

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF KEARNY

Public Employer

and

KEARNY FIRE CAPTAINS ASSOCIATION

Petitioner

Docket No. RO-402

and

FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION

NO. 18

Intervenor

DECISION AND DIRECTION OF ELECTION

A hearing was held to resolve a question concerning the representation of certain employees of the Kearny Fire Department. No post hearing briefs were filed. The Hearing Officer issued his Report and Recommendations on March 29, 1973. The Firemen's Mutual Benevolent Association Local 18 filed a statement of exceptions on April 12, 1973. The Commission has considered the entire record, the Hearing Officer's Report and the statement of exceptions, and finds as follows.

The Town of Kearny ("the Employer") is a public employer within the meaning of the Act and is subject to its provisions. The Kearny Fire Captains Association ("Petitioner") and Firemen's Mutual Benevolent Association Local 18 ("Intervenor") are employee representatives within the meaning of the Act. The Petitioner has asked to be certified as the exclusive representative of a unit of fire captains; the Employer and Intervenor oppose that request. There is, therefore, a question concerning representation and the matter is properly before the Commission.

Before moving to the substance of the Hearing Officer's recommendations, we will dispose of the statement of exceptions. It reads as follows:

'Reference your letter of March 29, 1973, I hereby file with you an exception to the hearing officers report in that I do not believe the decision was in accordance with the weight of the evidence.

'The evidence was heard nearly a year prior to the decision. The evidence quoted in the decision is not the most conclusive evidence, or that which has the greatest credibility upon the subject.'

Under Commission rules, N.J.A.C. 19:14-15 and 19:17-1(a) and (b), exceptions are due within 10 days of service of the Hearing Officer's Report. Here, the statement of exceptions, dated April 10, was received April 12, 14 days after service of the Report. In addition to being late, the statement fails to comply with the Commission's requirements for specificity of the matters excepted to and designation of the record evidence said to support the exceptions. See N.J.A.C. 19:14-16. The statement is written in such a way that the Commission is unable to know what evidence the Intervenor relies upon or why the evidence relied on by the Hearing Officer lacks probity. Since there is no meaningful way for the Commission to respond to the exceptions, and since in any event they were untimely filed, they will be disregarded.

The Employer has for a number of years recognized the Intervenor as the representative of all employees of the Kearny Fire Department, excluding the Chief and the five Assistant Chiefs. Although the instant controversy centers upon the 28 Captains and 94 Firemen employed in the fire department's Fire Extinguishment branch, the historical unit also

includes employees in the two other branches: Fire Prevention (Inspectors; Chief Inspector) and Auxiliary Services (Building Repairman; Apparatus Mechanics; Dispatchers; Linemen; Superintendent; Assistant Superintendent).

The Petitioner seeks to represent a unit composed of fire captains only, claiming that the captains are supervisors and that there exists a conflict of interest between the captains and the firemen. The Employer and the Intervenor oppose the petition, arguing that the captains are not supervisors within the meaning of the Act, and that even if they are supervisors, the statutory exceptions of "established practice, prior agreement or special circumstances" require their continued inclusion in the historical unit.

The Hearing Officer found the captains to be supervisors within the meaning of the Act by virtue of their role in certain disciplinary matters. Citing testimony of the Fire Chief, two Captains and a Fireman, as well as exhibits in evidence, the Hearing Officer concluded that the Captains have the authority to give oral reprimand and to assign extra work details, of an onerous nature, for minor infractions and that the foregoing constitutes the exercise of disciplinary authority. The record supports his findings and conclusions and we adopt them.

With respect to the statutory exceptions, the Hearing Officer concluded that the continued inclusion of captains in the historical unit was not dictated thereby. The Hearing Officer determined that the superficial requirements for the exceptions based upon "established practice" and "prior agreement" were present, in that the Employer and the Intervenor had engaged in collective negotiations, and had entered into agreements with respect to a mixed unit since 1969. He found, however, that

the "conflict of interest which is inherent in a unit containing both supervisors and non-supervisors" had been manifested, and therefore would preclude the application of the exceptions. He thereupon concluded that captains be removed from the existing unit and be given the opportunity for representation in a separate unit.

The Commission is in substantial agreement with the Hearing Officer's disposition of the ultimate issue. In the broadest sense the Hearing Officer's finding that it is appropriate to have a separation of fire captains from firemen for purposes of representation and collective negotiations is in accord with the Commission's earlier observation that in police and fire departments of substantial size the superior-subordinate relationship is likely to be accentuated to such a degree as to preclude the presence of a community of interest between the officer group and the rank and file.^{1/} This would be so whether the officers' authorities were within that narrow range of powers the statute ascribes to those termed "supervisors",^{2/} or whether they possessed merely supervisory-like authority of a more general kind routinely found in para-military situations.^{3/} These general observations, however, arise from the Commission's experience in fashioning negotiating units where none previously existed. In the instant case we are presented with an already existing unit which includes both officers and firemen and which has twice been the subject of a collectively negotiated agreement. The captains, through

^{1/} City of Union City, PERC No. 70

^{2/} The authority to hire, discharge, discipline or effectively recommend such action. See N.J.S.A. 34:13A-5.3.

^{3/} Camden Department of Public Safety, Division of Fire, PERC No. 52; affirmed sub nom. (unreported); cert. denied 62 N.J. 70 (1972).

this petition, now seek the opportunity for separate representation and rely upon their experience during past negotiations as justification for their separation. The Intervenor, as the encumbent representative of the overall existing unit, and the Employer as well, seek to preserve what exists and rely, inter alia, upon that provision of the statute whereby supervisors may be represented jointly with non-supervisors in certain exceptional situations.^{4/} In addition, the Employer cites the hazards of fragmenting existing units by permitting an element within the unit to sever itself. Referring to an earlier Commission decision,^{5/} it says that the Commission has raised a similar caution.

In deciding the ultimate question of whether this petition should be favorably acted upon, we think it unnecessary to determine as a preliminary matter whether the past experience of these parties (i.e., the Employer and Intervenor) constitutes either the "established practice" or "prior agreement" mentioned in the statute. According to the record there have been two formal labor agreements: one for calendar 1969 and the second for the two calendar years 1970 and 1971. The former was executed December 1969, thus being retroactive for virtually its entire term. The latter was executed May 1970, only five months after the first agreement's execution. Concerning pre-1969 events, although the Intervenor contends that it negotiated for all employees of the Fire Department over a period of many years, the record evidence is more conclusionary than

^{4/} N.J.S.A. 34:13A-6(d): [The Commission] shall decide in each instance which unit of employees is appropriate for collective negotiations provided that, except where dictated by established practice, prior agreement or special circumstances, no unit shall be appropriate which includes (1) both supervisors and non-supervisors...

^{5/} Jefferson Township Board of Education, PERC No. 61

conclusive on the issue of whether these dealings were in the nature of negotiations. For purposes of this case we will assume, without specifically finding, that there exists "established practice" and/or "prior agreement." Given that, we do not think that such circumstances dictate the continuation of the existing unit.

This is not a case where the Employer claims that the unit as presently composed has had a directly adverse effect upon the Employer's ability to manage its operation or to obtain from the officer group the faithful execution of their supervisory duties. Rather, the complaint arises from the employee side of the table where supervisors and those supervised sit as one. The claim is that the present unit has been and is an obstacle to collective negotiations as to one group of employees because that group has duties and authorities over more numerous subordinates within the same unit. The Hearing Officer has found evidence supporting that claim and we agree with those findings. Specifically, the captains as a group have at various times attempted to influence their negotiating committee in order to have introduced into the negotiating process a matter of principal (and to them singular) concern. Their desire to improve the salary differential between captains and subordinates would, if achieved, obviously enhance the distinction between the two groups, a development not likely to be perceived by subordinates as compatible with their best interests. The captains' efforts to influence their negotiating committee, which is controlled by firemen, failed each time.^{6/} Despite that fact, the Employer, in effect though not in fact, negotiated separately with the captains, moving to

6/ We need not decide whether the committee's action was fairly or arbitrarily taken. Given the considerations at work, it may simply have been inevitable.

meet their salary demands even though their representative had failed to transmit them, thereby giving a recognition to the status and interest of captains which they themselves had been unable to achieve through the formal negotiations conducted by their representative. The reactions of the Employer and the Intervenor with respect to the treatment of this supervisory group clearly indicate that the unit, intended to be the base for negotiations, is not fulfilling its purpose. And from these reactions and the record as a whole it may fairly be inferred that the captain's supervisory status - with his obligations to management and his authorities over firemen - is a principal cause of the deficiency. While there may be "established practice" and "prior agreement" joining supervisors and non-supervisors in one unit, the past experience clearly does not "dictate" that this grouping be continued. The captains will therefore no longer be required to be represented with firemen, but will be given the opportunity for representation in a separate unit.

Accordingly, the Commission finds appropriate a unit of all fire captains employed by the Town of Kearny including other officer titles operating at the same supervisory level,^{7/} but excluding the chief, assistant chiefs, firemen, craft and clerical employees, linemen, mechanics,

^{7/} The organization chart suggests there may be several other titles equivalent to captains or substantially so, but there is not sufficient evidence for a determination here. If the parties are unable to resolve questions of eligibility, those employed in titles not specifically excluded may vote subject to challenge.

utility repairmen, and dispatchers.

Those eligible to vote are employees in the unit described above who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or temporarily laid off, including those in military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who quit, or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Those eligible to vote shall vote on whether or not they desire to be represented for the purpose of collective negotiations by Kearny Fire Captains Association.

A majority representative shall be determined by a majority of the valid votes cast.

BY ORDER OF THE COMMISSION



John F. Lanson
Chairman

DATED: December 4, 1973
Trenton, New Jersey

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION No. 18
Intervenor

APPEARANCES:

Norman A. Doyle, Jr., Esquire
Attorney for Town of Kearny
For the Public Employer

George J. Minish, Esquire
For the Petitioner

Frederick S. Gillespie, Esquire
For the Intervenor

Anthony D. Rinaldo, Jr., Esquire
For the Intervenor

REPORT AND RECOMMENDATIONS OF HEARING OFFICER

A petition for Certification of Employee Representative was filed with the Public Employment Relations Commission by the Kearny Fire Captains Association on January 4, 1972. Pursuant to a Notice of Representation Hearing, dated January 27, 1972, hearings were held before the undersigned Hearing Officer on May 8, 9, and June 6, 1972 in Newark, New Jersey. All parties were given an opportunity at these hearings to call, examine and cross-examine witnesses, to present evidence, and to argue orally. All parties, through their attorneys, stipulated that they would not file briefs herein.

Upon the entire record in the proceeding, the Hearing Officer

finds:

1. The Town of Kearny is a public employer within the meaning of the Act and is subject to the provisions of the Act.

2. The Kearny Fire Captains Association, Petitioner, is an organization of public employees claiming to be a majority representative of public employees in an appropriate unit of fire captains. The Kearny Fire Captains Association is an employee representative within the meaning of the Act.

3. Firemen's Mutual Benevolent Association No. 18 is an employee representative within the meaning of the Act.

4. The Firemen's Mutual Benevolent Association No. 18 and the Town of Kearny are parties to an agreement dated August 12, 1970. This agreement is effective as of January 1, 1970 and continues in effect until December 31, 1971 and thereafter unless terminated by 60 days prior written notice given by either party to the other. Such notice had not been received by either party as of the date of the hearing.

Article No. 1 of the above agreement states: "The Town hereby recognizes the F.M.B.A. as the sole and exclusive representative of all the employees in the bargaining unit."

Article No. 1, Section 2 of the above agreement states: "The Bargaining Unit shall consist of the employees or members of the Fire Department of the Town of Kearny, New Jersey now employed or hereinafter employed, except the Fire Chief and the Deputy Chief."

Based on the foregoing, the Firemen's Mutual Benevolent Association No. 18 is an intervenor in these proceedings.

5. The Petitioner, the Kearny Fire Captains Association on December 11, 1971 either orally or in writing requested recognition as the exclusive negotiating representative for the employees in their requested unit.

The public employer on December 22, 1971, orally or in writing refused to grant recognition to the petitioner as exclusive representative unless and until the petitioner was certified by the N. J. Public Employment Relations Commission.

Accordingly, a question concerning the representation of public employees exists and the matter is properly before the undersigned for Report and Recommendations.

On January 4, 1972, the Kearny Fire Captains Association filed a petition seeking to be certified as the public employee representative of a unit consisting of all fire captains employed by the Town of Kearny. The petitioner seeks to exclude from this unit linemen, mechanics, utility repairman, firemen, clerks, professional employees, managerial executives, craft employees, chief inspector, superintendent, and assistant superintendent of fire alarms, assistant chief, chief, inspector and all other ranks.

"The Public Employer's position is that the appropriate unit is all Firemen, including the captains with the exception of the Chief and Deputy Chief as it is in the presently existing contract and as it was in this (one) previous to that contract." [Transcript 1, p. 10, line 11].

The Public Employer feels a unit of fire captains would be inappropriate because of its size and because of the prior history of negotiations. In addition, the Public Employer fears that the establishment of a unit of Fire Captains may lead to a further fragmentation of units and harm relations in the Town of Kearny. The Intervenor's position is the same as that of the Public Employer.

The Petitioner maintains that a separate unit of Fire Captains is necessary because:

(a) Captains are supervisors and should not be included in a unit with non-supervisory personnel.

(b) There is a conflict of interest between the Firemen and the Captains.

LEGAL ISSUES:

The legal issues presented to the undersigned Hearing Officer can be summarized as follows:

1. Whether the Captains in the Fire Department have the necessary authority to hire, discharge or discipline or effectively recommend same in order to be deemed supervisory. If the Captains are found to be supervisors, they should not be in a unit with non-supervisors (firemen).

2. If there is a finding that the Captains are supervisors, should they nevertheless be included in the same unit with firemen since "established practice, prior agreement or special circumstances" dictate their inclusion.

3. If the Captains are not found to be supervisors, does there exist a substantial actual or potential conflict of interest among Captains and Firemen of the Kearny Fire Department with respect to their duties and obligations so as to destroy the requisite community of interest.

BACKGROUND:

The record, organizational chart and working schedule introduced in evidence indicate that the Kearny Fire Department consists of Fire Chief, five Assistant Chiefs, 28 Captains, and 94 firemen. The duties of a firemen are:

"Under the immediate supervision of the Captain in the Fire Department during an assigned watch to keep in readiness to response to fire alarms, to maintain all fire fighting apparatus and equipment in good working condition. To fight fires and assist as directed in extinguishing them and perform all related work assigned."

(Exhibit P-3 in evidence)

The duties of a Captain are:

"To manage a Fire Station establishment, supervising housekeeping, care of apparatus, equipment and stores;

To supervise a Fire Company including responsibility for maintaining required standards of operation and training;

To be familiar with the district to which he is assigned and to be responsible for routine fire prevention activities in the district;

To respond to alarms to which his unit is assigned and as Captain to direct the mechanical operation of the equipment of his unit;

To make a proper size-up or appraisal of a fire in the absence of a Chief of Fire and to determine whether additional help is needed and be able to go to work without the direction of a superior officer." [Exhibit P-3 in evidence]

Section 1, Article 5 of the Rules and Regulations of the Fire Department of the Town of Kearny, Exhibit 4 states:

"Captains in the Fire Department shall rank next below the Assistant Chief Engineer of the Department and they shall have command of their stations and be responsible for their condition and the discipline and efficiency of the men, subject, however, to the supervision of their superior officers."

A Captain is in charge of the apparatus in a particular station on a particular tour. An engine company has a captain and a designated number of men assigned to it. A truck company may have two captains and a number of men assigned to it. On occasion only one captain is on duty. As a result, a captain may be supervising the activities of 3 to 7 firemen. The assistant chiefs have control of four stations.

An analysis of the collective negotiations history indicates the following:

On December 23, 1969 the Town of Kearny and the F.M.B.A. Local No. 18 entered into an agreement in which the Town recognized the F.M.B.A. as the sole and exclusive representative of all the employees in a certain defined bargaining unit. Article 1, Section 2 of the agreement identifies the unit as consisting of all employees or members of the Fire Department of the Town of Kearny, New Jersey (now employed or hereafter employed, except the Fire Chief and the Deputy Chiefs).

This recognition clause was continued in the agreement negotiated in 1970 and which was effective as of January 1, 1970, and continued in effect until December 31, 1971, and thereafter unless terminated by 60 days prior written notice given by either party to the other expressly stating its intention to terminate this agreement, in which case it shall be terminated 60 days following the receipt of such notice.

The parties stipulated that no such notice had been received.

LEGAL ISSUE NO. 1: SUPERVISORS:

On January 15, 1971, the Executive Director of the Public Employment Relations Commission issued a decision (E.D. No. 23) in the matter of Township of Teaneck, Public Employer, and F.M.B.A. Local 42, Petitioner. Both petitioner and intervenor, in their summation, have made reference to various portions of this decision to buttress their respective positions. The undersigned has researched E.D. No. 23 in order to apply the appropriate precedents.

On page 5 of E.D. No. 23, the Executive Director states the following:

"By statutory construction, a supervisor is one having the authority to hire, discharge, discipline or effectively recommend the same. The exercise of any of these authorities is sufficient to qualify that person as a supervisor within the meaning of the Act."

The Executive Director reviewed the record in the Teaneck case and found that with regard to the hiring and firing of personnel the officers (in this case, captains and lieutenants) had neither the power to do so themselves, nor the power to effectively recommend such course of action.

In a further review of the record, the Executive Director found that the officers did have certain authority with regard to disciplinary matters. This authority consisted of giving oral reprimands and the assignment of extra work details, of an onerous nature, for minor infractions. He found that these extra work assignments are within the discretion and the authority of the officers to administer and as such do constitute the power to discipline.

On page 6 of his decision the Executive Director found:

"I find that the imposition of extra work assignments, onerous in nature, as a reprisal for the breach of required conduct constitutes the exercise of disciplinary authority, and further that lieutenants and captains possess and exercise such authority in the performance of their duties. Accordingly, they are found to be supervisory employees within the meaning of the Act."

An examination of the record in the instant matter indicates that with regard to the hiring and firing of personnel the captains in the Fire Department do not possess such authority, nor do they have the power to effectively recommend such courses of action.

However, with regard to disciplinary matters the record establishes that the captains do possess certain authority. Joseph W. Phillips, the Chief of the Kearny Fire Department for the past seven years

and a member of the Kearny Fire Department for 25 years, under examination by the attorney for the Intervenor testified as follows:

(p. 35, l. 14) Q: What are the disciplinary functions of a Captain, disciplinary functions, sir?

A: The Captain would be responsible for the firmen's efficiently, meeting the standards of the Department , he would have every right to discipline that man to some degree.

I would say that possibly a special training session with the man; maybe an interview; if it got to be a personality clash between the two men, he would be able to straighten that out at that level.

However, the basic job I would think in this particular area of the Captain is to make sure that the fireman is operating properly with his group.

During the same interogation, the Fire Chief testified further:

Q: May he *(the captain) make him *(the fireman) do extra work in the firehouse because he has failed to perform certain functions?

A: It is done many times; it is a sign of a good captain that would do that.

Under examination by Co-Counsel for the Intervenor the Fire Chief testified:

(p.48, l. 21) Q: He does not have that authority. So that the discipline that he meets (sic) out for a wrong doer or someone who may be a little slow in the performance of his duties would be either additional training or additional housekeeping chores, would that not be true?

A: I believe that is the usual set-up.

Q: Right. So that the discipline that we talk about with regard to Captain is minimal. Isn't that correct?

A: In the penalty it is minimal.

On examination by the attorney for the petitioner the Fire Chief again confirmed that the Fire Captain can mete out extra work within the tour of duty as a disciplinary type action in the firehouse "in order to settle it at the lower level." (P. 53, line 3)

* Words in parenthesis added for clarity.

On page 56 of Transcript 1, Chief Philips testified that it was the Captain's "job to operate and run a shift properly" and in this capacity he would be responsible for enforcing the rules and regulations concerning behavior in the firehouse. He further testified that the Deputy Chief looks to the Captain as the "responsible party if anything goes wrong in the firehouse." The Captain is very often "used as a source of information as to the reliability and as to the performance of the Firemen." The Chief testified that a Captain may relieve a man of his duties if the Captain feels the Fireman is unfit for duty and the Captain would then record this action in his log or journal and notify the Deputy Chief. The Captain may run as many drills with the Firemen as he feels necessary. The Captain has frequent training programs that he has set up on his own. In a situation where a Captain has relieved a man of duty, the "discipline or the penalty would be given by the office after reading the report of the Captain." Captains have the authority to hold men over for the next platoon in order to make a full complement of men.

Captains function as Assistant Chiefs, with all of the authority of Assistant Chiefs, for at least 5 weeks of each year and in addition will function as an Assistant Chief when the Assistant Chief is off-duty because of sickness.

If a Captain were to find a Fireman unable to perform his duties, the Chief would want the Captain to relieve him of duty, notify the Assistant Chief and subsequently he should place charges against the employee. In the case of such charges the Chief would make the final determination after gathering all the facts and the Chief stated he would "most certainly" be guided by the recommendation of the Captain.

The Captain testified that he felt "that having the Captains in the same bargaining unit (with Firemen) renders the Captains less likely to discipline the Firemen, and would render these Captains less likely to report these infractions."

Captain Vincent R. DiRenzo in testifying as to his understanding of "discipline in the firehouse" stated:

"Well, discipline in the firehouse can take many forms. It can be in the form of manual or in some instances where some people consider a menial job or it could be in the form of drilling and instruction."

On page 84 of Transcript 2 the following exchange took place.

Q. If an individual, in your opinion requires discipline do you ever assign him, sir, do you ever assign him extra work details within his hourly tour, in other words, to a job which you might consider to be particularly onerous or...

Captain DiRenzo A. I have in the past.

Captain DiRenzo further testified, that of his own personal knowledge he knew that Captains meted out discipline in the form of extra training schedules and extra watch tours. He also testified that the purpose of discipline was to try to instill in a person that he should improve himself to measure up to a standard.

Robert J. Malone, Fireman testified that there has been "informal" discipline by a Captain. He further testified that this discipline would entail the Captain assigning the Fireman an extra watch or a detail.

In conclusion, it is apparent from the testimony of the Fire Chief, the Captain, the Fireman and the exhibits in the record that the Captains do have certain authority in disciplinary matters. This authority consists of giving oral reprimands and the assignment of extra work details, of an onerous nature for minor infractions. The rules and regulations of the Fire Department and the testimony of the Fire Chief confirms that this form of discipline is within the discretion and authority of the Captains and

furthermore, as the Chief testified, "it is a sign of a good Captain that would do that."

Accordingly, it is found that Captains possess and exercise disciplinary power in the correction of lesser infractions. I am led to the conclusion, as was the Executive Director in E.D. No. 23, "that the imposition of extra work assignments, onerous in nature, as a reprisal for the breach of required conduct constitutes the exercise of disciplinary authority." The record confirms that the Captains possess and exercise such authority in the performance of their duties.

Accordingly, the Captains are found to be supervisory employees within the meaning of the Act.

LEGAL ISSUE NO. 2

ESTABLISHED PRACTICE, PRIOR AGREEMENT OR SPECIAL CIRCUMSTANCES:

The Intervenor argues that notwithstanding a finding that the Captains are supervisors, they are nevertheless to be included in the same unit with firemen since "established practice, prior agreement or special circumstances" dictates their inclusion. The Act provides that no unit shall be appropriate which contains both supervisors and non-supervisors except where dictated by established practice, prior agreement or special circumstances. The language of the statute indicates that there must be clear and convincing evidence that one or more of these three exceptional situations exists to warrant diverging from the normal unit pattern.

An examination of the legislative intent and reasoning behind this statutory provision for a permissible variation from the norm is appropriate here.

The authors of this Act were convinced that a unit which included both supervisors and non-supervisors would not be a unit of employees appropriate for collective negotiation. The Act would permit an exception

Only where dictated by established practice, prior agreement or special circumstances. The intent of the exception was to permit the continuation of an otherwise unsatisfactory unit where life, history and experience had proven that, notwithstanding the apparent inappropriateness of the unit, the composition of the unit had not been a deterrent to the achievement of effective collective negotiations between public employer and employee representative nor had the apparently inappropriate unit been a deterrent to fair representation of the unit without conflict of interest. The intent of the Act was to prevent the disruption of a collective negotiations relationship which had proven to be functional in practice. The Act would sanction a continuation of the composition of the unit where there was proof that in actual experience, the conflict of interest, which is inherent in a unit containing both supervisors and non-supervisors, had not become a reality.

Accordingly, in the area of "established practice" the Act looks for a pattern of meaningful collective negotiations having been established in practice as evidentiary proof that the conflict of interest between supervisors and non-supervisors in the unit had failed to frustrate the process.

In the area of "prior agreement", the Act looks to a written agreement specifying terms and conditions of employment, concluded and executed in the context of collective negotiations and providing for the inclusion in one unit of supervisors and non-supervisors as evidentiary proof of the ability of the parties, notwithstanding the inherent conflict of interest, to function properly in the collective negotiations sphere.

In the instant matter, it is clear that the public employer and the F.M.B.A. have engaged in collective negotiations since 1969 and have concluded written agreements specifying terms and conditions of employment and providing for the inclusion in one unit of supervisors and non-supervisors.

The superficial requirements for the statutory exceptions are present in this matter. However, to be certain that the intent of the Act is adhered to, the Hearing Officer is obligated to carefully study the experience in life of the collective negotiations process in the instant matter to determine whether the process has been so devoid of conflicts of interest as to warrant the invocation of this statutory exception.

An examination of the record in this area reveals the existence of a very serious and troublesome conflict of interest which has permeated the relationships between the supervisors and non-supervisors in the context of the collective negotiations process.

The testimony in the record indicates that the question of salary differentials between the Firemen and the Captains was considered an important working condition issue among the Captains. It was the contention of the Captains that "across-the-board" increases over the years had resulted in a considerable decrease in the percentage of differential between the Firemen and Captains. Captain DiRenzo testified (p. 104 Transcript 2) that the Captains requested for the 1970-71 contract a differential which they had enjoyed in 1962. As a result, it is obvious from the record that one of the keenest aspirations of the Captains in the area of collective negotiations was the improvement of the percentage of differential between the ranks.

The Captains sought to realize this aspiration, the improvement of differentials, within the framework of the existing collective negotiations unit (consisting of 98 Firemen and 28 Captains). In each year of the collective bargaining history since the enactment of Chapter 303, the Captains submitted a request to the F.M.B.A. negotiating committee that they include a request for an improvement in the differential percentage as part of the package of demands to be presented to the public employer. Each year, the

record reveals, the F.M.B.A. negotiating committee (consisting of seven men - 5 Firemen, one Mechanic and one Captain) determined not to include in their package of demands a request for the improvement of the salary differentials and instead requested the maintenance of the existing differentials. The record further reveals that in the negotiations for the 1970-71 agreement, the Town fathers saw fit to come in with a proposal which, in effect, improved the percentage differential between the Firemen and the Captains (page A. 159 Transcript 3). The record also reveals that in the negotiations for the 1972 agreement, the Town authorities made a proposal "which would be in excess of maintenance and would in effect the differential or increase the differential." (Page A 160 Transcript 3)

In summary, the record indicates that in three years, the public employer has offered the Captains a higher differential percentage than had been requested by the employee representatives negotiating committee.

The above situation, corroborated by the testimony of witnesses for the Captains and Firemen, impelled the Captains to petition for a change in the collective negotiations relationships. The Captains wanted their proposals for higher differentials to be presented to the public employer and become the subject matter of collective negotiations rather than seeing their proposals vetoed by their own negotiating committee. The Captains, in the light of the history of the previous three years, had concluded that they could not realize their aspirations within the framework of an organization in which they were a minority (among the general membership and among the negotiating committee) and where proposals, significant to them, could possibly never reach the negotiating table.

Subsequent to the filing of the petition and prior to the opening of this hearing, the record shows that discussions took place between the Firemen and the Captains in an attempt to formulate new procedures within

the existing organization which would give the Captains more representation on the negotiating committee and eliminate the authority of the negotiating committee to veto a proposal before its presentation to the public employer. The record reveals that the membership of the unit rejected these proposals. As a result, at the time of this hearing, no changes in procedure had been put into effect to remedy the situation which had prompted the filing of this petition.

As stated above, the intent of the Act was to permit a deviation from the norm where from the history of "established practice" or "prior agreements", one could imply that there has been a proven track record of harmonious relationships and therefore one could reasonably predict a potential for continued harmony in the future. In the instant matter, the history of "established practice" or "prior agreements" is replete with instances of sharp conflicts of interest and could hardly be cited as the reason for the continued inclusion of Captains and Firemen in the same unit.

In the area of "special circumstances," the Intervenor cites the fire-fighting unit in which the Firemen and Captains are involved as "a small, cohesive working unit," a unit in which Firemen and Captains must assist each other, protect each other and rely upon one another. The testimony in the record by all parties to this dispute was to the effect that actual fire-fighting would never be influenced by the composition of the collective negotiations units. A search of the record fails to establish any evidence substantiating the claim of "special circumstances" and of sufficient weight to warrant invoking the statutory exceptions.

On the other hand, the following excerpt from the record of Captain Alexander's testimony not only refutes the "special circumstances" argument but highlights the crux of the issue in this hearing.

Q. Mr. Alexander, you are a Captain in the Kearny Fire Department?

A. Yes.

Q. For how long

A. Seven years.

Q. In your opinion, Captain, would there be a substantial potential conflict of interest between the Captains and the Firemen, if they remained in the same bargaining unit?

A. Yes.

Q. Why?

A. Because it puts me in the position of possibly disciplining a man in the company level, and having to go to that man and ask him for my increases. (P. A169 Transcript 3)

The above statement was not challenged by any of the other parties.

The undersigned is not unmindful of the fear of the Employer "that the establishment of a unit of Fire Captains may lead to a further fragmentation of units and harm labor relations in the Town of Kearny." It is not unusual for a minority group to harbor an aspiration in the collective negotiations sphere which fails to elicit the sympathy and/or support of the majority. If units were established merely to accommodate the unrealized aspirations of a group of employees within a larger unit, this would certainly lead to fragmentation of units and harmful labor relations.

However, in the instant matter, we are presented with the irreconcilable conflict, cited above by Captain Alexander. The Captains, who have strong aspirations for the improvement of their salary differentials, must exercise disciplinary authority over the Firemen who, by virtue of their

majority status, control the destiny of these aspirations. In these circumstances conflict is inevitable. Accordingly, the testimony of the Fire Chief in this context bears repetition. He stated "that having the Captains in the same bargaining unit (with Firemen) renders the Captains less likely to discipline the Firemen" and "would render these Captains less likely to report these infractions." In the area of collective negotiations it may be reasonable to require a minority group to remain a part of a larger unit and to continue to attempt to convince the majority of the merit of its aspirations. On the other hand, it would be most unreasonable to compel the Captains to remain a part of the existing unit and infer that the Captains should seek to convince the Firemen of the merit of their aspirations while at the same time exercising the disciplinary authority required of them by the public employer.

Based on the record and all of the factors cited above, it is concluded that the invocation of the statutory exception would serve to negate rather than implement the intent of the Act. Accordingly, it is found that the history of established practice and prior agreement in this matter does not dictate the continued inclusion of supervisors and non-supervisors in the same unit and it is also found that there are not any special circumstances sufficient in weight to warrant the invocation of this statutory exception.

LEGAL ISSUE No. 3

SUBSTANTIAL ACTUAL OR POTENTIAL CONFLICT OF INTEREST:

Having found the Captains to be supervisors and having found it improper to invoke the statutory exception because of established practice, prior agreement or special circumstances, it is not necessary for the undersigned to develop from the record any other areas which might create


a substantial actual or potential conflict of interest among Captains and Firemen of the Kearny Fire Department with respect to their duties and obligations so as to destroy the requisite community of interest.

RECOMMENDATIONS:

Based on all of the factors cited above and the official record of these proceedings, the undersigned recommends:

1. That a secret-ballot election be conducted among employees as hereinafter designated in the appropriate unit, and the date of this election shall be set by the Public Employment Relations Commission.
2. The appropriate unit shall be: All Fire Captains employed by the Town of Kearny and excluding linemen, mechanics, utility repairmen, firemen, clerks, professional employees, managerial executives, craft employees, chief inspector, superintendent and assistant superintendent of fire alarm, assistant chief, chief, inspector and all other employees.
3. Those eligible to cast ballots in this election shall vote on whether or not they desire to be represented for purposes of collective negotiations by the Kearny Fire Captains Association.

RESPECTFULLY SUBMITTED



Carl Kurtzman
Hearing Officer

DATED: March 29, 1973
Trenton, New Jersey