

D.R. NO. 2017-10

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

In the Matter of

BROOKDALE COMMUNITY COLLEGE,

Public Employer,

-and-

Docket No. CU-2015-031

BROOKDALE COMMUNITY COLLEGE, FOP LODGE NO. 79,

Petitioner.

Appearances:

For the Public Employer,
Cleary, Giacobbe, Alfieri, Jacobs, LLC
(Adam S. Abramson-Schneider, Esq.)

For the Petitioner,
Markowitz & Richman
(Matthew D. Areman, Esq.)

SYNOPSIS

The Director of Representation clarifies a collective negotiations unit of sergeants and rank-and-file patrol officers by removing sergeants from the unit. The Director found that the continued inclusion of sergeants in the unit created an impermissible conflict of interest under the New Jersey Employer-Employee Relations Act (Act) because the sergeants exercised significant command authority over patrol officers and patrol officers did not possess such authority over other unit employees. The Director also rejected the argument that under the "small force exception", this unit of eleven officers should remain intact, noting that the size of the unit was not the only factor to consider in assessing whether there was an impermissible conflict of interest under the Act. The critical factor identified by the Director in finding a conflict was whether or not patrol officers and sergeants performed essentially identical duties, which they did not in this case.

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DECISION

On May 26 and September 25, 2015, Brookdale Community College (BCC or College) filed a Clarification of Unit Petition and Amended Petition (petition). The petition, as amended, seeks clarification of a collective negotiations unit of rank-and-file police officers and superior officers represented by BCC Fraternal Order of Police, Lodge No. 79 (FOP). BCC asserts that the titles of senior sergeant and sergeant should be removed from FOP's unit because they are supervisors and their inclusion in FOP's unit generates an impermissible conflict of interest under

the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

FOP opposes BCC's petition and asserts sergeants and senior sergeants are appropriately included in FOP's unit. FOP contends that the inclusion of sergeants and senior sergeants in a unit with patrol officers does not create a conflict of interest and argues that under the "small force exception," any potential conflict in FOP's unit is de minimis.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2. On November 23, 2015, we sent a letter to FOP and BCC requesting information in support of their respective positions. Christopher Morgan, FOP's President and a BCC senior sergeant, filed a certification with exhibits in support of FOP's position (Morgan Cert.). Robert S. Kimler, Jr., a BCC police captain and officer in charge, filed a certification and supplemental certification with exhibits in support of BCC's position (Kimler Cert. and Kimmler Supplemental Cert.). No disputed substantial material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.6.

On November 17, 2016, I issued a tentative decision and invited responses. No response was filed. I find the following facts.

FOP and BCC are parties to a collective negotiations agreement (CNA) extending from July 1, 2011 through June 30,

2015. (Kimler Cert., Exhibit 9). FOP's unit consists of eleven officers: one senior sergeant; three sergeants; four senior police officers; one police officer 1; and two probationary police officers. (Morgan Cert., Paragraph 4; Kimler Cert., Paragraph 2). The job duties of the sergeant and senior sergeant are identical. (Morgan Cert., Paragraph 5). The senior sergeant title was added to FOP's unit by a collective negotiations agreement effective July 1, 2008 to reflect a difference in compensation between sergeants and senior sergeants. (Morgan Cert., Paragraph 5; Kimler Cert., Paragraph 3).^{1/}

BCC also employs a lieutenant and captain who are excluded from FOP's unit. (Morgan Cert., Paragraph 19; Kimler Cert., Paragraph 1). According to the College's police lieutenant job description, a lieutenant acts under the direction of a captain and "is in direct command of the sergeants." The lieutenant "provides direction and supervision to the sergeants", schedules and assigns all training activities for unit officers, investigates and recommends disciplinary actions to the captain for violations of departmental rules and regulations, "acts as Internal Affairs Officer for sergeants"^{2/}, creates "duty

1/ For ease of reference, the sergeants and senior sergeant collectively are referred to as "sergeants" and the senior police officers, police officer 1 and probationary police officers are referred to collectively as "patrol" officers.

2/ While the lieutenant has performed internal affairs
(continued...)

schedules" for patrol officers, and "approves or rejects requests from patrol personnel for shift swaps, personal days, compensatory time and vacations." (BCC Job Description, Lieutenant).

Morgan is BCC's sole senior sergeant. (Morgan Cert., Paragraph 4). He has served as FOP President since December 2001. (Morgan Cert., Paragraph 1). Morgan was hired by BCC as a police officer in January 1999. (Morgan Cert., Paragraph 4). Morgan certifies that BCC's job descriptions for sergeants and patrol officers "accurately reflects" the job duties and responsibilities performed by those officers. (Morgan Cert., Paragraphs 6 and 7).

According to the job description for sergeants, they are "responsible for providing direction and supervision over all assigned patrol officers." Sergeants "exercise functional

2/ (...continued)

investigations for the department, BCC assigned an internal affairs investigation to FOP President Morgan in or around April 2015. (Morgan Cert., Paragraph 18). Kimler certifies that Sergeant Risheem Whitten and Senior Sergeant Morgan were trained to conduct internal affairs (IA) investigations and have performed IA investigations of patrol officers. (Kimler Cert., Paragraph 14). Kimler refers to a New Jersey Attorney General Guideline that prohibits the assignment of IA duties to "any person responsible for representing members of a collective bargaining unit" and contends these IA responsibilities compel the severance of sergeants from FOP's unit. (Kimler Cert., Paragraph 16; Morgan Cert. Paragraph 23) Referring to the same AG Guideline, the FOP contends the lieutenant can perform the IA duties and avoid any conflict by not assigning IA functions to the FOP President. (Morgan Cert., Paragraphs 18 and 23).

supervision over 3-5 police officers" and "provide continual supervision over assigned officers through the observance of [their] daily duties." Sergeants must ensure that patrol officers comply with BCC police departmental rules. Sergeants submit daily reports to their superior officers "detailing [sergeants'] activities in directing and supervising" patrol officers, reviewing police incident reports and advising patrol officers as to proper actions to be taken in police investigations. Sergeants receive "administrative and functional supervision" from a lieutenant.

According to the job description for patrol officers, they act "under the direction and supervision of a superior officer." Patrol officers are "expected to follow all lawful orders and instructions from [their] superior officers." Morgan also notes that both patrol officers and sergeants perform patrol duties. (Morgan Cert., Paragraph 22)

Morgan certifies that sergeants do not have the authority to hire or fire BCC patrol officers, but "may have" effectively recommended discipline against patrol officers. (Morgan Cert., Paragraphs 11 and 12). Morgan states that hiring and firing recommendations are made by the "Officer in Charge" (OIC), Captain Kimler. (Morgan Cert., Paragraph 11; Kimler Cert., Paragraph 1). Hiring and termination recommendations are made by

the OIC to BCC's Human Resources Department for approval. (Morgan Cert., Paragraph 11).

Morgan states that sergeants are responsible for preparing evaluations of patrol officers' work performance. However, Morgan also certifies that "no disciplinary determinations or personnel actions have ever been made based upon these evaluations." (Morgan Cert., Paragraph 13). Sergeants' evaluations must be approved by the OIC and BCC Human Resources Department. (Morgan Cert., Paragraph 13).

Morgan further states that sergeants are responsible for approving leave of absence requests from patrol officers, but characterizes the sergeants' involvement in approving leave requests as "ministerial." He references a November 16, 2015 memorandum from Kimler which advises that the criteria for approving leave requests is "very simple and applies to everyone the same" and can be handled by sergeants without the involvement of other superior officers. (Morgan Cert., Paragraph 21, Exhibit F). Morgan certifies that the FOP unit has existed since 1976 without any conflicts of interest.

Captain Kimler has been employed in the BCC police department for approximately 15 years. (Kimler Cert., Paragraph 1). Kimler has served as the BCC's OIC for approximately eighteen months. (Kimler Cert., Paragraph 1). He certifies that the job duties performed by BCC patrol officers and sergeants are

set forth in BCC's job descriptions and in "any additional order/assignment/SOP [Standard Operating Procedure]" issued by the OIC. (Kimler Cert., Paragraph 4). Along with the job duties in the sergeants' job description, Kimler certifies sergeants perform the following tasks:

- (1) Utilize their authority over patrol officers to ensure efficient performance and achievement of departmental objectives;
 - (2) Guide and train patrol officers;
 - (3) Use and comply with departmental disciplinary procedures when necessary;
 - (4) Assign and schedule patrol officers during holiday periods; and
 - (5) Review patrol officers' uniform and appearance and provide counseling and/or discipline for improper appearance.
- (Kimler Cert., Paragraph 4).

Kimler also states that sergeants influence BCC's hiring, disciplinary and promotional decisions. (Kimler Cert., Paragraph 9). Sergeants participate in panel interviews for prospective patrol officers and give scores and overall rankings to candidates. (Kimler Cert., Paragraph 9). The Chief of Police, Dean of Human Resources or his/her designee also serve on the panel, along with "any other members of the Police Department or College community that the Chief of Police and Dean of Human Resources appoint to the interview panel." (Kimler Cert., Exhibit 7). The candidates receiving the highest scores after an interview move to the next step of the hiring process, which includes a criminal background check and physical and

psychological testing. (Kimler Cert., Paragraph 9). The Dean of Human Resources makes recommendations for hiring to BCC's Board of Trustees based upon the panel interview results, upon successful completion of the tests and background check. (Kimler Cert., Paragraph 9). Sergeant Rasheem Whitten, a member of FOP's unit, completed and signed two scoring sheets following a candidate interview on October 6, 2015, which the BCC relied on in deciding to hire two probationary patrol officers. (Kimler Cert., Paragraph 9, Exhibit 16). Sergeants Whitten and Morgan served on interview committees in 2014 and 2015. (Kimler Cert., Paragraph 9, Exhibit 12).

Kimler certifies that sergeants are also involved in the promotional process. (Kimler Cert., Paragraph 9). Sergeants participate on panel interviews of promotional candidates. (Kimler Cert., Paragraph 9). Pursuant to BCC General Order #2.3.1, issued by Kimler on March 13, 2015, promotional candidates must "participate in an oral interview with the Dean of Human Resources, Chief of Police, and any other member of the Police Department that the Dean of Human Resources and Chief of Police selects to be appointed to the interview panel." (Kimler Cert., Exhibit 8). Kimler certifies that sergeants have participated in this interview process. (Kimler Cert., Paragraphs 9 and 10).

Sergeants also conduct annual performance evaluations of patrol officers. (Kimler Supplemental Cert., Paragraph 2, Exhibit 17). The evaluations consist of six (6) different performance criteria which are utilized to assess each officer's annual performance. (Kimler Supplemental Cert., Exhibit 17). The evaluating sergeant gives the patrol officer one of three grades for each performance criterion: "does not meet standards", "meets standards", or "exceeds standards." (Kimler Supplemental Cert., Exhibit 17). The evaluations are used by BCC to implement corrective actions to improve a patrol officer's performance. (Kimler Supplemental Cert., Paragraph 2). Kimler certifies that if an "individual's performance is not acceptable by a sergeant and/or senior sergeant, the individual gets placed on probation for a period not to exceed ninety (90) days pursuant to the recommendation of the sergeant and/or senior sergeant." (Kimler Supplemental Cert., Paragraph 2). Kimler certifies that sergeants have not issued a negative evaluation of a "veteran" patrol officer that has led to probation, but that one "new hire" was removed from employment based, in part, on "counseling and discipline by a sergeant prior to [the officer's] final removal by the Chief of Police." (Kimler Supplemental Cert., Paragraph 2). In addition to probation, a patrol officer will not receive his or her annual salary increment if the officer does not

receive a satisfactory evaluation. (Kimler Supplemental Cert., Paragraph 4).

BCC has also provided several examples of verbal reprimands and counseling notices issued by sergeants to patrol officers.

(Kimler Supplemental Cert., Exhibits 18 and 19). By way of example, in February 2011 Sergeant Halpin verbally reprimanded a patrol officer for "manipulating a duty weapon" and brandishing the weapon in violation of BCC police departmental rules.

(Kimler Supplemental Cert., Exhibit 19). The Chief of Police issued a written reprimand to the patrol officer based, in part, on Sergeant's Halpin verbal reprimand. (Kimler Supplemental

Cert., Exhibit 19). In February and August, 2016, Senior Sergeant Morgan issued three "Performance Notices" to patrol officers regarding attendance issues, and failure to generate a written report. (Kimler Supplemental Cert., Exhibit 19).

Morgan's performance notices advised the officers that, absent improvement in work performance, progressive discipline may be imposed. (Kimler Supplemental Cert., Exhibit 19). Sergeant

Anthony Ceglie issued a Performance Notice on March 23, 2016 to a patrol officer for attendance issues. (Kimler Supplemental Cert., Exhibit 19).^{3/}

^{3/} The parties' collective negotiations agreement also addresses sergeants' involvement in evaluating, implementing corrective actions, terminating and adjusting the salaries of patrol officers. (Kimler Cert., Paragraph 10, Exhibit (continued...))

Sergeants are responsible for reviewing and approving patrol officer's leave requests. (Kimler Cert., Paragraph 11). Article 12.6 of the CNA provides that "prior approval of the immediate supervisor shall be required before an employee shall enter a leave status." (Kimler Cert., Exhibit 9). Sergeants are required to review and approve all leave requests taking into account the staffing needs of the BCC police department. (Kimler Cert., Paragraph 11).

Sergeants are also responsible for reviewing the attendance records of patrol officers to determine whether sick and/or vacation leave privileges are abused. (Kimler Cert., Paragraph 13). The OIC created an "early warning system" (EWS) whereby sergeants were expected to document instances where leave privileges were abused, and report those abuses to the OIC. (Kimler Cert., Paragraph 13). Sergeants have implemented EWS by meeting with patrol officers and writing and delivering performance notices in accordance with EWS. (Kimler Supplemental Cert., Exhibit 19; Kimler Cert., Paragraph 13).

3/ (...continued)

9). Article 11.3 of the CNA provides that a patrol officer's immediate supervisor has "primary responsibility for evaluation of the performance related to the functional responsibilities delineated in the job description for the title occupied by the employee." Pursuant to Article 11.6, a patrol officer may also be placed on probation for ninety days with no salary adjustment if his or her performance is unacceptable and can be terminated if no improvement in performance is made during the probationary period.

Sergeants are also responsible for processing grievances at steps 1 and 2 of the CNA's grievance procedure. (Kimler Cert., Paragraph 12). Article 17.3(a) of the CNA provides that a grievant "shall first discuss it [the grievance] with the immediate superior within thirty (30) days, either directly or through the Lodge's designated representative, with the objective of resolving the matter informally." (Kimler Cert., Exhibit 9). Article 17.3(b) also makes sergeants responsible at Step 2 of the grievance procedure for rendering a written decision on a grievance if Step 1 does not result in a resolution. (Kimler Cert., Paragraph 11, Exhibit 9).

Kimler certifies that patrol officers do not perform any of the supervisory duties that sergeants perform. (Kimler Cert., Paragraph 15). They do not process grievances, discipline other employees, conduct evaluations, approve leave requests, or participate in the hiring, firing or promotional process for BCC police officers. (Kimler Cert., Paragraph 15).

ANALYSIS

Our Act provides in pertinent part:

. . . 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.

[N.J.S.A. 34:13A-5.3]

The New Jersey Supreme Court held in West Orange Bd. of Ed. v. Wilton, 57 N.J. 404, 425-427 (1971), 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 subordinates and the personnel exercising power over them.

For over forty years, we have held that the inclusion of superior officers in a rank-and-file police unit creates an impermissible conflict of interest. Union City, P.E.R.C. No. 70, NJPER Supp. 295 (¶70 1972); Town of West New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1987); Woodbridge Tp., D.R. No. 96-19, 22 NJPER 216 (¶27116 1996); Borough of Madison, D.R. No. 99-1, 24 NJPER 441 (¶29203 1998); Bordentown Tp., D.R. No. 2003-6, 29 NJPER 85 (¶24 2002); Wayne Tp., D.R. No. 2005-9, 31 NJPER 16 (¶9 2005); City of Hackensack; D.R. No. 2013-14, 40 NJPER 87 (¶33 2013). Given the quasi-military structure of police departments, the strict chain of command within police departments, and the risk of divided loyalties superior officers may have to their employers and fellow unit members, we have presumed that there is an inherent conflict of interest between superior and rank-and-file police officers. Union City; West New York. This presumption is not dependent upon a finding that a superior

officer is a statutory supervisor. Hackensack, 40 NJPER at 89. Even where there is no actual conflict of interest in a combined unit of superior officers and rank-and-file officers, we have severed superior officers from units with rank-and-file officers based upon the potential for a conflict of interest. Id.

The conflict of interest presumption may be overcome in small police units where the duties of superior and rank-and-file officers are virtually identical. Borough of Merchantville, D.R. No. 80-38, 6 NJPER 305 (¶11146 1980) (unit of patrol officers and a detective-sergeant was appropriate since the detective-sergeant had no greater authority than patrol officers in a ten member police department); Pine Valley Borough, D.R. No. 99-15, 25 NJPER 269 (¶30114 1999) (unit of sergeants and patrol officers appropriate since all officers performed interchangeable responsibilities and only difference in job classification was that sergeants earned a slightly higher salary than patrol officers). In such cases, we have found that any potential for a conflict of interest is de minimis since the superior officers did not exercise supervisory authority over subordinates and superior officers were not in a position where their loyalty to their employer was compromised. Id. However, we have found impermissible conflicts of interest in small units of superior and rank-and-file officers where the facts indicate superior officers can and have exercised significant command authority

over their subordinates. Bordentown, 29 NJPER at 89 (Director removed sergeants from a unit of 18 officers based on findings that sergeants had significant command authority over patrol officers and were involved in the hiring process for new officers).

Here, I find that the continued inclusion of sergeants in a unit with rank and file officers creates an impermissible conflict of interest under the Act. Sergeants exercise significant supervisory and command authority over patrol officers. BCC's job descriptions state that sergeants supervise patrol officers and submit daily reports of their supervisory activities to their superiors. Patrol officers must comply with all lawful orders from sergeants and, pursuant to their job descriptions, "act under the direction and supervision of a superior officer." The parties' CNA and BCC police departmental policy require sergeants to evaluate patrol officers' work performance, guide and train patrol officers, process patrol officer grievances, conduct interviews, rank prospective hires, and participate in the promotional process for patrol officers by ranking candidates after a panel interview. Sergeants are also responsible for approving patrol officers' leave requests.

Sergeants can also effectively discipline patrol officers for improper appearance and other infractions. (Kimler Cert., Para. 4; Morgan Cert., Para. 12). Pursuant to Articles 11.3 and

11.6 of the CNA, sergeants, as patrol officers' immediate supervisors, have the authority to evaluate a patrol officers' work performance and determine whether a patrol officer's performance during a probationary period is acceptable. (Kimler Cert., Exhibit 9). If an officer's performance is unacceptable during the probationary period, he or she "shall be terminated." (Kimler Cert., Exhibit 9, Article 11.6). These facts are clear indicia of the type of supervisory and command authority that creates, at a minimum, a substantial, potential conflict of interest between superior and rank-and-file officers.

Bordentown; West New York.^{4/}

FOP contends that, under the "small force exception", its unit of eleven (11) officers should remain intact. It contends there is no evidence of an actual conflict of interest, that the unit has existed harmoniously for several decades, and that any potential conflict is de minimis given the size of the unit and

^{4/} Since we have found that the sergeants' supervisory and command authority over patrol officers creates a substantial potential conflict of interest, we need not address whether Sergeant Morgan's IA responsibilities generate an impermissible conflict of interest. We note parenthetically that a officer's participation in a IA investigation, by itself, does not necessarily create an impermissible conflict of interest. UMDNJ, D.R. No. 2007-12, 33 NJPER 97 (¶33 2007) (Director finds that a lieutenant's possible participation in an IA investigation of a fellow unit member that could result in discipline does not raise an impermissible conflict where the lieutenant can only, as IA officer, recommend that an employee be disciplined, but not recommend or determine the level or extent of discipline).

that sergeants and patrol officers both perform patrol duties. While the size of the unit is a relevant factor under our small force exception caselaw, it is not dispositive. Bordentown. The application of the small force exception turns on whether the duties of patrol officers and sergeants are essentially identical, or different such that sergeants exercise authority that patrol officers do not possess. Bordentown; Pine Valley Borough. Here, the facts presented indicate a significant difference between the duties of sergeants and patrol officers. While both sergeants and rank and file police officers perform patrol duties, sergeants have command authority over police officers.

Since I have determined that sergeants should be removed from FOP's unit based on an impermissible conflict of interest, I need not address whether sergeants are statutory supervisors. Madison, 24 NJPER at 444 (Director declines to address whether sergeants are supervisors since evidence supported existence of an impermissible conflict).

Accordingly, I hereby remove the sergeant and senior sergeant titles from FOP's unit.^{5/}

^{5/} Upon removal, the sergeants and senior sergeants will be unrepresented unless or until a majority representative is recognized or certified.

ORDER

Effective immediately, the titles sergeant and senior sergeant are removed from FOP's unit.

Very truly yours,

/s/Gayl R. Mazuco, Esq.
Director of Representation

DATE: November 29, 2016
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by December 13, 2016.