

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

In the Matter of

BOROUGH OF MERCHANTVILLE,

Public Employer-Petitioner,

-and-

DOCKET NO. CU-78-55

MERCHANTVILLE POLICE ASSOCIATION
(FOP GARDEN STATE LODGE #3),

Employee Representative-
Petitioner.

SYNOPSIS

The Director of Representation adopts the findings and recommendations of a Hearing Officer that the detective-sergeant may be included in a negotiations unit comprised of Police Department nonsupervisory personnel. The record reveals that the detective-sergeant, who functions primarily as an investigator, but who also is second in command of the eleven man department, is not a supervisor within the meaning of the New Jersey Employer-Employee Relations Act and that any conflict of interest between the detective-sergeant and other unit members is de minimis.

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Petitioner.

Appearances:

For the Public Employer-Petitioner
Jubanyik, Varbalow & Tedesco, attorneys
(Frank V. Tedesco of counsel)

For the Employee Representative-Petitioner
Florio & Maloney, attorneys
(Michael P. McCafferty of counsel)

DECISION

On June 7, 1978, a Petition for Clarification of Unit was jointly filed with the Public Employment Relations Commission (the "Commission") by the Borough of Merchantville (the "Borough") and the Merchantville Police Association (FOP Garden State Lodge #3) (the "Association") raising a question concerning the composition of a recently recognized collective negotiations unit. The Petition was filed for the purpose of resolving a dispute between the parties as to whether the detective-sergeant may

appropriately be placed in the recognized nonsupervisory unit.

Pursuant to a Notice of Hearing, a hearing was held before Commission Hearing Officer Bruce D. Leder on December 27, 1979, in Merchantville, New Jersey, at which time all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. The parties filed statements in lieu of briefs by April 22, 1980. The Hearing Officer issued his Report and Recommendations on April 15, 1980, a copy of which is attached hereto and made a part hereof. Neither party has filed exceptions to the Hearing Officer's Report and Recommendations.

The undersigned has reviewed the record, including the transcripts and the Hearing Officer's Report.

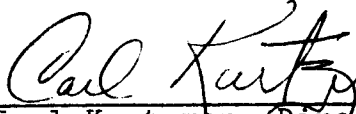
The detective-sergeant functions primarily as an investigator and, secondly, performs administrative work. He is second in command of the Police Department. The police force consists of ten police officers and one chief.

The Hearing Officer found, and the record supports the finding, that the detective-sergeant is not a supervisor since he does not have the authority to hire, fire, or discipline or to effectively recommend the same. The Hearing Officer concluded, in the context of this small police department, that a possible conflict of interest between the detective-sergeant and other members of the negotiations unit was de minimis. In re Borough of Rockaway, E.D. No. 43 (1972); In re Township of Hanover, E.D.

No.41 (1971); and In re Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977). The Hearing Officer noted that there was no evidence shown that the detective-sergeant had ever been placed in a position where he had to compromise his loyalty to his public employer.

Accordingly, the undersigned, finding that the Hearing Officer's findings of fact and legal conclusions are amply supported by the evidence in the record, and in the absence of exceptions to the Hearing Officer's Report, adopts the findings and recommendations of the Hearing Officer. The undersigned determines that the recognized collective negotiations unit includes the detective-sergeant.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Carl Kurtzman, Director

DATED: May 21, 1980
Trenton, New Jersey

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

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Employee Representative-
Petitioner.

SYNOPSIS

A Commission Hearing Officer in a clarification of unit proceeding recommends that the Association's unit be clarified to include the detective-sergeant. The Hearing Officer finds that the detective-sergeant is not a supervisor within the meaning of the Act nor does he find a conflict of interest between the disputed title and other unit members.

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.

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For the Public Employer
Jubanyik, Varbalow & Tedesco, Esqs.
(Frank V. Tedesco, of Counsel)

For the Employee Organization
Florio & Maloney, Esqs.
(Michael P. McCafferty, of Counsel)

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

On June 7, 1978, a Petition for Clarification of Unit was jointly filed with the Public Employment Relations Commission (the Commission) by the Borough of Merchantville (the Borough) and the Merchantville Police Association (the Association) seeking a determination whether the position of detective-sergeant is a supervisory employee within the meaning of the Act.

Pursuant to a Notice of Hearing a hearing was held before Hearing Officer Bruce D. Leder on December 27, 1979, in Merchantville, New Jersey, at which time all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Final submissions by the parties, in lieu of briefs, were filed by April 22, 1980. ^{1/}

1/ By February 6, 1980, both parties had advised the undersigned that they would not file a post-hearing brief. But, on January 23, 1980, the Borough sought to

(continued)

Upon the entire record in this matter, the Hearing Officer makes the following findings:

(1) The Borough of Merchantville is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the Act), is subject to its provisions and is the employer of the employee who is the subject of this matter.

(2) The Merchantville Police Association is an employee representative within the meaning of the Act and is subject to its provisions.

(3) The Merchantville Police Association was recognized as the majority representative of a unit including all sergeants, patrolmen, and dispatchers during August of 1977.

(4) At the time the unit was recognized, a dispute arose with respect to the inclusion of the title of detective-sergeant. ^{2/}

(5) The Borough alleges that the detective-sergeant is a supervisor within the meaning of the Act and it is inappropriate to include this title in the unit represented by the Association.

(6) The Association alleges that the detective-sergeant is not a supervisor and should be included in the unit it represents.

(7) The parties have agreed to a stipulation of facts which is attached hereto and made a part hereof.

Accordingly, there is a question concerning the composition of the collective negotiations unit and the matter is properly before the Hearing Officer.

^{1/} (continued) submit into evidence a letter from former mayor, G. Burton German, Jr., dated December 18, 1979. On February 15, 1980, the Association sought to submit into evidence an affidavit by Detective-Sergeant Wilson E. Haddon dated February 10, 1980, in response to that letter. On February 22, 1980, the Borough objected to the introduction of said affidavit. On April 22, 1980, the Association agreed to withdraw said affidavit only on the condition that the Borough withdraw the letter from the former mayor. Since the hearing was officially closed on December 27, 1979 (and absent agreement of the parties on the submission of the two documents), the Hearing Officer hereby refuses to admit these documents into evidence and will not consider their contents in this report. See N.J.A.C. 19:11-6.3.

^{2/} See Stipulation of Facts Part E.

Background

The composition of the Police Department of the Borough is as follows: one chief, one detective-sergeant, three sergeants, six patrolmen and four dispatchers. The Association currently represents all of these titles, except the chief and the disputed detective-sergeant. Wilson Hadden currently holds the title of detective-sergeant and has held the title since its creation sometime in 1974 or 1975. ^{3/} The position was created based upon the report and recommendations of a state organization comprised of retired police chiefs. ^{4/} At the time the position was created, it was envisioned that the individual would primarily function as a detective and, secondarily, as number two in command of the Police Department. ^{5/}

Position of Parties

The Borough maintains that the detective-sergeant is the "acting chief" during the absence of the Chief of Police. As such, he has total supervisory powers. Additionally, the detective-sergeant has different working conditions from other policemen. Hence, the Borough alleges that the detective-sergeant is inappropriate for inclusion in the unit currently represented by the Association.

On the other hand, the Association alleges that the detective-sergeant does not have the authority to effectively recommend hiring, promotions, transfers, discipline or discharge of employees, and, therefore, is appropriate for inclusion in its unit.

Framework for Analysis

There are many Commission decisions on the issue of whether superior officers may be included in negotiations units with non-superior officers. ^{6/}

^{3/} Tr. p. 11.

^{4/} Tr. p. 35.

^{5/} Tr. p. 37.

^{6/} See, generally, 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); In re City of Camden, P.E.R.C. No. 52 (1971).

Generally, those decisions provide that the quasi-military structure of police departments virtually compels that superior officers and non-superior officers be placed in separate units.

The first level of analysis is whether the disputed title meets the statutory definition of a supervisor. N.J.S.A. 34:13A-5.3 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 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.

Thus, a supervisor is an individual who has the authority to hire, discharge, discipline or to effectively recommend the same. ^{1/}

Even absent a finding that an employee is a supervisor within the meaning of the Act, a superior officer may be excluded from a unit of non-superior officers due to a conflict of interest with other unit employees. This test was set forth in Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971). In pertinent part, the Supreme Court held:

...where the performance of the obligations or the power delegated by an employer to a supervisory employee whose membership in the unit is sought creates an actual or potential conflict between the interests of a particular supervisor and other included employees, the community of interest required for the inclusion of such supervisor is not present. 57 N.J. at 425.

Therefore, even if a superior officer does not have the power to hire, discharge, discipline or effectively recommend the same, the employee may still be excluded from a unit of other employees due to a substantial conflict of interest.

The third test involves a department in which there is a very small force. If superior officers perform the same duties as patrolmen and the conflict

^{1/} In re Cherry Hill Department of Public Works, P.E.R.C. No. 30 (1970).

of interest is de minimis in nature, then a mixed unit of supervisory and non-supervisory employees may be appropriate. ^{8/}

Discussion

There is no doubt from the record that the detective-sergeant plays little, if any, role in the hiring, firing and discipline processes of the Police Department. With respect to discipline, the parties stipulated that:

The present detective-sergeant has never been part of the above (discipline) process nor in the institution or effectuation of any disciplinary action (see Stipulation of Facts Part D).

The hiring process is accomplished through a testing and interviewing procedure. The mayor of the Borough testified that the detective-sergeant plays no role in this process. ^{9/} Finally, regarding the discharge of employees, the chief has the sole authority to file a complaint against an employee with the Police Committee, a subcommittee of the Borough Council. ^{10/} This committee would then investigate the change to determine whether or not the employee should be fired. The detective-sergeant plays no role in this process. Therefore, the Hearing Officer finds that the detective-sergeant is not a supervisor within the meaning of the Act, as he has no authority to hire, fire, discipline nor to effectively recommend the same.

Before addressing the conflict of interest issue, it is relevant to understand the duties performed by the detective-sergeant. Various witnesses ^{11/} testified that the detective-sergeant functions as an investigator ^{12/} (hence, the title detective) and as an executive officer (hence the title sergeant). The

^{8/} In re Borough of Rockaway, E.D. No. 43 (1972); In re Township of Hanover, E.D. No. 41 (1971).

^{9/} Tr. 26, 77.

^{10/} Tr. p. 28.

^{11/} Tr. 21, 22, 58.

^{12/} See Stipulation of Fact Part B.

detective-sergeant is responsible to do all investigatory work of the department. As a result of this type of work, the detective-sergeant may be called upon to work at any time as compared to the fixed tour of duty that the other patrolmen and sergeants work.

As executive officer, the detective-sergeant performs as the second in command to the chief and performs various administrative work. ^{13/} The chain of command from top to bottom is: chief, detective-sergeant, sergeants and then patrolmen. ^{14/}

It is this latter role as second in command that may lead to a conflict of interest. Yet, the record reveals that the detective-sergeant is primarily an investigator and, only secondarily, is he placed in the position of the senior officer of the Police Department. In fact, the detective-sergeant has no greater authority than a sergeant or a police officer if they were the most senior officer on duty during a particular shift.

Although it was envisioned that this title would be one of greater leadership, it has not actually occurred. The detective-sergeant testified that, in the event of an emergency, he would contact the chief or the Director of Public Safety rather than make a decision himself. ^{15/} The fact that the detective-sergeant has received a differential in pay from other sergeants does not establish a conflict of interest. The conflict is measured by power or authority over other police personnel and the degree of loyalty owed to the Borough. No such authority has ever been exercised by the detective-sergeant, nor has any evidence shown that the detective-sergeant has been placed in a position where he had to compromise his loyalty to the public employer. The uniqueness of the detective-sergeant title is its investigatory function which has led to slightly different terms and

^{13/} Tr. p. 37, 10.

^{14/} Tr. 14.

^{15/} Tr. pp. 92-94.

conditions of employment. These differences, though, are not the kind that indicate a conflict of interest, but rather signify the unique nature of the detective work performed by the detective-sergeant.

Finally, even if there is a conflict due to the position of the detective-sergeant in the chain of command, it is de minimis. ^{16/} The police force consists of just ten police officers and one chief. It is evident that the chief and, in his absence, the Director of Public Safety, are individuals who are responsible for the operation of the department. The inclusion of the detective-sergeant in the negotiations unit will adversely affect the operation of the Police Department. The fact that the detective-sergeant is second in the chain of command does not vest him with any greater authority than any police officer (whether a sergeant or police officer) who might be the most senior officer on a given tour of duty.

Recommendation

Based upon the record and the above-stated findings of fact, the undersigned recommends that the detective-sergeant be included in the unit currently represented by the Merchantville Police Association be clarified to include the detective-sergeant. Furthermore, it is recommended that the clarification be made effective immediately. ^{17/}


Bruce D. Leder
Hearing Officer

DATED: April 25, 1980
Trenton, New Jersey

^{16/} See footnote #8.

^{17/} At the time the petition was filed, there was no contract between the parties. See In re Clearview Board of Education, D.R. No. 78-2, 3 NJPER 248 (1977).

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STIPULATION OF FACTS

A. PROMOTIONS - Essentially, promotions within the Department are under the control of the Public Safety Director subject to ratification by Council. Said promotions are based upon testing, interview evaluations, prior experience and a critique by the Chief, if the same is solicited. Recommendations from the Chief are permitted and solicited. For the past two years, the present Detective Sergeant has not recommended nor has been solicited for his recommendations as to promotions during his entire time as Detective Sergeant.

B. INVESTIGATORY - The very nature of the position of a Detective is investigatory. The present Detective Sergeant has attended and completed various courses on investigation. When the Detective Sergeant is at a "scene" he is in sole control of the investigation. The patrolman's duty is to protect the scene. As head investigator he has the authority to direct the patrolman and Chief of Police to perform certain duties. It should be noted that in the absence of the Chief or another superior officer or the Detective Sergeant, the patrolman on the scene has a similar authority to call for assistance and to direct the same.

C. HOURS OF EMPLOYMENT - The Detective Sergeant basically works an eight (8) hour shift. The exact time of day is controlled once again by the very nature of his position, to wit, investigatory. Each particular case may require that his investigation occur during a particular time period. During

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his hours of employment the Detective Sergeant has the use of a designated unmarked vehicle.

D. DISCIPLINARY ACTIONS - All reports with regard to the deiscipline of any officer are to be made to the Chief. The Detective Sergeant is not part of any "step procedure" in any disciplinary matter. Essentially, reports are made to the Chief who in turn directs the same to the Public Safety Director. The Public Safety Director submits said matter to the Police Board which is comprised of the Mayor, Public Safety Director and a designated Council person. The present Detective Sergeant has never been part of the above process nor in the instituting or effectuation of any disciplinary action.

E. CONTRACT NEGOTIATIONS - The unit consists of dispatchers, patrolmen and sergeants and excludes chief. This unit was recognized in August, 1977. The title of Dectective Sergeant was agreed by the parties to be submitted to P.E.R.C.

Negotiations did take place prior to the recognition in August, 1977. The present Detective Sergeant was not included in those negotiations.

F. SIZE OF DEPARTMENT - The present composition of the Department is as follows:

CHIEF
1 Detective Sergeant
3 Sergeants
6 Patrolmen
4 Dispatchers