

D.R. NO. 2003-6

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

In the Matter of

TOWNSHIP OF BORDENTOWN,

Public Employer/Petitioner,

-and-

Docket No. CU-2002-10

BORDENTOWN POLICE OFFICERS ASSOCIATION,

Employee Organization.

SYNOPSIS

The Director of Representation clarifies a unit to exclude sergeants from the collective negotiations unit of patrol officers represented by the Bordentown Township Police Officers Association based on a potential that a conflict of interest exists by the continued inclusion of sergeants in the unit with patrol officers, and that no "small force" exception applies. The sergeants are removed from the unit effective at the expiration of the current collective negotiations agreement (December 31, 2002).

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Appearances:

For the Public Employer
Hartsough Kenny & Chase, attorneys
(Gregory Sullivan, of counsel)

For the Employee Organization
Loccke & Correia, attorneys
(Charles E. Schlager, of counsel)

DECISION

On September 17, 2001, the Township of Bordentown (Township) filed a Clarification of Unit Petition seeking to remove sergeants from the collective negotiations unit of patrol officers represented by the Bordentown Township Police Officers Association (Association). The Township claims that the sergeants are supervisors, and their inclusion in the same collective negotiations unit with the patrol officers they supervise poses an inherent conflict of interest. Specifically, the Township asserts that the police department's chain of command is disrupted when these supervisors find themselves dependent upon their union leadership, who are subordinate officers, with regard to labor contract disputes

and disciplinary actions. The Township claims that as a result of this conflict, sergeants lack an incentive to supervise their subordinates effectively and are discouraged from properly executing their supervisory functions. The Township argues that permitting this conflict to continue potentially compromises the public safety interests of its residents. The Township suggests that the sergeants should be placed in a separate unit in order to establish the proper relationship between supervisors and subordinates and to restore the proper functioning of the department's chain of command.

The Association denies that the sergeants' inclusion in the unit creates any conflict of interest. It asserts that the unit is subject to the small force exception as defined in Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977). The Association maintains that the sergeants do not possess any significant supervisory authority, but rather perform nearly the same functions as patrol officers, and that they ride in similar cars. Further, the Association argues that the Township is attempting to weaken the sergeants' bargaining power and limit the Association's effectiveness.

We have conducted an administrative investigation pursuant to N.J.A.C. 19:11-2.2 and 2.6. An investigatory conference was conducted on November 28, 2001. The parties submitted position statements, additional information and supporting documents by February 22, 2002. By letter dated August 7, 2002, I summarized the parties' positions and accompanying evidence and advised the parties

of my intention to grant the Township's position to remove sergeants from the current unit based upon the potential for conflict of interest. I provided the parties an opportunity to respond and forward additional materials by August 19, 2002. On August 19, 2002, the Association submitted a letter indicating that it wished to file a response to my August 7, 2002 letter, and sought an extension. I granted the Association an extension until September 13, 2002. In a letter dated August 30, received September 5, 2002, the Association advised that it no longer intended to file a response in this matter. The Township did not file a response. Therefore, there being no substantial and material factual issues in dispute, the disposition of the petition is properly based on our administrative investigation which has shown the following.

The Township police department consists of approximately 20 police personnel. It is headed by Police Chief Danny Kiernan; under him is one lieutenant, five sergeants and 13 patrol officers. The Association's collective agreement with the Township covers patrol officers and sergeants for the period January 1, 2000 through December 31, 2002.

The sergeants' duties and responsibilities are set forth in the department's written policies and procedures. Under departmental policies and procedures, sergeants are assigned as "supervisory officers" and are required to exercise immediate supervision over the activities of their subordinate patrol officers. Specifically, Section 2:5.4 of these procedures provides

that supervisory officers such as sergeants are responsible for the following:

(a) Supervision. Closely supervise the activities of their subordinates, making corrections where necessary and commenting where appropriate.

(b) Leadership. Provide on-the-job training as needed for efficient operation and coordination of effort when more than one member or employee is involved.

(c) Direction. Exercise direct command in a manner that assures the good order, conduct, discipline, and efficiency of subordinates.

Further, new Township Rules and Regulations specify:

B. Police Sergeants:

1. Definition:

Under the supervision of the Police Lieutenant during an assigned tour of duty, has charge of police activities intended to provide assistance to subordinate officers under his/her command. They provide protection for persons, safeguard property, and assure observance of the laws, apprehend lawbreakers, and does (sic) related work as required.

2. Examples of Work:

Closely supervises all subordinate officers assigned to him/her during his/her tour of duty and makes corrections when needed and commenting when appropriate.

Is responsible for the general good order of his/her command during his/her tour of duty in (sic) include proper discipline, conduct, welfare, field training, and efficiency of operations.

Responsible for communication of all orders, or other information needed to be passed on to his/her command and other squads as needed.

Inspection of subordinates under his/her command and makes corrections when necessary.

In addition, Township Ordinance #1991-21 specifies:

2-7.6 Powers and Duties of Uniformed Members

. . . Each Police Sergeant shall have and exercise the following authority and perform the following duties:

(1) Supervise all Police Officers and Special Law Enforcement Officers as are assigned to him and serving on the same shift, and issue necessary instructions and directions to them.

Pursuant to department policies and procedures, sergeants are in charge of the detective bureau, the traffic unit, community police, D.A.R.E. (Drug Abuse Resistance Education) program, bicycle patrol, firearms and patrol duty. Further, sergeants ride in patrol cars that are marked with the word "supervisor" on the side front quarter panel.

Moreover, a Township ordinance provides that ". . . if no Police Lieutenant should be able to act, a Police Sergeant, when so ordered by the Chief, shall temporarily have the authority and perform the duties of the Chief." The Ordinance also states that a sergeant, when so ordered by the chief, shall temporarily have the authority and perform the duties of a lieutenant.

According to the Township, when both the lieutenant and the chief are unavailable, the most senior sergeant is in charge of the department. The Township notes that this occurred when, from November 9 through November 11, 2001, Sgt. Dumont was in charge of the department due to the absence of the lieutenant and the chief.

Further, under departmental discipline procedures, sergeants may give counselling sessions and oral reprimands to subordinates as well as written reprimands (subject to approval by the chief). Sergeants may also initiate emergency suspensions under certain circumstances.

Township procedures also provide:

Whenever any supervisory officer observes or is informed of the misconduct of another member or employee which indicates the need for disciplinary action, he shall take authorized and necessary action and render a complete written report of the incident and his actions to the Chief's office.

Under Township rules and regulations, sergeants must ensure that all citizens' complaints against police officers are taken and fully documented. Further, sergeants are responsible for approving or disapproving vacation days for their subordinates prior to submission of the requests to the administration. The lieutenant then reviews the vacation requests to ensure there is no conflict with scheduled training; if there is a conflict, the request is returned to the sergeant, who subsequently returns it to the officer.

Sergeants are also involved in scheduling. Specifically, they ensure that shifts are fully staffed, and arrange for and approve mandatory and voluntary overtime. They also perform biannual employee evaluations.

In addition, sergeants conduct the oral boards for hiring new officers and make hiring recommendations to the Township administrator, the lieutenant and the chief. All sergeants vote and

rate each candidate; the chief, the lieutenant and the patrol officers have no input in rating or voting on new hires.

Sergeants also prepare and submit for the chief's approval departmental Standard Operating Procedures on matters such as firearms, chemical agents and off-duty weapons. They select and request departmental equipment, such as handguns, and annually submit such requests to the chief for approval. Sergeants are also required to prepare and submit to the chief an annual budget proposal for equipment within their respective areas of responsibility, and have done so in such areas as community policing and bike patrol. Sergeants are also asked to develop policy in their area of expertise, which is reviewed and implemented by the chief.

In addition, sergeants participate in training their subordinates and are compensated for such participation. Under department regulations, they are also responsible for the scheduling, training and supervision of all new police recruits in the field training program. Sergeants prepare and submit grant applications, subject to appropriate approval procedures. Under department procedures, sergeants are also responsible for reviewing all patrol officer reports in order to ensure all are completed and submitted in a timely and professional manner.

The Township asserts that the patrol officers and the sergeants do not have the same responsibilities; sergeants spend much of their time performing their supervisory roles. The Township

notes that this difference in duties is reflected by the department statistical report of "on-the-street" numbers, which shows that for the period January 1 through October 31, 2001, each sergeant averaged 60 summons, 7 arrests, 0.5 drunk driver arrests, 350 service calls, 9 offense reports and 3 motor vehicle accident investigations. However, during the same period, patrol officers each averaged 271 summonses, 56 arrests, 2.5 drunk driving arrests, 1194 service calls, 68 offense reports, and 18 motor vehicle accident investigations.

The Township alleges that an actual conflict situation arose when one of the sergeants on the oral hiring board was the godfather of one of the candidates applying for employment. The Township maintains that this situation presented a question of possible divided loyalty.

The Township also alleges that a second incident also produced an actual conflict of interest. A sergeant working with a patrol officer who was then also serving as Association president, encouraged the officer to file a "complaint" against the lieutenant which turned out to be baseless. According to the Township, the sergeant should have been exercising "supervisory authority" over the patrol officer and "preventing" the filing of such baseless charges.

Finally, the Township notes that it is not a "small town" by virtue of its number of residents, its large number of service calls and its volume of traffic on its four major roadways - the New

Jersey Turnpike, Interstate Route 295, State Route 130 and State Route 206.

* * *

The Association disputes certain of the Township's factual contentions. First, according to the Association, sergeants do not have any significant authority over patrol officers. Specifically, with respect to discipline, the Association stresses that sergeants only have the authority to issue counseling letters, oral reprimands and performance notices, and that while sergeants may issue emergency suspensions, they may only do so the following day. The Association notes that the authority to issue emergency suspensions goes beyond sergeants to include "officers in charge of the shift" and this could apply to patrol officers in situations when the sergeant on the shift is on leave. Further, the Association notes that all police officers, not just sergeants, are required to ensure that all citizen complaints against police officers are fully documented.

Moreover, according to the Association, sergeants only tentatively approve vacation leave, as the vacation requests are then submitted to the lieutenant for final approval. The Association further claims that not just sergeants but also patrol officers who become "officers in charge" of the shift supervise and issue instructions, when the shift sergeant is on leave.

The Association claims that the lieutenant, and not sergeants, are responsible for scheduling, but acknowledges that

sergeants have done scheduling in the past and that one sergeant schedules firearms training twice a year. Moreover, the Association claims sergeants are merely part of a committee that interviews and makes recommendations on new hires. The Association also notes that sergeants do not have independent authority to prepare and issue departmental Standard Operating Procedures.

Further, the Association claims that sergeants lack independent authority to select equipment and notes that all police officers can make suggestions. The Association further points out that not just sergeants, but also patrol officers, participate in training.

The Association acknowledges that sergeants perform biannual employee evaluations. The Association also agrees that, to some extent, sergeants contribute to the budgetary process. However, the Association contends that sergeants have no true influence in the budget process since the lieutenant, the chief, the business administrator, the Township attorney, the Township's financial consultants, the mayor and the Township council all have the actual review and approval responsibility and authority over the budget.

Moreover, according to the Association, the practice of sergeants reviewing and approving the reports of patrol officers had been discontinued and was just reinstated by the chief on January 2, 2002. The Association, moreover, disputes that sergeants supervise the detective bureau; however, it acknowledges that they do

supervise the traffic unit, the community policing unit, the DARE unit and the bike unit.

In addition, the Association disputes the Township's statistics allegedly reflecting the disparity between the "on-the-street" activity of the sergeants and patrol officers. According to the Association, for the named period, the sergeants each averaged 152 summonses, 18 arrests, 1 drunk driving arrest, 876 service calls, 24 offense reports and 8 motor vehicle accident investigations; patrol officers each averaged 247 summonses, 51 arrests, 2 drunk driving arrests, 1086 service calls, 62 offense reports and 17 motor vehicle accident investigations. The Association claims these differences are de minimis and that the statistics show that sergeants and patrol officers perform essentially the same duties.

The Association stresses that the Township has not cited any specific conflicts of interest but only "potential conflicts" in the present unit and notes that the Township only complains of the "potential" obstruction of proper supervision. Further, while the Association acknowledges that sergeants are designated members of the oral hiring board, the Association disagrees that favoritism has or could occur because of this.

Finally, the Association objects to the Township raising the incident about the union president, a patrol officer, and a sergeant filing charges against the lieutenant. It notes that the patrol officer and the sergeant have a statutory right to file a

complaint against another public employee they believe has committed a possible illegal act; that the removal of sergeants from the bargaining unit will have no effect on similar future situations since no employee can "prevent" another employee from filing a charge; and that no actual conflict arose from the incident.

ANALYSIS

N.J.S.A. 34:13A-5.3 provides in pertinent part that "except where established practice, prior agreement or special circumstances dictate the contrary, . . . any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, [shall not] have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership. . . ." In Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 at 425-427 (1971), the New Jersey Supreme Court held that public employees who exercise significant power and responsibilities over other personnel should not be included in the same negotiations unit as their subordinates because of the conflict of interest between these employees and their supervisors.

In Town of West New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1988), the Commission reaffirmed its long line of cases holding that we will ordinarily find a conflict of interest between superior officers and rank-and-file officers in a police department. In Union City, P.E.R.C. No. 70, NJPER Supp. 295, 297 (¶70 1972), cited in West New York, the Commission explained:

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]^{1/} 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. [Id. at 350.]

In West New York, the Commission also cited with approval, South Plainfield, in which the Director of Representation found:

. . . 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

^{1/} The text in the original mistakenly used the word "community" instead of "conflict."

virtually compels that superior officers and patrolmen be placed in separate units. This is so inasmuch as the exercise of significant authority in a chain of command operation produces an inherent conflict of interest within the New Jersey Supreme Court's definition of that concept in Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 (1971). The existence of an inherent conflict of interest in these circumstances must lead to a determination that separates superior officers from rank and file notwithstanding a previous history of collective negotiations in a combined unit. Moreover, the finding of such conflict is not contingent upon a finding that the superior officers are supervisors within the meaning of N.J.S.A. 34:13A-5.3. [Id. at 349.]

* * *

Accordingly, in cases involving police department units, superior officers will normally be severed from rank and file personnel unless it is shown that there is an exceptional circumstance dictating a different result. Examples of such are the following: (1) A department in which there is a very small force where superior officers perform virtually the same duties as patrolmen, and where any conflict of interest is de minimis in nature; (2) Where it is determined that superior officers are supervisors, the existence of established practice, prior agreement or special circumstances dictate the continued inclusion of superior officers in a unit of rank and file personnel. [emphasis added; footnotes omitted. Id. at 350.]

In West New York, the Commission removed superior officers from the rank and file unit based upon the potential for conflict of interest, even though a history of a long relationship in one combined unit existed, and notwithstanding the employer's lack of assertion of actual conflict. There, the Commission observed that it was removing the superiors even in the absence of direct evidence of actual conflict -- "where a superior officer was actually torn

between his divided loyalties to his employer and his unit, thus damaging the public interest" -- finding that such a standard (actual conflict) is "too exacting and is inconsistent with West Paterson,^{2/} especially when public safety employees are involved." West New York, 13 NJPER at 279. The Commission said:

Rather, we believe severance is appropriate for uniformed employees even where there has been an 'established practice' where, as here, the employees' job responsibilities place him in a substantial conflict of interest with his subordinates. [Id.]

Thus, there is presumption that an inherent potential conflict of interest exists between police superior officers and rank-and-file police in a police department, which is not dependent upon a finding of supervisory status or the presence of actual conflict. An exception may be found if it is demonstrated that the duties and authority of superiors and rank-and-file are virtually identical so that any potential for conflict between the two is de minimis. See Town of Harrison, P.E.R.C. No. 93-104, 19 NJPER 268 (¶24134 1983), affirming H.O. No. 93-1, 19 NJPER 39 (¶24018 1992). This situation is likely found only in a very small police force, where the lines of demarcation between ranks is slight. See Pine Valley Borough, D.R. No. 99-15, 25 NJPER 269 (¶30114 1999); Township of Greenwich, D.R. No. 99-7, 25 NJPER 61 (¶30023 1998); Borough of Audubon Park, D.R. No. 88-6, 13 NJPER 741 (¶18278 1987); Borough of Merchantville, D.R. No. 80-38, 6 NJPER 305 (¶11147 1980).

^{2/} West Paterson Bd. of Ed., P.E.R.C. No. 77, NJPER Supp. 333 (¶77 1973).

Here, I find that no actual conflict of interest has manifested itself in this department. While the Township presented examples it contends are actual conflicts of interest, they are not the type of conflicts Wilton instructed us to avoid. In West New York, the Commission explained that a Wilton conflict is one in which the superior officer is torn between his allegiance to his employer as a supervisor, and his loyalty to his negotiations unit. The Township's claim that a sergeant failed to deter the union president from filing a complaint against the lieutenant is not a situation that would be resolved by dividing the negotiations unit, since an employer cannot expect a supervisor to interfere with an employee's statutory right to initiate a grievance or complaint against his superiors. Similarly, the sergeant's participation in interviewing his godson is not a Wilton conflict, and in fact, could occur even if the negotiations unit is separated. Therefore, I find that neither of these situations presents an actual Wilton conflict of interest resulting from the inclusion of superiors in the rank-and-file unit.

However, based on the facts in this matter, I find that an impermissible potential conflict of interest exists between the sergeants and their subordinate patrol officers. As stated in Township policies and procedures, sergeants supervise patrol officers. Specifically, it is undisputed that they perform evaluations, they have the authority to mete out certain types of discipline and that they are responsible for ensuring that the

reports of their subordinate patrol officers are properly completed. Further, they are in charge of the divisions or bureaus within the department, including the traffic unit, community police, D.A.R.E. program, bicycle patrol, and firearms and patrol duty. Moreover, the sergeants' patrol cars are clearly marked "supervisor." These facts support a finding that sergeants have significant command authority over their subordinate patrol officers. See City of Atlantic City, D.R. No. 98-16, 24 NJPER 393 (¶29179 1998).

Further, sergeants are significantly involved in the hiring process for new patrol officers, serving on the oral board and being solely responsible for voting on and rating each candidate. Moreover, as occurred in November 2001, they fill the post of the lieutenant and even the chief when such circumstances arise. These responsibilities place them in potential conflict situations with their subordinate patrol officers.

Although the Township and the Association disagree over the "on-the-street" statistics, either version shows significant disparity between the activity of the sergeants versus the patrol officers. Based upon all of the above, I find that the duties of the superiors and the patrol officers are significantly different. Thus, the "small force exception" cannot be applied in this case.

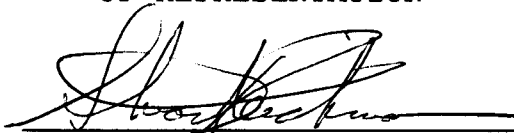
In light of the above, I conclude that a potential for conflict of interest exists by the continued inclusion of sergeants in the unit with patrol officers, and that no "small force"

exception applies. West New York; Roselle Park Borough, D.R. No. 89-19, 15 NJPER 174 (¶20074 1989); Tp. of Sparta, D.R. No. 87-2, 12 NJPER 678 (¶17256 1986). Accordingly, I am removing the sergeants from the unit effective with the expiration of the current agreement.^{3/} We need not reach the issue of whether sergeants wish to be represented in their own unit unless an appropriate, timely representation petition is filed by an organization seeking to represent them.

ORDER

The sergeants are hereby removed from the unit effective at the expiration of the current contract (December 31, 2002).

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Stuart Reichman, Director

DATED: September 10, 2002
Trenton, New Jersey

^{3/} As explained in Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977) at 252, a Unit Clarification filed during the pendency of a current collective agreement will be effective at the expiration of that agreement.