

D.R. NO. 2018-10

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

In the Matter of

COUNTY OF SOMERSET,

Petitioner,

-and-

Docket No. CU-2015-028

POLICE BENEVOLENT ASSOCIATION
LOCAL 177,

Respondent.

SYNOPSIS

The Director of Representation clarifies a collective negotiations unit of sergeants, corporals, and rank-and-file corrections 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 rank-and-file officers.

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Appearances:

For the Respondent,
Detzky, Hunter and DeFillippo LLC, attorneys
(Stephen B. Hunter, of counsel)

For the Petitioner,
Ruderman Horn and Esmerado PC, attorneys
(Mark S. Ruderman, of counsel)

DECISION

On April 24, 2015, the County of Somerset (County) filed a Clarification of Unit Petition seeking to clarify a "wall-to-wall" collective negotiations unit of rank-and-file corrections officers and superior officers represented by Somerset County PBA, Local 177 (PBA) to exclude corporals, sergeants, lieutenants, captains, and the Chief. The County contends that the disputed titles are supervisors and their continued inclusion creates an impermissible conflict of interest under the New

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

Following two investigatory conferences and multiple settlement discussions, the parties voluntarily agreed to a partial disposition of this matter. They agreed to clarify the unit to exclude the Chief, captains and lieutenants and to include corporals and rank-and-file corrections officers. They jointly seek the Commission's determination whether the unit should be clarified to exclude sergeants.

The PBA opposes clarification (i.e., removing the sergeants), contending that the sergeants are not supervisors within the meaning of the Act and create no conflict of interest as delineated in Board of Education of West Orange v. Wilton, 57 N.J. 104, 425-427 (1971). It argues that no substantial actual or potential conflict between sergeants and rank-and-file corrections officers warrants their exclusion from the unit.

We have conducted an administrative investigation into the facts. N.J.A.C. 19:11-2.2. The parties provided certifications and arguments in support of their respective positions. The PBA submitted certifications from James Villamil (Villamil), President of PBA Local 177, and Anthony Davia (Davia), currently a sergeant and former PBA Local 177 president.^{1/} The County

^{1/} Davia's certification provides in part that removal of superior officers from the unit would create an "us versus (continued...)

filed exhibits and certifications from Mark Ruderman, Esq. (Ruderman), Warden Charles O'Neil (O'Neil), and Jonathan Cochran (Cochran), County Compensation Specialist.

On August 11, 2017, I wrote to the parties and advised I was inclined to order that the collective negotiations unit of rank-and-file corrections officers, corporals, and sergeants be clarified to remove the sergeant title. In the letter, I also invited the parties to respond if they disagreed with my factual and/or legal determinations. On August 28 and September 1, 2017, the PBA and the County, respectively, sent letters in response. No disputed substantial material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. Based upon the administrative investigation, I make the following findings of fact:

PBA Local 177 was the majority representative of all uniformed employees of the Somerset County Department of Corrections, including rank-and-file corrections officers, corporals, sergeants, lieutenants, captains, and the chief (until the parties agreed to a partial clarification, pursuant to the

1/ (...continued)
them" environment, to the detriment of the operation of the correctional facility. This asserted justification is not recognized under our statute or relevant case law as an exception to the prescribed remedy in the event that the facts of a case establish an (intolerable) conflict of interest. It was also rendered moot to the extent that the PBA voluntarily consented to clarify the unit to exclude the Chief, captains and lieutenants.

processing of the petition in this matter). The parties have had a negotiations relationship for more than forty (40) years and most recently signed a memorandum of agreement extending from January 1, 2015 through December 31, 2017.

The descending hierarchy and number(s) of titles in the Department of Corrections are: warden, deputy warden, chief, captain, approximately four (4) lieutenants, fourteen (14) sergeants, six (6) corporals, and eighty five (85) rank-and-file officers. There are four (4) administrative sergeants (scheduling, training, records and maintenance), three (3) line sergeants on the day shift, four (4) line sergeants on the 4:00 p.m.-12:00 a.m. shift, and three (3) sergeants on the 12:00 a.m.-8:00 a.m. shift.

For each shift, a designated shift commander presides and to whom a designated shift supervisor reports. Shift commanders are employed in the ranks of sergeant and above and shift supervisors are employed in the ranks of corporal and above. Warden O'Neil certifies that a shift commander ensures the safety of staff and inmates and the security of the facility; enforces and reports all violations of procedures, rules, and regulations; fills staff vacancies, reviews and approves shift switches; and assigns officers to various posts in the jail. O'Neil's certification is consistent with the duties set forth in the shift commander job description that the County provided.

O'Neil also certifies that the shift supervisors are responsible for similar duties as shift commanders, however, they directly supervise rank-and-file officers through constant monitoring and inspection of each post throughout the jail. Shift supervisors ensure that the records and log books maintained by rank-and-file officers are accurate, and they also are responsible for filling out a daily shift report. Shift supervisors report all violations of protocol and personnel regulations to the respective shift commander. O'Neil's certification is consistent with the duties listed in the shift supervisor job description.

O'Neil certifies that all sergeants are authorized to report incidents of misconduct and file disciplinary charges against rank-and-file officers. The County submitted a directive (policy 14.7) providing: "[A]ny command or supervisor officer observ[ing], or is informed, [of] misconduct of another employee, which indicates the need for disciplinary action; [he/she] shall take authorized and necessary action. The officer must render a complete written report of the incident of the member or employees actions to his/her superior officer." The County also filed a directive (policy 14.1) providing: "A superior officer shall make a written report to the Warden in each case of misconduct, incompetence, neglect of duty, violations of rules and regulations on the part of subordinates or inmates. They

shall check on the timeliness and accuracy of any report written by subordinates.”

Sergeants are responsible for filling out employee performance reports, which identify a rank-and-file officer's performance issues. The County provided examples of employee performance reports completed by sergeants. In January 2015, Sergeant Davia completed an employee performance report of a rank-and-file officer who was late in reporting for duty.

PBA President, Villamil certifies that sergeants do not play any role in conducting annual performance evaluations and play no role in the hiring or discharging of personnel. Final hiring decisions are made by the Sheriff and final disciplinary decisions are made by the Warden. However, Villamil certifies that “supervisors”^{2/} have been called to testify against rank-and-file officers at disciplinary hearings.

Finally, and according to County Compensation Specialist Cochran, in July 2015, the salary differential between a sergeant and the highest pay grade for a corrections officer is 15.91%. The salary differential between a corporal and the highest pay grade for a corrections officer is 4.9%.

ANALYSIS

N.J.S.A. 34:13A-5.3 provides in pertinent part:

^{2/} I infer Villamil's use of the term, “supervisors” in his certification means any rank above rank-and-file corrections officer.

. . . 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 West Orange Bd. of Ed. v. Wilton, 57 N.J. 404, 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 subordinates and the personnel exercising power over them.

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 observed that a paramilitary organization, with its strict observance of the chain of command, is distinguishable from other governmental services. When asked to draw negotiations unit parameters in these cases, we consider whether an actual or a substantial potential conflict of interest exists. In West New York, the Commission observed:

[W]here these [conflicts of interest] 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,... [Id., 13 NJPER at 297]

In West New York, the Commission also cited with approval Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977), 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 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]

In West New York, the Commission ordered that superior officers be removed from the unit based upon the potential for a conflict of interest with rank and file officers, despite a history of a long relationship in one combined unit, and

notwithstanding that the employer did not assert that an actual conflict existed. The Commission removed 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, i.e., actual conflict, is "too exacting and is inconsistent with West Paterson, especially when public safety employees are involved." West New York, 13 NJPER at 279 (citing West Paterson Bd. of Ed., P.E.R.C. No. 77, NJPER Supp. 333 (¶77 1973)). The Commission wrote:

Rather, we believe severance is appropriate for uniformed employees even where there has been an 'established practice' where, as here, the employee's job responsibilities place him in a substantial conflict of interest with his subordinates. [West New York at 279.]

We presume that in police departments, an inherent potential conflict of interest exists between police superior officers and rank-and-file police officers. The presumption is not dependent upon a finding of the supervisory status of superiors or upon the presence of actual conflict among the groups. An exception may be found in small units if the duties and authority of superiors and rank-and-file are virtually identical so that any potential for conflict between the ranks is de minimis. See Town of Harrison, P.E.R.C. No. 93-104, 19 NJPER 268 (¶24134 1993), affirming H.O. No. 93-1, 19 NJPER 39 (¶24018 1992); Pine Valley

Borough, D.R. No. 99-15, 25 NJPER 269 (¶30114 1999) (unit of three (3) patrolmen and one (1) sergeant appropriate where sergeant is not a statutory supervisor and performs the same duties as patrolmen); Township of Greenwich, D.R. No. 99-7, 25 NJPER 61 (¶30023 1998) (small force exception applied where all ranks of small department have interchangeable responsibilities); Borough of Audubon Park, D.R. No. 88-6, 13 NJPER 741 (¶18278 1987) (small force exception applied to unit of one (1) sergeant and two (2) patrolmen); Borough of Merchantville, D.R. No. 80-38, 6 NJPER 305 (¶11147 1980) (unit appropriate where sergeant has no greater authority than patrol officers in ten (10) member department).

The above-cited principles concerning the separation of superior officers from rank-and-file personnel and from other superior officers under Wilton rationale are no less applicable when they involve a proposed separation of sergeants in a corrections unit from the balance of a collective negotiations unit comprised of rank-and-file officers.

Here, I find that the continued inclusion of sergeants in a unit with rank-and-file officers and corporals creates an impermissible conflict of interest under the Act. Sergeants are obligated to exercise significant supervisory and command authority over rank-and-file officers. Policy directives and job descriptions oblige sergeants to report incidents of misconduct and file disciplinary charges against rank-and-file officers.

Shift commanders, a post held by sergeants, are responsible for filling shift vacancies, reviewing and approving shift switches, and assigning officers to various posts in the jail. O'Neil certifies that shift supervisors, a post also held by sergeants, closely supervise rank-and-file officers by inspecting each post and ensuring the officers are adequately performing their duties. These facts show that sergeants possess enough supervisory and command authority over rank-and-file officers to create a substantial, potential conflict of interest between the sergeants and the corporals and rank-and-file corrections officers.

This determination obviates the need to determine whether sergeants are statutory supervisors. Borough of Madison, D.R. No. 99-1, 24 NJPER 441, 444 (¶29203 1998) (Director declines to address whether sergeants are supervisors since evidence supported existence of an impermissible conflict).

The small force exception is inapplicable in this case, as there are well over one hundred corrections officers across all of the ranks in Somerset County. Finally, although the parties have a long history of a unit with both sergeants and rank-and-file officers, that history does not overcome the potential conflict or harm to the public interest. West New York, 13 NJPER 277 (¶18115 1987) ; See also Woodbridge Tp., 22 NJPER 216 (¶27116 1996).

Accordingly, I hereby order that the collective negotiations unit of rank-and-file corrections officers, corporals and sergeants be clarified to remove the sergeant title.

/s/Daisy B. Barreto
Acting Director of
Representation

DATED: September 14, 2017
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 September 28, 2017.