

P.E.R.C. #71

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH

Public Employer

and

Docket No. R-131

ELIZABETH POLICE SUPERIOR OFFICERS  
ASSOCIATION, INC.

Petitioner

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CITY OF ELIZABETH

Public Employer

and

Docket No. CE-9

ELIZABETH FIRE OFFICERS ASSOCIATION

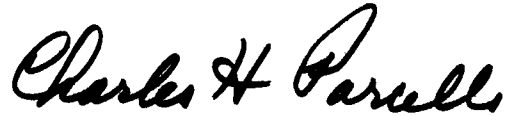
Petitioner

ERRATUM

The sentence beginning at the end of line one on page two of the decision of the Commission in the above-captioned matter should read as follows:

The Police Superior Officers Association excepts  
to the latter finding, and the ultimate recommendation. <sup>1/</sup>

BY ORDER OF THE COMMISSION



Charles H. Parcels  
Acting Chairman

DATED: September 19, 1972  
Trenton, New Jersey

STATE OF NEW JERSEY  
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SUPPLEMENTAL DECISION

These consolidated cases are before the Commission pursuant to an order by the Superior Court, Appellate Division remanding them for a factual determination of whether or not there exist among the various officer ranks within the Police and Fire Departments of the City of Elizabeth conflicts of interest requiring the exclusion of some classes of officers from the respective departmental officer units for which the Commission had earlier certified representatives. As foundation for that determination the Commission set the cases for further hearing following which Hearing Officer Jeffrey B. Tener issued his Report and Recommendations. His Report indicates that by all party agreement reached at the conclusion of the hearing the area of controversy has been substantially reduced so that presently the inquiry focuses only upon the titles Chief and Deputy Chief in each of the two departments. In summary, the Hearing Officer found that the responsibilities and authorities assigned to these positions were not of the "managerial executive" level; he did find, however, that because of these responsibilities and authorities there was a substantial conflict of interest between these positions and the subordinate officers as a group. Consequently, he recommended that the Chief and his Deputy Chiefs be excluded from the officer unit

in each department. The Employer excepts to the former finding. The Police Superior Officers Association, Inc. excepts to the latter finding, and the ultimate recommendation. 1/

The Commission's prior decision on the merits of the unit dispute in the Elizabeth Police Department preceded the Supreme Court's decision in Board of Education of the Town of West Orange v. Elizabeth Wilton, et al, 57 N.J. 404 (1971). 2/ It was on the basis of Wilton that the Appellate Division found cause for remand of the instant cases. And it was the application of the principles in Wilton to the facts as found that guided the Hearing Officer to his conclusion that a substantial conflict of interest existed between Chief and his Deputies vis-a-vis the subordinate officers. We have reviewed the record, the briefs, the Hearing Officer's Report and Recommendations and the Association's exceptions regarding the conflict issue and find those exceptions to be without merit. We agree with and adopt the Hearing Officer's findings, conclusions, recommendation and the reasons therefor. In particular we agree with his application of Wilton, the only aspect of the Association's exceptions which the Commission believes it would be instructive to comment upon. The Association points out that Wilton involved the field of education, not police and fire, and that the individual involved had authorities and responsibilities different from those the Association attributes to the Chief and Deputy Chiefs. Granting that the two situations are not factually the same, the Commission believes that Wilton and the principles stated therein have application beyond the particular facts of that case. Duties and powers may differ in degree and kind without necessarily affecting the legitimate application of Wilton in determining whether a community of interest exists among the employees concerned. Required is a complete examination of the nature of authority over subordinates, the nature of responsibility to superiors and the context within which they function. It is more a question of relationships and proximities within a given case than distinctions or comparisons with another case whose fact setting will inevitably be somewhat different. Conceding as we do that certain factual distinctions exist between Wilton and the situation at hand, we nonetheless conclude that Wilton was correctly applied here. With this much said it is debatable that more need be said. Because of the groundwork laid by the parties and the Hearing Officer after the remand hearing, these cases are, as the Hearing Officer observes, now in the posture of presenting only questions of unit clarification, i.e., should

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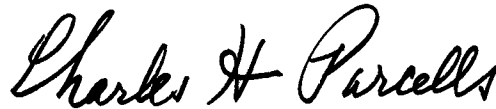
1/ Neither set of exceptions conforms fully to the Commission's Rules and Regulations with respect to the filing of exceptions in that neither party has identified those portions of the record claimed to support the exception.

2/ The unit in the Fire Department was established by the Commission essentially on the basis of the parties' consent and acquiescence, and did not at that time present a significant dispute.

the disputed titles be included or excluded from the existing units. Having found substantial basis for their exclusion, the Commission has disposed of the issue. To proceed now to a determination of whether they are managerial executives will in no way further clarify these units: if the question is answered in the affirmative, this will only reinforce the basis for exclusion; if in the negative, that will not overcome the basis for exclusion. The Court's remand order does not specifically require this additional determination although from the tenor of the opinion it seems to be expected. We will therefore reach it in order to satisfy that expectation. We find that the Hearing Officer has correctly analyzed the issue and the facts presented and has properly concluded that the disputed titles are not managerial executives. We adopt his findings, conclusions, recommendation and reasons therefor with respect to that issue.

As a result of this proceeding the existing units of officers in the Elizabeth Police and Fire Departments are clarified to exclude therefrom the titles Chief and Deputy Chief.

BY ORDER OF THE COMMISSION



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Charles H. Parcels  
Acting Chairman

DATED: September 13, 1972  
Trenton, New Jersey

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

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and

Docket No. R-131

ELIZABETH POLICE SUPERIOR OFFICERS  
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CITY OF ELIZABETH

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and

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ELIZABETH FIRE OFFICERS ASSOCIATION

Petitioner

Appearances

John R. Weigel, Esquire  
Special Counsel, Law Department, City of Elizabeth

Deputy Chief Patrick J. Maloney, President  
Elizabeth Police Superior Officers Association, Inc.

Captain William J. Sheridan, President  
Elizabeth Fire Officers Association

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

BACKGROUND

These matters are before the undersigned as a result of an Order Consolidating Cases dated April 27, 1971 and a Notice of Representation Hearing of the same date. However, these cases had a considerable history prior thereto. The Elizabeth Police Superior Officers Association, Inc., filed a Petition for Certification of Public Employee Representative August 12, 1969. Pursuant to a

Notice of Representation Hearing dated September 15, 1969, a hearing was held before the undersigned Hearing Officer October 1, 1969. Thereafter, on December 23, 1969, the Hearing Officer issued his Report and Recommendations. Exceptions to that Report and Recommendations were timely filed by petitioner. Subsequently the Commission issued a decision, P.E.R.C. No. 36, in which it directed an election in a unit described as follows: "The chief and deputy chiefs, captains, lieutenants and sergeants, but excluding the director of the Elizabeth Police Department and all other employees."<sup>1/</sup> The Public Employment Relations Commission conducted an election in that unit April 7, 1970 and issued a Certification of Representative on April 16, 1970 certifying the Elizabeth Police Superior Officers Association as the exclusive representative for purposes of collective negotiations. The City of Elizabeth, on April 23, 1970, filed a Notice of Appeal with the Appellate Division of the Superior Court of New Jersey from the decision of the Commission.

On October 9, 1969 the Elizabeth Fire Officers Association filed a Charge against Public Employer with the Public Employment Relations Commission alleging that the City of Elizabeth had failed to negotiate in accordance with the Certification of Representative issued by the Public Employment Relations Commission on August 8, 1969. That certification designated the Elizabeth Fire Officers Association as the exclusive representative of fire officers and probationary fire officers. On April 2, 1970 the Public Employment Relations Commission issued a Decision and Order,<sup>2/</sup> directing the City of Elizabeth to cease and desist from refusing to negotiate collectively with the Elizabeth Fire Officers Association and from interfering with the efforts of that organization

1/ City of Elizabeth, P.E.R.C. No. 36, p. 5.

2/ City of Elizabeth, P.E.R.C. No. 41.

to negotiate for or to represent employees as the exclusive collective negotiating representative. Additionally, the City was directed to negotiate collectively with the Association as the exclusive representative of all employees in the unit with respect to grievances and terms and conditions of employment. On April 23, 1970 the City of Elizabeth filed a Notice of Appeal with the Appellate Division of the Superior Court of New Jersey from this decision of the Commission.

The Superior Court of New Jersey, Appellate Division, issued an Order of Consolidation June 23, 1970 in connection with these two appeals. In its decision of March 9, 1971 that court remanded this matter to the Public Employment Relations Commission.<sup>3/</sup>

It was in response to this remand that the Commission issued its Order Consolidating Cases and Notice of Representation Hearing both dated April 27, 1971. Pursuant to an Order Rescheduling Hearing dated May 24, 1971, the first day of hearing in this matter was held June 15, 1971 in Newark, New Jersey. Subsequently hearings were held in Elizabeth, New Jersey on September 9, 1971, October 10 and 14, 1971 and November 4, 1971. At this hearing all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Briefs were submitted by the Elizabeth Police Superior Officers Association, Inc., and by the City of Elizabeth. The findings and recommendations herein are based upon the entire record in this proceeding.

#### POSITIONS OF PARTIES

Although the positions of the parties underwent several modifications during the course of the hearing, the final positions are accurately reflected

3/ Elizabeth Fire Officers Association v. Elizabeth and Elizabeth Police Superior Officers Association, Inc. v. Elizabeth, 114 NJ Super. 33 (App. Div., 1971)

in agreements entered into between the City of Elizabeth and the respective associations on December 20, 1971. These agreements each bear the signatures of the Mayor, the City Clerk and several officers of the respective associations, as well as an approval from the City Attorney regarding the form and legality of the agreements. The agreement between the City of Elizabeth and the Elizabeth Police Superior Officers provides, in pertinent part, as follows:

The City of Elizabeth, as public employer, shall immediately recognize the Elizabeth Police Superior Officers Association, Inc., as the negotiating agent for a unit consisting of Sergeants, Lieutenants and Captains...The status of the Chief and Deputy Chiefs in the Police Department as members of the bargaining unit represented by the Elizabeth Police Superior Association, Inc. shall await final determination by PERC.

Similarly, the agreement between the City of Elizabeth and the Elizabeth Fire Officers Association, Local 2040, I.A.F.F., AFL-CIO, provides the following:

The City of Elizabeth, as public employer, shall immediately recognize the Elizabeth Fire Officers Association, Local 2040, I.A.F.F., AFL-CIO, as the negotiating agent for a unit consisting of Captains and Battalion Chiefs...The status of the Chief and Deputy Chiefs in the Fire Department as members of the bargaining unit represented by the Elizabeth Fire Officers Association, Local 2040, I.A.F.F., AFL-CIO shall await the final determination by PERC...The City of Elizabeth, as public employer, and the Elizabeth Fire Officers Association, Local 2040, I.A.F.F., AFL-CIO, as public employee representative, agree to submit the issue of the status of the Chief and Deputy Chiefs in the Elizabeth Fire Department on the record already made at the PERC hearing in the matter of City of Elizabeth, Public Employer, and Elizabeth Police Superior Officers Association, Inc., Petitioner, N. J. Public Employment Relations Commission, Docket #R-131, to the end that the same treatment shall be accorded the Chiefs and the Deputy Chiefs in both the Elizabeth Fire Department and the Elizabeth Police Department, in accordance with the apparent intent of the Superior Court of New Jersey, Appellate Division.

The undersigned recommends that these agreements entered into by



the parties be recognized. Accordingly, the undersigned is charged with making findings and recommendations regarding the unit status of the Chief and Deputy Chiefs of the Elizabeth Police Department. As indicated above, the concerned parties have agreed to apply the result obtained in that proceeding to the Chief and Deputy Chiefs of the Elizabeth Fire Department.

The parties agreed that the titles in dispute are supervisory within the meaning of Chapter 303. The City contends that the Chief and Deputy Chiefs are managerial executives. In the absence of a finding that the occupants of the positions are managerial executives, the City contends that the relationship of the incumbents of those positions to other unit members is such that there is a substantial actual or potential conflict of interest between occupants of the positions in question and other supervisory members of the negotiating unit.

The position of the Police Superior Officers Association is that the Chief and Deputy Chiefs are not managerial executives and, furthermore, that their duties and obligations to the City do not place them in a position of conflict vis-a-vis other unit members. Accordingly, it is their position that the Chief and Deputy Chiefs do have a community of interest with other unit members and that they should be included in the negotiating unit with the other supervisory employees.

#### ISSUES

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

(1) Are Chief and Deputy Chiefs of the Elizabeth Police Department managerial executives within the meaning of Chapter 303?

(2) Is there a conflict of interest between the Chief and Deputy

Chiefs on the one hand and other supervisory members of the negotiating unit on the other hand? Is the relationship such as to constitute an actual or potential conflict of interest as discussed by the Supreme Court of New Jersey in Board of Education of the Town of West Orange in the County of Essex v. Elizabeth Wilton, et al, 57 NJ 404 (1971)?

STATUTORY AND JUDICIAL REFERENCES

Section 7 of Chapter 303 has the following provision regarding managerial executives: "Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, that this right shall not extend to any managerial executive except in a school district the term managerial executive shall mean the superintendent of schools or his equivalent..." (Emphasis added)

The statute also provides that, "The negotiating unit shall be defined with due regard for the community of interest among the employees concerned..."<sup>4/</sup>

The Supreme Court in the Wilton case, in interpreting legislative intent associated with the enactment of Chapter 303, stated that:

Ordinary considerations of employer-employee relations make it sensible to say that if performance of assigned duties by a particular supervisor bespeaks such an intimate relationship with the management and policy-making function as to indicate actual or potential substantial conflict of interest between him and other supervisory personnel in a different or lower echelon of authority, such supervisor should not be admitted to the same negotiating unit.<sup>5/</sup>

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<sup>4/</sup> N.J.S.A. 34:13-A-5.3

<sup>5/</sup> Board of Education of the Town of West Orange v. Wilton, supra, at 416.

In its opinion, the Superior Court of New Jersey, Appellate Division, remanded the matter to PERC "...for a specific fact finding and statement of the reasons therefor, as to whether the respective superior officers' obligations to Elizabeth as they now exist are sufficiently indicative of potential conflict of interest between the respective officers to require exclusion of some of the supervisory personnel from this particular negotiating unit."<sup>6/</sup>

#### MANAGERIAL EXECUTIVES

The first issue relates to the contention of the City that the Chief and the two Deputy Chiefs of the Elizabeth Police Department are managerial executives and thereby precluded from coverage under the Act.

The term "managerial executive" is not defined in the New Jersey Statute.<sup>7/</sup> However, in several decisions issued by the Executive Director, this issue has been considered. In the Plainfield case,<sup>8/</sup> in discussing the people to whom some allegedly confidential secretaries reported, it was stated that:

...each of the four management personnel are involved in the formulation of labor relations policy utilized by members of the Board of Education in collective negotiations... It is axiomatic that those charged with the responsibility for negotiating on the formulation of labor relations policy may not be included in the same unit as those affected by such negotiations or such policy.<sup>9/</sup>

In Hanover,<sup>10/</sup> the Executive Director discussed the term as follows:

While the Act does not define a managerial executive, the essential characteristics of the term as utilized in the field of labor relations denote one who determines and executes policy through subordinates in order

<sup>6/</sup> Elizabeth Fire Officers Association v. Elizabeth, *supra*, at 38.

<sup>7/</sup> Section 7 does provide that, "...in a school district the term managerial executive shall mean the superintendent of schools or his equivalent..."

<sup>8/</sup> Plainfield Board of Education, E.D. No. 1

<sup>9/</sup> Ibid., pp. 2-3

<sup>10/</sup> Township of Hanover, E.D. No. 41.

to achieve the goals of the administrative unit for which he is responsible or for which he shares responsibility. It is the final responsibility to formulate, determine and effectuate policy that distinguishes the managerial executive from other staff or line positions.<sup>11/</sup>

The Commission, in Bergen County,<sup>12/</sup> stated that:

The statute provides no definition [of managerial executive], but the minimum elements are generally regarded to be substantial involvement in the formulation and determination of those policies designed to achieve the agency's principal objectives.<sup>13/</sup>

Other jurisdictions have had to grapple with this same problem. The Taylor Law in New York State was amended in 1971 to provide a definition of managerial employees. The law as first enacted had no definition of that term. The amended law contains the following definition of managerial employees:

The term 'public employee' ...shall not include... persons who may reasonably be designated from time to time as managerial...Employees may be designated as managerial only if they are persons (a) who formulate policy or (b) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature or requires the exercise of independent judgment.<sup>14/</sup>

The Assistant Secretary of Labor recently fashioned a definition of a "management official" in the context of federal employment under Executive Order 11491. The reported definition follows:

When used in connection with the executive order, the term 'management official' means an employee having authority to make, or to influence effectively the making of, policy necessary to the agency or activity with respect to personnel, procedures, or programs.

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<sup>11/</sup> Ibid, p. 3.

<sup>12/</sup> Bergen County Board of Chosen Freeholders, P.E.R.C. No. 69

<sup>13/</sup> Ibid, p. 3.

<sup>14/</sup> Taylor Act, Section 201-7

In determining whether a given individual influences effectively policy decisions in this context, consideration should be concentrated on whether his role is that of an expert or professional rendering resource information or recommendations with respect to the policy in question, or whether his role extends beyond this to the point of active participation in the ultimate determination as to what the policy in fact will be.<sup>15/</sup>

Without adopting any of the above-quoted definitions, several concepts do emerge from them. In each case, policy formulation or determination is a requisite characteristic. Additionally, each definition embraces or is broad enough to include the concept of meaningful activity in the areas of personnel, contract negotiation, and contract administration. We shall examine the positions of Chief and Deputy Chief of the Elizabeth Police Department in this context.

When viewed in this light, the contention of the City fails to hold up. Beyond the mere assertion that the Chief and Deputy Chiefs are managerial executives and the testimony of the Director that they have a role in policy-making<sup>16/</sup> as well as that of a Deputy Chief that he spends quite a bit of his day formulating, interpreting and carrying out policy<sup>17/</sup> and that of the Chief that he has discussed policy formulation with the Director,<sup>18/</sup> the record contains scant support for the position of the City. What emerges is the impression there is a rather free flow of communication among the Deputies, the Chief and the Director with respect to a wide range of problems within the purview of the Police Department, eg. use of civilian personnel in place of patrolmen, thereby freeing patrolmen for strictly police-type work,<sup>19/</sup> manpower and equipment needs

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<sup>15/</sup> "Gov't. Employment Relations Report", No. 443, A-10, March 13, 1972.

<sup>16/</sup> Vol. 1, p. 107

<sup>17/</sup> Vol. 2, pp. 120-121

<sup>18/</sup> Vol. 4, p. 107

<sup>19/</sup> Vol. 4, p. 164

of the Department, <sup>20/</sup> experiments with the four day, ten-hour day work week, <sup>21/</sup> wearing of uniforms to and from work as well as while on lunch hour, <sup>22/</sup> use of Special Police in certain high crime areas, <sup>23/</sup> establishment of Police-Community Relations Unit. <sup>24/</sup> However, and this flows partly from the para-military nature of the Police Department, the record indicates that it is the Director and sometimes the Mayor or City Council who ultimately decides on such matters. Suggestions from the Chief and the Deputies as well as from lesser ranks are welcome and often solicited. But decision-making is highly centralized at the very top of the structure, i.e., above the Deputies and the Chief. A Deputy Chief testified as follows in response to a question from the Hearing Officer regarding what he can do on his own:

If you're talking about, for example, purchasing of (sic) repairing items, coordinating investigations between, for example, the juvenile division and the executive division, sometimes there is investigations that involve adults and juveniles, of course, follow up investigations in arrests that are made as far as the detective bureau is concerned, to see about clearance of crimes and so forth - many, you know, routine, you might say routine functions of various units....Of course all purchases, all major purchases must go through the director, the chief and the director. <sup>25/</sup>

This testimony is not consistent with the discretion and independence associated with a managerial executive.

The Chief testified as to his view of how the Department should be run.

In the opinion of the hearer, and as the Chief himself stated, his description

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<sup>20/</sup> Vol. 4, p. 165

<sup>21/</sup> Vol. 1, p. 116

<sup>22/</sup> Vol. 4, p. 105

<sup>23/</sup> Vol. 4, pp. 111-114

<sup>24/</sup> Vol. 4, pp. 115-116

<sup>25/</sup> Vol. 1, p. 163

conformed to the testimony of other witnesses as to how in fact it is run although the Chief indicated his belief that the Director on occasion jumped the line of command.<sup>26/</sup> The Chief testified that the Director should make policy for the Department and then he should order the Chief to implement that policy. The Director should consult with the Chief on this. Then the Chief, with the help of subordinates, should devise various options or solutions to achieve the policy. These options should be presented to the Director for him to select the best of those methods of policy implementation. Finally, the Chief should implement the policy by issuing necessary orders, directives, etc.<sup>27/</sup> As stated above, this somewhat idealized account was offered as a description of the way in which the Chief believed the Department should be run and not of how it is run. As indicated, in the opinion of the undersigned, the record generally is consistent with that statement although it reflects greater involvement from above, i.e., Director, Mayor, Council in the operation and control of the department than suggested by the Chief's proposal.

Furthermore, an examination of sample orders issued by the Deputy Chiefs and the Chief which were offered and received in evidence as joint exhibits cover matters of a rather routine, innocuous nature for the most part. The three illustrative orders issued by Deputy Chiefs relate to the mechanical operation of radio equipment, street and manhole openings, and requests from the Fire Department for ambulance service. Orders issued by the Chief had to do with the use of cadets to make the 1971 unlicensed dog census, storage and issuance of emergency equipment, funeral arrangements for a deceased captain, investigations of rape cases, a Memorial Day parade, a guide to be used by

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<sup>26/</sup> Vol. 4, p. 126  
<sup>27/</sup> Vol. 4, pp. 124-126.

the desk officer and radio dispatcher when the complaint received is bank robbery, notifications of impending heavy snowfall, special instructions pertaining to a primary election day, procedures to be followed in an arrest survey during a particular month, fingerprinting procedures, and the proper completion of forms and reports. Also submitted was an order issued by the Chief regarding weekend duty and an inspection schedule for top supervisors. This latter order, while merely implementing a policy adopted and order issued by the Director, has implications which shall be considered below. Again, however, the conclusion is inescapable; the sample orders issued by the Chief and Deputies which were submitted as joint exhibits do not support the conclusion that the Chief and Deputy Chiefs are managerial executives.

CONFLICT OF INTEREST

The second major area of concern relates to the question of whether there is a conflict of interest between the Deputy Chiefs and/or Chief on one hand and other superior officers on the other as discussed by the Supreme Court in Wilton. In that decision the Court stated:

On the basis of our discussion in this case, we are satisfied, despite the ambiguity in the statute, that PERC was in error in declaring that all supervisors, regardless of their status with respect to each other, per se possess the community of interest which requires or justifies their inclusion in the same negotiating unit. As indicated above, we hold that where a substantial actual or potential conflict of interest exists among supervisors with respect to their duties and obligations to the employer in relation to each other, the requisite community of interest among them is lacking, and that a unit which undertakes to include all of them is not an appropriate negotiating unit within the intentment of the statute.<sup>28/</sup>

Thus, subsumed under the only specific statutory criterion relating to

28/ Board of Education of the Town of West Orange v. Wilton, supra, at 427.



appropriate negotiating units - i.e., community of interest - is conflict of interest. The Wilton decision mandates a consideration of conflict of interest in the instant matter. A finding of a substantial actual or potential conflict of interest would be inconsistent with the "...establishment and promotion of fair and harmonious employer-employee relations in the public service..."<sup>29/</sup> as stated by the Supreme Court in Wilton.

The concept of "conflict of interest" is not a precise one. It can be approached from several angles: size and structure of the employing unit; need of other unit employees for protection from the employees in question; whether the good faith performance of the required duties would put the employees in question in an inconsistent, ambiguous or untenable position vis-a-vis other unit members; the potential impact on other unit members of the honest carrying out of job requirements; their role in the employing unit in matters relating to discipline and the application of personnel policies or the administration of a negotiated agreement; the side of the negotiating table on which the employees should sit; the nature of the authority which an employee has over other employees; the relation of the duties performed to the management function.

The City of Elizabeth is under Plan F of the Faulkner Act.<sup>30/</sup> The Administrative Code provides for the existence of a Police Department, "the head of which shall be the Director."<sup>31/</sup> Section 4-24 of Article III of the Administrative Code provides that the Director "...shall be appointed by the Mayor with the advice and consent of the Council."

There are close to 300 employees in the Police Department including, according to the departmental payroll of July 1, 1971,<sup>32/</sup> one Chief, two Deputy

<sup>29/</sup> Board of Education of the Town of West Orange v. Wilton, supra, at 416

<sup>30/</sup> N.J.S.A. 40:69A-1 et. seq.

<sup>31/</sup> Administrative Code, City of Elizabeth, Article XI

<sup>32/</sup> Exhibit E-8

Chiefs, seven Captains, 15 Lieutenants, 28 Sergeants, over 30 Detectives and approximately 175 Patrolmen. Given a structure of these dimensions, it would be virtually impossible to suggest that a single individual, the Director, could effectively manage and control it. This is true even recognizing the para-military structure of the Department and the fact that it is characterized by a highly centralized command structure. This observation strongly suggests to the undersigned the need for a close and careful examination of the record evidence for indications of some showing of effective responsibility and control at levels in the hierarchy below that of the Director. Because of the positions of the parties, this inquiry will be confined to the Chief and the Deputy Chiefs.

The Director testified that the Chief is the head of operations of the Police Department.<sup>33/</sup> One Deputy Chief is in charge of the uniformed divisions (traffic and patrol) and the other one is in charge of the non-uniformed and civilian employees.<sup>34/</sup> The Director, Chief, and two Deputies work very closely together. A word used repeatedly to describe the relationship was "consultative." He testified that the two Deputy Chiefs have overall charge of their two units; the Department is controlled and coordinated by the Chief who, in turn, works closely and is in constant communication with the Director.<sup>35/</sup> A Deputy Chief stated that, within the dual structure of the Department, the Deputy Chiefs - each in his own area - assist the Chief and that the Chief coordinates the activities of the two main divisions.<sup>36/</sup> The Chief stated that he supervises the entire Police Department<sup>37/</sup> through the two Deputy Chiefs.<sup>38/</sup>

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<sup>33/</sup> Vol. 1, p. 30

<sup>34/</sup> Vol. 1, p. 30

<sup>35/</sup> Vol. 1, p. 108

<sup>36/</sup> Vol. 1, p. 123

<sup>37/</sup> Several confidential units report directly to the Director, Vol. 4, p. 26.

<sup>38/</sup> Vol. 4, p. 25

Various functions and activities shed light on this subject. The budget request which the Director submitted called for a 10% raise right up the line for employees. He discussed this with the Deputy Chief of Administration and with the Chief. Neither indicated opposition and, according to the Director, if he had, it would have been discussed further. <sup>39/</sup>

While it is the Director who issues orders transferring people from one position to another, he does this on the basis of recommendations and consultation. <sup>40/</sup>

There is a grievance procedure in the contract between the City and the PBA <sup>41/</sup> providing for a progression of unresolved grievances up the chain of command from the immediate supervisor through the Director. There is testimony that the grievance machinery hasn't been invoked to date. <sup>42/</sup>

In negotiating with the PBA, the City negotiating committee consisted of the Business Administrator, the City Attorney, the Personnel Officer, and Special Labor Counsel. <sup>43/</sup> The Director testified that he had attended all bargaining sessions except one and that he routed tentative agreements between the City and the PBA to the Chief and Deputy Chiefs for their comments and opinions. He stated that he did receive some comments. <sup>44/</sup> It would not be unreasonable to assume that a similar arrangement might develop when the City and the Police Superior Officers Association engage in formal bargaining as they have agreed to do. This, obviously, has the potential for putting the Chief and Deputy Chiefs in the untenable position of having to straddle the bargaining table.

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<sup>39/</sup> Vol. 1, pp. 47-48

<sup>40/</sup> Vol. 1, p. 77

<sup>41/</sup> Joint Exhibit 9

<sup>42/</sup> Vol. 1, p. 92

<sup>43/</sup> Vol. 2, p. 29

<sup>44/</sup> Vol. 2, pp. 61-62

A Deputy Chief testified that he had been a member of the negotiating team for the Police Superior Officers Association. <sup>45/</sup>

Another significant area relates to disciplinary proceedings. A composite picture of these matters follows. When there is a complaint against a police officer, the appropriate captain generally conducts an investigation. The results of this investigation are submitted to the appropriate Deputy Chief. The Deputy attaches his recommendation to the investigation and transmits it to the Chief. It is not totally clear from the record the exact form that the recommendation takes but it appears that he recommends for or against disciplinary action. It is the Chief who, upon receipt of the report and the recommendation of the Deputy, decides whether formal charges will be preferred. <sup>46/</sup> It is the Director who actually conducts the hearing. These hearings are attended by the Chief and the two Deputies. While the testimony is not consistent, it is clear that on at least certain occasions, the Chief and/or Deputy Chiefs have made comments and expressed their views to the Director prior to the rendering of a decision. This appears not to be the usual procedure, however.

A few other somewhat isolated examples may contribute to a fuller appreciation of this situation. The Chief makes spot checks, field inspections and tours throughout the City. <sup>47/</sup> While it is likely that a major purpose of such activities is to keep himself fully informed of the police function and presence generally, the potential for coming across situations not to his liking vis-a-vis patrolmen and superior officers cannot be ignored.

One Deputy Chief, with the approval of the Director, initiated a pilot project involving a ten-hour day, four day week for several squads. One purpose

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<sup>45/</sup> Vol. 3, p. 34

<sup>46/</sup> Testimony in this area is somewhat ambiguous. One example was cited where the Chief recommended that a hearing be held and the Director turned down the recommendation. It was stated but not supported that this had occurred in quite a few cases. In any event, the influence of the Chief at this stage is significant.

<sup>47/</sup> Vol. 1, p. 103

of this experiment was to provide more coverage during high crime hours.<sup>48/</sup>  
However, such a program obviously has an effect upon employees which may or may not be welcome. Broadly speaking, this constitutes recognition that the interests of employees may not be identical with the interests of the employer. Yet the interest of the employer obviously is a legitimate one which is entitled to full and faithful expression and execution.

Finally, a series of exhibits<sup>49/</sup> involving more extensive field coverage by higher superior officers is a further example. They demonstrate that the Chief has been closely involved with the Director in working out and implementing significant manning changes. In this particular case, the Mayor ordered a change and he ordered the Director to implement the change. The Chief, for various reasons, resisted. While this was a complex situation with personality conflicts, etc., it nevertheless points out that the interests of the Chief - which should be consistent with the interests of Department and the Director within the extant political framework - may be different from the interests of the superior officers.

With regard to the Deputy Chiefs, it should be pointed out that there is a standing order providing for one Deputy Chief to take the place of the Chief in the latter's absence. The other Deputy Chief becomes Acting Chief if the two aforementioned individuals are absent.<sup>50/</sup> Whoever takes over for the Chief is the Acting Chief and assumes the role of the Chief.<sup>51/</sup> One Deputy Chief testified that he has served as Acting Chief a dozen or more times in the last two years, sometimes for a week at a time.<sup>52/</sup> He handled all of the functions of the

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<sup>48/</sup> Vol. 1, pp. 116-117

<sup>49/</sup> Exhibits PA-3-5 ad E-9

<sup>50/</sup> Vol. 2, p. 75

<sup>51/</sup> Vol. 2, p. 78

<sup>52/</sup> Vol. 2, pp. 107-108

Chief during those times. <sup>53/</sup> It is clear, therefore, that a Deputy Chief acts in the place of the Chief in the latter's absence. Accordingly, aside from any conflicts which may exist between Deputy Chiefs and other superior officers by virtue of the job requirements of the Deputy Chief, conflicts between the Chief and other superior officers would inure to the surrogate of the Chief, the Deputy Chiefs, as well.

The above-cited facts, adduced from the record in this proceeding, convince the undersigned that there is a conflict between the interests of the Chief and Deputy Chiefs on the one hand and the other superior officers on the other hand. The size and structure of the Police Department suggests this conclusion. Testimony regarding disciplinary procedures; job functions; relationship among Director, Chief and Deputies; the functioning of the Department; grievance procedure; discussion among Chief, Deputies and the Director on proposed salary increases for all employees; etc., is so indicative of a substantial conflict of interest - actual and potential - that it overwhelms the areas of identity of interest between the concerned ranks.

#### FINDINGS

Based upon all of the above and the record in its entirety, the undersigned finds:

1. The parties stipulated that the City of Elizabeth is a public employer within the meaning of the Act and is subject to the provisions thereof.
2. The parties stipulated that the Elizabeth Police Superior Officers Association, Inc., is an employee representative within the meaning of the Act.
3. The parties in a related case - City of Elizabeth and Elizabeth Fire Officers Association, Docket No. CE-9, agreed to apply the results of the Police

Department case to the Fire Department.

4. The City of Elizabeth agreed to recognize the Police Superior Officers Association, Inc. as the negotiating agent in a unit comprised of Sergeants, Lieutenants and Captains. However, the parties were unable to resolve the unit status of the Chief and the Deputy Chiefs. Accordingly, by agreement of the parties, this matter has evolved into a unit clarification type of proceeding and, the matter having been remanded to the Public Employment Relations Commission by the Superior Court, Appellate Division, and the parties being unable to agree upon the unit placement of the Chief and the Deputy Chiefs, the matter is appropriately before the undersigned for Report and Recommendations.
5. The Chief and Deputy Chiefs are not managerial executives within the meaning of 34:13A-5.3.
6. The relationship of the Chief and the Deputy Chiefs to other supervisory employees in the recognized unit is suggestive of a conflict of interest between the Chief and Deputy Chiefs on one hand and the other supervisory unit members on the other. Therefore, in conformance with the intentment of the Supreme Court in Wilton and Chapter 303, Laws of 1968, the undersigned finds that the Chief and the Deputy Chiefs not to have a community of interest with other superior officers and that they should be excluded from the recognized unit as well as from the unit with P.E.R.C. certified April 16, 1970.

#### RECOMMENDATIONS

It is respectfully recommended that the unit certified April 16, 1970 by the Public Employment Relations Commission be modified to include only Sergeants, Lieutenants and Captains of the Police Department of the City of Elizabeth and to exclude the Chief and Deputy Chiefs and that the unit recognized

in the Police Department by the City of Elizabeth by agreement dated December 20, 1971 be confined to the same titles.

It is further recommended, in accordance with the agreement of the City of Elizabeth and the Elizabeth Fire Officers Association, that a similar unit of superior officers be recognized excluding the Chief and the Deputy Chiefs of the Elizabeth Fire Department.

  
Jeffrey B. Tener  
Hearing Officer

DATED: July 28, 1972  
Trenton, New Jersey