relationships. 21/

21/ Assuning *arguendo* that an established practice was technically found, the significance of this practice would be diminished, if not obliterated, by the near doubling of the department and the increase in the complexity of negotiations since 1968 (Finding of Fact 8 and 19). See *In re Borough of South Plainfield*, H.O. No. 78-1, *supra* at 216.

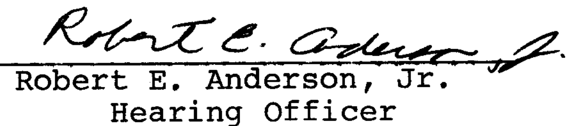
Technically, the question of supervisory status within the meaning of the Act need not be considered if a substantial conflict of interest exists, and neither *South Plainfield* exception is applicable. The undersigned, however, will briefly discuss this issue in the event the Director should decide to reach it. *N.J.S.A.* 34:13A-5.3 provides, in pertinent part:

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

See also *N.J.S.A.* 34:13A-6(d); compare *Wilton's* broader definition of supervisor, *supra* at p. 418. The Director retains the ultimate formal authority to hire, fire, and discipline, but the superior offiers are significantly involved in each personnel process. Thus, the oral inteview board for hiring and promotion decisions consists of no unit members besides superior officers; the Director has always hired or promoted the individual with the highest ratings given by these officers (Findings of Fact 11 and 15). No formal discharge decisions have been made, but captains have plainly assumed the effective power to discharge on two occasions (Finding of Fact 17). Superior officers have limited authority to discipline without the Director's approval and total control over the investigation and lodging of disciplinary charges (Finding of Fact 16). Compare *In re Metuchen Borough*, *supra*, with *In re Township of Hanover*, E.D. No. 41 (1971). As an alternative basis for his recommendations, the undersigned concludes that this complex of responsibilities and effective power over patrolmen's career opportunities makes the superior officers "supervisors" within the meaning of *N.J.S.A.* 34:13A-5.3 and 6(d).

CONCLUSIONS AND RECOMMENDATIONS

Upon consideration of the entire record and the foregoing discussion, the Hearing Officer concludes that a substantial conflict of interest exists between superior police officers and patrolmen in the Township of East Brunswick and that no prior agreement, established practice, or special circumstance negates or outweighs the problems posed by this conflict of interest. Accordingly, the Hearing Officer recommends the removal of superior officers -- sergenants, lieutenants, and captains -- from the negotiations unit which Local 145 represents.



Robert E. Anderson, Jr.
Hearing Officer

Dated: October 29, 1981
Trenton, New Jersey