

P.E.R.C. NO. 99-60

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Petitioner.

Docket No. RO-H-94-91
(Chief Investigators and
Assistant Chief Investigators-
Office of the Public Defender)

SYNOPSIS

The Public Employment Relations Commission finds that certain titles which CWA, AFL-CIO petitioned to represent are not managerial executives. The State of New Jersey contends that these employees are managerial executives excluded from representation under the New Jersey Employer-Employee Relations Act. The Commission, fully considering the responsibilities of chief investigators and assistant chief investigators and applying the standards established in New Jersey Turnpike Auth. and AFSCME Council 73, 150 N.J. 331 (1997), concludes that these employees do not formulate management policies and practices or direct their effectuation.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Public Employer, Peter Verniero, Attorney General
(Michael L. Diller, Senior Deputy Attorney General)

For the Petitioner, Weissman and Mintz, attorneys
(Steven P. Weissman, of counsel)

DECISION

On December 17, 1993, March 29, 1994, and April 19, 1995, the Communications Workers of America, AFL-CIO filed a petition for certification and amendments to that petition. CWA seeks to represent a negotiations unit of about 275 employees employed by the State of New Jersey in various departments. The employer contends that all these employees are "managerial executives" excluded from representation under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On March 29, 1994, the Director of Representation ordered a hearing. The parties stipulated that hearings would be held and decisions issued on selected titles to answer questions about their status and to provide a basis for discussing and possibly resolving

the status of other titles. The titles selected included chief investigator and assistant chief investigator in the Office of the Public Defender. For convenience, we will occasionally refer to employees in these two titles jointly as "head investigators."

Seven days of hearing were held on these head investigator titles. The hearings began on June 15 and ended on December 1, 1994. Hearing Officer Regina A. Muccifori conducted the first two days of hearings, but then took a leave of absence. Hearing Officer Susan Wood Osborn completed the hearings.

After the hearing, the parties jointly asked the Commission to hold the case so they could discuss settlement possibilities. These discussions having been unsuccessful, the parties filed post-hearing briefs by December 11, 1996.

On March 7, 1997, Hearing Officer Osborn issued her report H.O. No. 97-2, 23 NJPER 269 (128129 1997). Applying the standards established by an Appellate Division panel in New Jersey Turnpike Auth. v. AFSCME, 289 N.J. Super. 23 (App. Div. 1996), she concluded that the chief investigators and assistant chief investigators are not managerial executives.

The Supreme Court granted certification in the Turnpike Authority case so the parties agreed to hold this part of the case (as well as another part involving section chiefs in the Department of Environmental Protection) until the Court issued its decision. That decision was issued on July 14, 1997. New Jersey Turnpike Auth. v. AFSCME, 150 N.J. 331 (1997).

This case was then reactivated. The parties received extensions of time to file exceptions and responses.

On December 1, 1997, the employer filed exceptions contesting certain findings of fact and asserting that the chief and assistant chief investigators are managerial executives under the Supreme Court's standards in Turnpike Authority. On February 18, 1998, CWA filed a response asserting that they are not.

Findings of Fact

We have reviewed the record. We adopt and incorporate the Hearing Officer's thorough findings of fact (H.O. 97-2 at pp. 2-34), as supplemented or modified by the following findings. In this portion of our opinion we are simply reviewing the accuracy of the Hearing Officer's findings. The bulk of the employer's exceptions go to the significance, rather than accuracy, of the facts. We consider their significance in our analysis.

We add to finding no. 1 that the Public Defender's Office has an appellate section in Trenton (7T10; R-1). Regional offices carry out the pretrial and trial representation of indigent persons charged with indictable offenses.

We modify finding no. 3 to state that Ira B. Levisohn was listed as a Deputy Commissioner, not a Deputy Public Defender, on the organizational chart for the Department of the Public Advocate (R-1). The "management team" referred to in findings no. 3 and 4 is a state-level management team. The chain-of-command relationships described are accurate. These findings do not suggest that the state-level management team "supervises" regional office operations

daily or that each regional office "reports to" the state-level management team daily.

We add to finding No. 5 the number of investigators in each regional office (R-3 to R-23). CI means chief investigator; ACI means assistant chief investigator; PI means principal investigator; SI means senior investigator; I means investigator; IA means investigator aide, IN is undefined; and IT means investigator trainee.

Atlantic Region: 1 CI, 1 ACI, 5 PI, 2 SI
 Bergen: 1 ACI, 3 PI, 1 I, 1 IA
 Burlington: 1 ACI, 3 PI, 1 SI
 Camden: 1 CI, 1 ACI, 4 PI, 3 SI, 3IN
 Cape May: 1 ACI, 2 PI
 Cumberland: 1 ACI, 3 PI, 1 SI
 Essex Adult: 1 CI, 3 ACI, 4 PI, 6 SI, 5 I, 7IT
 Essex Juvenile: 1 ACI, 4 PI, and 1I
 Gloucester: 1 ACI, 4 PI, and 1I
 Hudson: 1 CI, 1 ACI, 5 PI, 2 SI, 2I
 Hunterdon: 1 ACI, 1 PI
 Mercer: 1 CI, 10 PI, 1I
 Middlesex: 1 CI, 4 PI, 1 SI, 1I
 Monmouth: 1 CI, 1 ACI, 7 SI, 1I
 Morris: 1 ACI, 2 PI, 1I
 Ocean: 1 ACI, 4 PI
 Passaic: 1 CI, 1 ACI, 6 PI, 1I, 1IT
 Salem: 1 ACI, 1 PI
 Somerset: 1 ACI, 3 PI
 Sussex: 1 ACI, 1 PI
 Union: 1 CI, 3 PI, 1 SI, 3I
 Warren: 1 ACI, 1 SI

We accept the accuracy of findings no. 9-11 regarding job descriptions. We clarify footnote 8 stating that the job description for chief investigator does not reflect changes made in a 1992 reclassification. The chief title is now a regional one rather than a central office one and chief investigators have no responsibility for locations besides their regional office

(1T21-1T23; 1T114). We add to finding No. 11 that head investigators may make changes affecting only investigators without the approval of the deputy in charge of the regional office, but must seek the deputy's approval of other changes (3T53-3T54; 3T104-3T105). An assistant chief investigator in the Essex Adult Region developed the computer program for tracking investigations in that office (3T117).

We accept the accuracy of findings no. 12-16 concerning work assignments of chief and assistant chief investigators generally. We will consider findings concerning Noreen Caterino later.

We correct finding no. 18 to state that the investigation report form (P-2) used in regional offices was developed by an operations committee of chief and assistant chief investigators. Assistant Director of Investigations James Irving acted as the committee chair (3T17; 3T78-3T81). With that correction, we accept the Hearing Officer's findings no. 17-20 concerning review of investigations.

The Hearing Officer's findings no. 21-24 concerning interfaces between investigators and attorneys do not need to be corrected or modified.

Findings No. 25-31 concern the reporting relationships between the Investigations Director, William Gevers, and the chief and assistant chief investigators. We add to finding no. 25 that Gevers holds the head investigators accountable for overseeing

investigations in their regional offices daily (1T31-1T33). However, he works closely with them to facilitate the operation of the department and talks with them regularly by phone (2T80).

We add to finding no. 31 a cross-reference to finding no. 8, making it clear that while the chief and assistant chief investigators serve as the raters for PAR evaluations of investigators beneath them, the deputy in charge of the regional office rates the head investigator and Gevers or his assistant reviews those evaluations (1T91).

Findings no. 32-36 concern personnel actions such as discipline and overtime. We add to finding no. 33 that while she was an assistant chief investigator in the Essex Adult Region office, Caterino brought up with Gevers the need for a bilingual variant of the investigator title because she understood Gevers had the authority to correct the problem (4T13-4T14). We clarify finding no. 36 to state that the chiefs have no power to make final decisions imposing discipline on their investigators, although they may recommend to the deputy in charge that an investigator be disciplined and that recommendation, if approved, would then be passed on to higher levels ending with the Public Defender (1T72-1T73). Caterino has never taken a formal disciplinary action and does not believe she has the authority to do so (4T45-4T46). We also add to finding no. 36 that overtime policy is established centrally (1T99) and long-term leaves of absence must be approved by the operations committee of headquarters personnel (2T20).

Finding no. 36 also concerns budgets. We add that neither Caterino nor John Collins, the head investigator in Somerset County, ever helped prepare a budget (3T64-3T65; 6T31-6T32).

Findings no. 36-42 discuss staffing. We add to finding no. 37 that at the time of the hearing, hiring in State government was frozen except for temporary positions (2T15). We add to finding no. 41 that the process to create an assistant chief position began before Caterino became chief investigator in the Hudson region (3T133). Caterino is deciding how that title will fit into the Hudson office (3T59).

Findings no. 43 and 44 concern training and the current headquarters operations committee. These findings are accurate. We add that chief investigators who served on the operations committee before the 1992 reorganization would have been from headquarters. H.O. at p. 5, n. 6.

Findings no. 45-47 concern control of equipment and supplies. We add that, subject to the approval of their regional deputies, head investigators can use petty cash vouchers to purchase keys, film, and similar minor items (2T109). But their authority to purchase equipment has been considerably curtailed since a central purchasing system was established (1T117-1T118; 3T65). As head investigators, Caterino and Collins have not made any decisions on spending levels. Nor have they made any purchases without higher-level approvals (3T65; 3T68; 6T32). We

clarify finding no. 46 by stating that while a head investigator may ask that State cars be replaced or reallocated regionally, decisions about granting such requests are made centrally (4T44-4T45).

Finding no. 48 concerns staff meetings. We correct and clarify this finding to state that the amount of the administrative fee to be charged clients was discussed at headquarters meetings with regional deputies. Chiefs and assistant chiefs were not invited to that meeting; instead, they attended a meeting at which they were informed about the fees and the procedures for collecting and depositing the monies. These procedures vary between regional offices and are determined by the deputy in consultation with head investigators (5T132-5T135). Caterino reviews periodic statements of amounts collected by investigators in the Hudson region and reminds investigators to collect these monies (3T49-3T50).

Findings no. 49-53 concern policy decisions. We add to the paragraph prefacing finding no. 49 that investigators attending training sessions in Trenton receive handouts concerning investigations (4T11). As the Hearing Officer found, however, no state-wide manual sets investigative procedures. Such procedures vary locally since court procedures vary locally (1T19; 1T111; 3T138; 6T67). The record does not specify or illuminate the extent to which court procedures dictate local differences or the extent to which head investigators have exercised substantive

discretion in adopting investigative procedures to conform to court rules. We clarify also that while head investigators are not authorized to resolve policy questions impacting on other regions or non-investigative personnel and policies, they report any problems to their deputies (3T105; 3T137) or Gevers (1T32; 4T45) and may try to work out conflicts between attorneys and investigators informally (3T137). We correct finding no. 51 to state that head investigators do not need the deputy's approval to change the way investigators are assigned by type or location (3T54). We clarify finding no. 52 by stating that Caterino did not help develop the policies adopted at headquarters concerning conflicts of interest, press contacts, and bilingual investigators (3T82-3T86; 4T41) and there is no evidence that other head investigators did so (1T121; 2T112; 3T90). We also add to finding no. 53 that Gevers informed head investigators at meetings about his concern that field representatives in the Public Defender's Office needed a career ladder for promotion to the chief and assistant chief titles (2T74-2T76). The record does not reflect whether or how they responded to this concern.

Finding no. 54 concerns Caterino's role with respect to the Central Judicial Processing ("CJP") program in Hudson County. Caterino's expanded use of interns has freed up investigators to do more field investigations (4T22-4T23).

Finding no. 55 concerns the non-supervisory duties of principal investigators and the supervisory responsibilities of

head investigators. We do not find that the chief and assistant chiefs entertain their investigators' step one grievances. The record is silent on that question. However, when Caterino was an assistant chief investigator, one shop steward (a principal investigator) represented all investigators. The steward did not come to Caterino since Caterino's group of employees had no problems, but she did take unspecified representational concerns to the chief investigator (4T7).

Analysis

Article I, ¶19 of the New Jersey Constitution guarantees public employees the right to organize and to choose a representative to present their proposals and grievances. The Employer-Employee Relations Act implements this guarantee by entitling the public employees it covers to form, join and assist employee organizations and to have their chosen representatives negotiate for them over their terms and conditions of employment. N.J.S.A. 34:13A-5.3; Lullo v. IAFF, 55 N.J. 409 (1970). The Legislature sought to promote the public interest in labor relations stability and to improve morale and efficiency by granting employees a special means of access to their employer over working conditions intimately and directly affecting them, most notably their compensation. Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 591 (1980); West Windsor Tp. v. P.E.R.C., 78 N.J. 98, 113-114 (1978). The Legislature, however, also determined that the

employer's interests in determining governmental and managerial policies without negotiations or the risk of divided loyalties in decisionmaking justified restricting negotiations over proposals or grievances that would significantly interfere with governmental policymaking; requiring that supervisors be placed in negotiations units apart from the employees they supervise; and excluding some employees from the Act's protections altogether. N.J.S.A. 34:13A-3e; Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 163 (1978); West Orange Bd. of Ed. v. Wilton, 57 N.J. 404 (1971). The Legislature thus made choices and accommodations in seeking to protect both the interests of employees in negotiating over their own pay and other vital working conditions and the interests of governmental employers in having their policymaking deliberations uncompromised by divided loyalties.

N.J.S.A. 34:13A-3(d) defines public employees to "include any public employee, i.e. any person holding a position, by appointment or contract, or employment in the service of a public employer...." The only exclusions from the definition of "public employee" are "elected officials, members of boards and commissions, managerial executives and confidential employees."

Unless one of the four statutory exclusions applies, the Act permits professional employees and supervisors to organize. N.J.S.A. 34:13A-5.3; N.J.S.A. 34:13A-6(d). The category of professional employees includes such employees as "attorneys,

physicians, nurses, engineers, architects, teachers, and the various types of physical, chemical and biological scientists." N.J.A.C. 19:10-1.1. Supervisors are defined as employees "having the power to hire, discharge, discipline or to effectively recommend the same." N.J.S.A. 34:13A-5.3. By permitting supervisors to organize, our Legislature implicitly accepted the viewpoint that employees can seek to negotiate over their own wages and working conditions without being disloyal in carrying out their supervisory responsibilities. See Packard Motor Car Co. v. NLRB, 330 U.S. 485, 19 LRRM 2397, 2399 (1947).

"Managerial executives" are excluded from the Act's coverage. N.J.S.A. 34:13A-3(f) defines "managerial executives" as:

persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district.

Our Supreme Court examined this exclusion in New Jersey Turnpike Auth. and AFSCME Council 73, 150 N.J. 331 (1997). That case partially modified, but otherwise approved standards set forth in Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (11259 1981).

The Montvale standards had provided:

A person formulates policies when he develops a particular set of objectives designed to further the mission of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent

of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. [Montvale at 508-509; emphasis added].

The Supreme Court concluded that the underlined requirement was unduly restrictive, especially as applied to large organizations in which some managers might not possess "organization-wide power" yet still have "significant power, discretion and influence within their own departments." Excising that requirement, the Supreme Court approved these revised standards:

A person formulates policies when he develops a particular set of objectives designed to further the mission of a segment of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. [Id. at 356.]

While holding that a managerial executive need not possess organization-wide power, the Supreme Court also rejected

portions of the lower court's opinion that would have expanded the managerial executive definition to exclude all employees above first-line supervisors and to adopt the private sector exclusion of all managerial employees who effectuate managerial policies. The Supreme Court reasoned that the problem of divided loyalties is of less concern in the public sector than in the private sector because public employees do not have a right to strike; public employees have a much narrower scope of negotiations; public employers are not seeking to maximize profits; and public employers and public employees share a stronger common interest in the mission of the organization. The Court also stressed that the Legislature had rejected a managerial executive definition, proposed by Governor Cahill, that would have excluded persons "effectuating and making operative" management policies and practices and had instead confined that part of the exclusion to persons "directing the effectuation" of such policies and practices."^{1/} The Court concluded that "directing the effectuation" connotes a higher level of authority than does "effectuating and making operative." Id. at 355.

^{1/} The Legislature simultaneously rejected several other proposals of Governor Cahill that would have contracted organizational rights to match the private sector model he favored. Those proposals included denying representation to supervisors; deleting the limitation of the managerial executive exclusion in the school board context to superintendent-level employees; and continuing to automatically deny representation to all heads and deputy heads of departments and agencies.

Under Turnpike Authority, the line between managerial executives and lower-level employees will have to be located case-by-case. Our analysis in each instance will focus on the weight and interplay of multiple factors such as the employee's position in the hierarchy, functions and responsibilities, and extent of discretion. Our goal will be to determine whether the employee has the authority and accountability of a managerial executive to formulate or direct the effectuation of management policies and practices.

We now apply the Turnpike Authority standards to the facts of this case. We begin by examining the relative position of chief investigators and assistant chief investigators in the hierarchy of the Public Defender's Office. We preface our discussion with some observations about this part of the Turnpike Authority standards.

An employee need not be at the top of an organization to be a managerial executive. But the higher an employee is in the hierarchy and the fewer levels of decisional review, the more likely it is that the employee has authority to formulate or direct the effectuation of management policies and practices. In examining the hierarchy, we will also consider the number and positions of employees reporting to an employee asserted to be a managerial executive; the more employees who report to a person and the higher and broader range of positions they hold, the more

likely it is that the person has managerial executive status.^{2/} And we will consider the extent to which an employee regularly participates in management-level committees convened to discuss and adopt managerial policies and strategies. Compare County of Rensselaer (Hudson Valley Community College), 18 N.Y. PERB 3001 (1985) (Director of Learning Resources who participated in weekly meetings of college deans and served in president's cabinet formulated policy). We finally repeat that the Legislature contemplated the possibility that some employees holding managerial titles would be eligible for representation when it limited the managerial executive exclusion in the school board context to superintendent-level employees and when it limited that exclusion in other contexts to employees who formulate policies and practices or direct their effectuation. Thus, merely holding a managerial title in the employer's hierarchy does not make one a managerial executive.

The Office of the Public Defender has a headquarters staff located in Trenton. It also has 21 regional offices, each headed by a deputy public defender. The chiefs and assistant chief investigators in the regional offices have dual reporting lines. With respect to personnel, administrative, interregional and investigative policy matters, they report to William Gevers,

^{2/} We agree with the State, however, that a first-level supervisor or even a non-supervisor may still be a managerial executive.

the Investigations Director in Trenton, or one of his assistants. Gevers reports to the first assistant public defender, Thomas Smith, who reports to the deputy assisting the Public Defender. With respect to daily supervision and case-related matters, the head investigators report to the deputy public defender in charge of their office. The deputy evaluates the head investigator and Gevers or an assistant reviews those evaluations.

The head investigators generally appear to be first-level supervisors of employees in investigator titles.^{3/} Office sizes vary, but usually there are five or fewer investigators reporting to an assistant chief or chief investigator.

Head investigators are not part of the Public Defender's management team for determining the budget. Nor are they part of the current headquarters' operations committee determining administrative and personnel matters. Head investigators do participate on a training committee chaired by the Assistant Director of Investigations.

We next examine the functions and responsibilities of the chief and assistant chief investigators. We preface our discussion with some observations about this part of the Turnpike Authority standards.

We agree with the State that it is right to focus on what an employer charges its employees with doing. Job descriptions

^{3/} But in the six offices with both chief and assistant chief investigators, chief investigators appear to be second-level supervisors.

are presumptively important and accurate indicators of an employee's authority and accountability. They are not, however, dispositive: we must look at the actual job responsibilities, authority, and relationship to management of the employees holding the job title in question. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); Montvale. But if employees in that title are charged with exercising managerial executive authority and are to be held accountable for misexercising that authority, then the fact that superiors occasionally override decisions or reject recommendations by some employees in that title will not lead to the loss of managerial executive status.

We reiterate Turnpike Authority's holding that a managerial executive need not exercise organization-wide power, especially in a large organization, if that employee has significant power, discretion and influence within a department. Accord Gloucester Cty., P.E.R.C. No. 90-36, 15 NJPER 624 (¶20261 1989). But breadth of authority is still a relevant consideration: the broader an employee's authority and the more closely related to the central mission of the organization, the more likely it is that the employee is a managerial executive.^{4/}

^{4/} Compare NLRB v. Louisville Gas & Elec. Co., 760 F.2d 99, 119 LRRM 2069 (6th Cir. 1985) (pollution control analysts lacked sufficient authority over fundamental policy); Maccabees

We also note that the statutory definition of managerial executive does not require that an employee be responsible for formulating or directing the effectuation of labor relations policies. Compare Bell Aerospace (rejecting NLRB's adoption of such a test). But in applying the statutory definition, we believe it is proper to keep in mind the competing legislative concerns: the Legislature saw both a public interest in permitting public employees to organize and negotiate over their own terms and conditions of employment and a public need to deny representational rights to managerial executives because of a concern about divided loyalties. The more power employees have over labor relations and personnel policies and such key matters as staffing, budgeting and financial determinations, the greater the concern about potential divided loyalties and the more likely it is we will find an employee to be a managerial executive.

Finally, we note that employees are not excluded from the Act simply because they have the authority normally exercised by a supervisor or professional employee. Their responsibilities must reflect a greater degree of authority and accountability.

4/ Footnote Continued From Previous Page

Mutual Life Ins. Co. v. NLRB, 757 F.2d 767, 118 LRRM 3173 (6th Cir. 1985) (claims representatives not managerial since authority limited to "relatively unimportant areas"); Iowa Elec. Light & Power Co. v. NLRB, 717 F.2d 433, 114 LRRM 2526 (8th Cir. 1983) (quality control inspectors lacked sufficient authority over fundamental policy).

The job description for chief investigator states that a chief is in charge of investigative work programs and investigative staff within a regional office. The job description lists duties such as: supervising investigators in all phases of field and office work; making assignments and instructing investigators, directing the preparation of investigative records; training investigators; supervising and reviewing investigators' reports and other work; supervising such operations; evaluating employees; and recommending hiring, firing, promoting, demoting and/or disciplining employees.

The job description for assistant chief investigator is almost identical, but adds that the assistant works under the direction of the chief investigator. However, this is so only in the largest offices where there is a chief investigator as well as an assistant chief investigator. In most offices, the assistant chief acts as the head investigator. In smaller offices, the assistant chief may also carry a caseload.

Performance agreements for both titles (R-40; R-41) list the first major work assignment as supervising and directing staff investigators in all areas of investigation and case preparation.

The job descriptions and performance agreements charge head investigators with performing largely supervisory responsibilities. Those supervisory functions include both functions specified by N.J.S.A. 34:13A-5.3 -- hiring, firing and discipline -- and other functions commonly performed by

supervisors -- assigning work and overtime; training, instructing and evaluating employees; keeping work unit records, and making other personnel recommendations about individual employees.^{5/} At the same time, the responsibility of head investigators to oversee their work unit as a whole and to ensure the adequacy of its work product can be seen as entailing a larger responsibility than simply supervising each individual employee reporting to them.

The responsibilities of head investigators are closely related to the mission of the Office of the Public Defender. That mission is to provide effective legal representation for all indigent persons in criminal proceedings. Accomplishing that mission requires both an adequate investigation before trial and competent representation at trial. Trial representation is provided at the regional office level. The head investigators in the regional offices have authority and accountability for overseeing investigations on a daily basis and ensuring their quality.

^{5/} The National Labor Relations Act excludes supervisors from its coverage and defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical in nature, but requires the use of independent judgment. 29 U.S.C. §152 (11). (Emphasis supplied). Governor Cahill proposed adopting this broader definition of supervisors and then excluding all supervisors so defined from the Act. The Legislature rejected that proposal.

The deputy public defender is the manager in charge of each regional office. The authority of head investigators to make decisions about regional office practices does not extend beyond the sphere of normal daily investigative operations. Head investigators have the authority and accountability to oversee their investigations staff, but deputies expect to be apprised of problems in personnel matters and particular cases. If there are conflicts between attorneys and investigators that cannot be resolved informally, deputies have the responsibility for resolving the disputes. Deputies also have the responsibility for deciding whether and how to arrange attorneys and investigators into work teams, but they consult with the head investigators and receive valued advice or recommendations.

Head investigators do not have responsibility for labor relations policies or budgeting, staffing, and financial determinations. Decisions about these matters are made at Trenton headquarters. For example, chiefs and assistant chiefs do not work on any financial reports, do not serve on the management team for reviewing budgets, and were not part of headquarter determinations concerning staffing ratios and layoffs. On this record, there is little reason to fear that head investigators, if permitted to organize, would be effectively negotiating with themselves or exercising budgeting, staffing, or financial power disloyally. We also note that head investigators did not have any say on statewide policies concerning conflicts of interest, political activities, press contacts and gifts.

We next examine the discretion exercised by head investigators. We preface our discussion with some observations about this part of the Turnpike Authority standards.

A managerial executive need not have final responsibility for signing off on policies, provided his or her recommendations effectively control what policies will be adopted by establishing their key components. See Turnpike Authority v. AFSCME, 289 N.J. Super. 23, 36 (App. Div. 1996); Ocean Cty. Utilities Auth., P.E.R.C. No. 98-120, 24 NJPER 212 (129100 1998); Union Cty., P.E.R.C. No. 48, NJPER Supp. 166 (148 1970); NLRB v. Yeshiva Univ., 444 U.S. 672, 683 (1980). However, we will distinguish between the exercise of a managerial executive's discretion to effectively determine policies and the duty characteristic of staff positions to suggest courses of action or supply information. We will look to see who has the effective discretion and power to call the shots in formulating policies or directing their effectuation.

Unless a statutory exclusion applies, the Act covers supervisors, technical experts, and professional employees. Such employees may exercise substantial discretion and authority within their areas of expertise and responsibility, yet still be entitled to seek representation if they do not formulate or direct the effectuation of managerial policies and practices. Compare Yeshiva at 690 n.30; Flinkote Co., 217 NLRB No. 85, 89 LRRM 1295 (1975); General Dynamics Corp., 213 NLRB No. 124, 87 LRRM 1705

(1974); see also Rabban, Distinguishing Excluded Managers from Covered Professionals under the NLRA, 89 Columbia L. Rev. 495 (1989); Note, Collective Authority and Technical Expertise: Reexamining the Managerial Employee Exclusion, 56 N.Y.U. L. Rev. 694 (1981). Also, an employee may have considerable discretion, but not be a managerial executive if his or her exercise of that discretion must conform to established policy. Bell Aerospace Co., 219 NLRB No. 42, 89 LRRM 1664 (1975); Eastern Camera, 140 NLRB No. 569, 52 LRRM 1068 (1963). We thus will ordinarily look for a level of managerial discretion beyond that normally exercised by a supervisor, technical expert, or professional employee, or an employee implementing established policy.

The regional offices provide the daily services of the Office of the Public Defender without daily supervision by the central office, although Gevers works closely with the head investigators and speaks with them regularly by telephone. The delivery of investigative services is decentralized: state-wide guidelines do not govern how investigations are to be conducted and investigative procedures vary according to how the courts operate in each county. But the record does not indicate that head investigators have adopted or effectively determined investigative policies independent of requirements established by the courts or the central office. So long as problems do not arise, head investigators generally act independently in overseeing daily investigations and supervising and assigning

investigators. But they must consult with and defer to the regional office deputy or Gevers on any non-routine matters such as requesting experts; reassigning cases to another office; resolving disputes and changing lines of communication between attorneys and investigators; suspending, prioritizing or reopening investigations; changing investigative procedures; disciplining investigators; and responding to a client's complaints about access to an investigator's work. They do not have the discretion or authority to resolve such problems.

Head investigators also exercise some discretion and influence in responding to concerns and suggesting innovations implicating both legal and investigative functions. In that regard, we cite Caterino's collegial interactions with deputy public defenders in creating work units of attorneys and investigators and working out problems in the CJP program. But it is the deputies in charge of the regional offices who have the responsibility and discretion to determine policies encompassing both legal and investigative functions.

Head investigators also serve on a training committee and help plan curricula for all investigators. That role differs somewhat from the role of a supervisor in training individual employees. While such a role may require the use of professional discretion and judgment; it does not necessarily make that employee a managerial executive. Milwaukee Children's Hosp. Ass'n, 255 NLRB No. 130, 107 LRRM 1025 (1981) (staff development

instructors not managerial); see also County of Rensselaer (Coordinator of Human Resources responsible for training College personnel not managerial).

Finally, head investigators served on a past operations committee that developed forms for regional offices to use in recording requests for investigations, the results of investigations, and the time spent on cases and in obtaining subpoenas. These forms record basic information rather than set investigative policies.

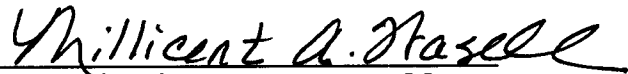
Weighing these factors and considering their interplay, we conclude that chief and assistant chief investigators do not formulate management policies and practices or direct their effectuation. We have fully considered that these employees' responsibilities are tied to the Public Defender's mission to provide competent legal representation to indigent clients. They oversee daily investigations in the decentralized regional offices and must ensure the quality of that investigation. But the work units they oversee are small -- typically five or fewer investigators -- and their responsibilities as set forth in the job descriptions and performance agreements are largely supervisory. They appear to be low-level supervisors who can determine whether subordinate investigators have done an adequate job in specific cases or whether more work is needed; but they lack power to determine organizationally the means and resources that will be committed to achieving the policy objective of

providing competent representation. These employees do not serve on the headquarters' management team or current operations committee and do not have effective power or influence over the choices made by management officials concerning the policies to be adopted, the courses of action to be followed, or the staffing levels and fiscal resources to be allocated. Within the regional offices, the deputy is the person in charge and responsible for coordinating policy implementation among the different sections of the office and resolving any intersectional conflicts or unusual problems. While the deputies appear to possess the higher-level of policymaking authority and accountability required by Turnpike Authority, the head investigators do not.

ORDER

The chief investigators and assistant chief investigators are not managerial executives.^{6/}

BY ORDER OF THE COMMISSION


 Millicent A. Wasell
 Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: December 17, 1998
 Trenton, New Jersey
 ISSUED: December 18, 1998

^{6/} Given the parties' agreement as to how the petition should be processed, we enter no further order.

H.O. NO. 97-2

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

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

Docket No. RO-H-94-91
(Chief Investigators and
Assistant Chief Investigators-
Office of the Public Defender)

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Petitioner.

SYNOPSIS

A Hearing Officer recommends that the Commission find that chief investigators and assistant chief investigators in the State Office of the Public Defender are not managerial executives within the meaning of the Act. The chiefs and assistant chiefs do not formulate policies. They have no effective input into policy development. The chiefs and assistant chiefs are effectively first-level supervisors over the regional office investigators. As such, they do not "oversee or coordinate policy implementation by line supervisors", a component of the managerial executive test as set forth in Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980). In addition, chiefs and assistant chiefs may exercise discretion only in limited areas which are primarily ministerial.

Therefore, the Hearing Officer finds that the chiefs and assistant chiefs are not managerial executives under the standards set forth in Montvale, nor under the tests established by the Appellate Division in N.J. Tpk. Auth., P.E.R.C. No. 94-24, 19 NJPER 461 (¶24218 1993), rev'd and rem'd 289 N.J. Super. 23 (App. Div. 1996), certif. granted ___ N.J. ___ (1996).

This is an interlocutory Hearing Officer's Report on a petition to represent third-level supervisors employed by the State of New Jersey in various departments. Pursuant to the parties' pre-hearing stipulation, either party may now file interim exceptions in accordance with N.J.A.C. 19:11-7.3. Alternatively, the parties may choose to file exceptions with the Commission after hearings have been conducted and reports issued with respect to all of the petitioned-for titles.

H.O. No. 97-2

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

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

Docket No. RO-H-94-91
(Chief Investigators and
Assistant Chief Investigators-
Office of the Public Defender)

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Petitioner.

Appearances:

For the Public Employer
Peter Verniero, Attorney General
(Michael L. Diller, Senior Deputy Attorney General)

For the Petitioner
Weissman and Mintz, attorneys
(Clare Pessolano, of counsel)
(Steven P. Weissman, of counsel, on the brief)

HEARING OFFICER'S REPORT AND
RECOMMENDED DECISION

On December 17, 1993, March 29, 1994, and April 19, 1995, Communications Workers of America, AFL-CIO filed a Petition for Certification and Amendments seeking to represent a collective negotiations unit of third-level supervisors employed by the State of New Jersey in various departments. CWA proposes to include about 275 employees in 62 titles in the proposed unit. The State objects to the petitioned for unit. It contends that all of these employees are managerial executives and therefore excluded from representation

under the New Jersey Employer-Employee Relations Act, N.J.S.A.
34:13A-1.1 et seq.

On March 29, 1994, the Director issued a Notice of Hearing. The parties stipulated that hearings would initially be conducted and decisions sequentially issued on certain groups of titles to answer the question of their alleged managerial status. Hearings concerning the chief investigators and assistant chief investigators in the Office of the Public Defender were conducted on June 15, 16, August 19, 23, October 18, 20 and December 1, 1994.^{1/} The parties presented documents, examined witnesses and filed post-hearing briefs by February 26, 1997.^{2/} This report and recommended decision, which is the first in the series, concerns the alleged managerial status of chief investigators and assistant chief investigators in the Office of the Public Defender. Based upon the entire record,^{3/} I find as follows:

FINDINGS OF FACT

1. The CWA seeks to represent about 35 chief and assistant chief investigators in the Office of the Public Defender.

^{1/} This portion of the hearings was reassigned to me pursuant to N.J.A.C. 19:11-6.4, when the originally designated Hearing Officer took a leave of absence from the Commission.

^{2/} Following the hearings, the parties jointly requested we suspend processing of this matter to permit the parties to pursue settlement discussions. Settlement efforts have not been successful, however, and the matter is ripe for a decision.

^{3/} The transcripts of each successive hearing day shall be referred to as "1T", "2T" and so forth. The parties' joint exhibits shall be referred to as "J-", the Employer's exhibits as "R-", and the Petitioner's exhibits as "P."

The primary mission of the Public Defender's Office is to represent indigent persons charged with indictable offenses in criminal proceedings in New Jersey (1T17; 7T11).

Organizational Structure

2. Until recently, the Office of the Public Defender was part of the Department of Public Advocate. Effective July 1, 1994, that department was abolished and the Public Defender's Office was placed "in but not off" the New Jersey Department of State (1T13). In the transition, a few small offices formerly in the Department of Public Advocate were also moved to the Office of the Public Defender, namely, the Mental Health Advocacy Office and the Division of Disabilities Advocacy Office^{4/} (7T10-7T11; R-24, R-26). All of these offices employ investigators, including chief investigators and assistant chief investigators (1T13-1T14).

3. The Office of the Public Defender is headed by the public defender who reports to the Governor (R-1). She is assisted by Deputy Public Defender Ina Levisohn. Thomas Smith, the first assistant public defender, reports through Levisohn to the public defender (R-1). Smith is assisted by two assistant public defenders, Dale Jones and Diana Johnston (R-1; 1T86-1T88). Tom Scully, a deputy public defender, has also recently been reassigned to headquarters to assist Smith (1T86). Although part of the

^{4/} The Inmate Advocacy Office and the Office of Dispute Settlement were carried in the transition but have since been abolished.

"management team", Scully does not appear to be one of the line positions in the chain of command (1T86-1T87).

There is a regional Public Defender's Office in each of the 21 counties (R-2 through R-23). Each regional office is headed by a deputy public defender (the "deputy"), who reports either to Smith or one of his assistants (R-2 through R-23; 1T15, 1T67-1T68). For supervision purposes, Smith has divided the regional offices into three geographic groups: one area reports to Johnston, one to Jones, and one to Smith directly (5T20-5T21). The regional offices range in size from the largest, Essex, with a staff of 124 employees spread over two divisions, to the smallest, Hunterdon, with a staff of 6 employees (R-8, R-9, R-12).

4. In addition to the regional offices, Smith supervises six divisions, including the Investigations Division, which is headed by the Investigations Director William Gevers (1T67). Gevers' office is located in headquarters in the Trenton Justice Complex (1T30). Gevers reports to Smith (1T82). Gevers has two deputy administrators assisting him -- Jim Irving and Bob Davis. Smith considers the public defender "management team" to consist of himself, his assistant public defenders and Gevers (1T91).

5. The deputy supervises his or her regional office staff, including attorneys,^{5/} the investigations staff, and the clerical support staff (1T15, 1T68). The public defender employs

^{5/} The staff attorneys hold the civil service title assistant deputy public defender I or II.

approximately 167 investigators, virtually all of which are assigned to these regional offices (2T14). The investigators report to either an assistant chief investigator or a chief investigator, depending upon the size of the regional office. The staff investigators hold the title investigator, senior investigator or principal investigator, as determined primarily by length of experience (1T25).

6. CWA currently represents the regional office staff attorneys, investigators, and senior investigators in its State-wide professional unit, the principal investigators in its primary level supervisors unit, and the clerical support employees in its administrative unit. The chief investigators and assistant chief investigators are unrepresented (J-1, J-2).

A "head investigator" is in charge of the investigations staff in each region (1T15, 1T21). In the ten largest regional offices, a chief investigator fills the role of head investigator. In the largest regions, the chief is assisted by one or more assistant chiefs. In the smaller regional offices, the head investigator role is filled by an assistant chief investigator (1T22).^{6/} In some regions, the chief and assistant chief have independent responsibilities. For example, in the Atlantic County

^{6/} Prior to a reorganization in 1992, all regional offices had assistant chiefs directly supervising the investigative staff. Chief investigators worked out of headquarters and supervised investigations staff in a cluster of several regional offices (1T114, 1T20-1T23).

office, the chief is in charge of investigators in the Adult Section, while the assistant chief supervises the investigators in the Juvenile Section (1T21).

7. The chiefs and assistant chiefs have dual reporting lines: for personnel, administrative and investigative policy matters, they report to Gevers or one of his assistants; for case-related, day-to-day supervision, including matters involving interface with the attorneys, they report to the deputy supervising the regional office (R-2 through R-23; 1T31).

8. Chiefs and assistant chiefs who act as head investigators in their regions are evaluated and rated on a Performance Assessment Review ("PAR") by the deputy in charge of that regional office. Gevers and the deputy meet together with the head investigator to discuss the evaluation, and Gevers signs it (1T91, 5T34-5T35, 6T31, 6T63). In offices where the assistant chiefs report to a chief, the chief evaluates the assistant, and the evaluation is reviewed and signed by the deputy (5T33).

Job Descriptions

9. The civil service job descriptions for the chief investigators and the assistant chief investigators (R-28 and R-29) were most recently revised in 1992.^{7/} The job description for

^{7/} John Collins, Assistant Chief in the Somerset region, testified that R-29 accurately represents the responsibilities of assistant chief investigators (6T53).

chief investigator provides^{8/} that a chief:

...has charge of work programs and staff of division or programs with...the largest regional offices...supervises investigators in the performance of all phases of field and office work; makes assignments and gives instructions to investigators, directs the preparation of appropriate records of investigations; supervises and participates in training for investigators; supervises the preparation of and reviews investigators' reports and other work; supervises work operations; responsible for employee evaluations, recommending hiring, firing, promoting, demoting and/or disciplining employees (R-28).

The chief investigator is required to possess a bachelor's degree and five years field investigations experience, including two years of supervisory experience (R-28).

10. The job description for assistant chief investigator (R-29) provides,

Under direction of the Chief Investigator, has charge of work programs and staff of a division, program or regional office....

7/ Footnote Continued From Previous Page

Hudson Chief Investigator Noreen Caterino testified that the job descriptions for chief and assistant chief are basically reflective of the duties and responsibilities of those titles, except that chiefs and assistants do not create or review any financial reports (3T32).

8/ The job description does not reflect changes implemented by a 1992 reorganization, since it inaccurately refers to chiefs having regional responsibility which is contradicted by testimony.

However, this job description is accurate only for those assistants who work in larger offices where they report to a chief investigator. As noted above, in smaller regional offices, the assistant chief acts as head investigator and reports to the deputy and to Gevers, as do chiefs acting in the role of head investigator.

The job description further describes the responsibilities of assistant chief investigators as identical to those described for chief investigators (R-29). The assistant chief job description requires a bachelors' degree with four years field investigatory experience, and one year of supervisory experience (R-29).

All chiefs and assistant chiefs have attended at least three of the six levels of certified public manager courses sponsored by DOP (1T65, 4T11-4T12).

11. According to Gevers, the chief investigator "manages, supervises and directs the operations of the investigator staff" (1T17). In larger offices, the chiefs or assistant chiefs acting as head investigators are primarily responsible for coordinating the activities of the investigation staff and acting as a liaison between the staff attorneys and the investigators (2T120). Chiefs do not ordinarily carry an investigative caseload. In smaller offices, the assistant chief acts as head investigator, and is responsible for the supervision and administration of the investigative staff, and also carries a caseload (2T120, 2T69).

For example, in Essex, which is the largest region both in terms of caseload and employees, the chief does largely administrative work and leaves the daily supervision of the investigative staff to the assistant chiefs. The Essex office is composed of an Adult Division and a Juvenile Division (R-28, R-29). The Adult Section has three assistant chiefs reporting to the chief; they are each assigned a unit of investigators to make supervision easier (1T41, 1T42). The assistants in the Adult Division assign, review and supervise the investigators' work.

In Hudson, Chief Investigator Noreen Caterino supervises nine investigators (3T55). She is aided by an assistant chief, a newly created position in that region whose duties have not been fully developed (3T59). Caterino also coordinates the Central Judicial Processing ("CJP") court program and an intern program, and handles most of the administrative matters (2T69-2T70, 3T41, 3T50).

Work Assignments

12. The head investigator is responsible for prioritizing and assigning investigations to the investigative staff and insuring the timeliness and quality of their reports (2T118, 5T37). The head investigator in each region develops and maintains daily operating procedures such as case assignment and review methods (1T35). These procedures include methods of logging clients, investigations, and case assignments (3T116-3T117). Case management procedures are computerized in most regions, but vary from region to region (3T117-3T118). Smith explained that there are no written guidelines

or procedural manuals dictating investigation case assignment or review methods because the courts in each County operate somewhat differently. However, memoranda setting standards and policies are periodically circulated to regional staff (1T19, 1T34, 1T71).

13. All cases are assigned to the regional office directly from the courts. Persons charged with criminal offenses can apply to the court for Public Defender services. The court evaluates the defendant's indigency and, when appropriate, assigns the case to the Public Defender's Office for representation. The court sends the appropriate form and the complaint to the regional Public Defender's Office, where a file is initiated. The head investigator is responsible for securing a copy of the complaint from the court if it has not been provided. The investigation process begins when the chief, assistant or the attorney completes a form (P-1) requesting an investigation (3T12, 3T13, 3T95-3T96). The chief or assistant chief assigns the case to an investigations staff member for processing and preparation of the case for trial (1T17).

14. The assigned investigator initially conducts an interview with the client, either at the jail or in the regional office. He reviews the allegations in the complaint, advises the client of the charges, and gets a detailed report of the events surrounding the incident leading to the charges (1T18). The investigator secures the client's signature on reimbursement forms and attempts to collect a \$50 administrative fee (1T18).

Once assigned, the investigator has discretion, under the supervision of the head investigator, on how to best prepare the case for trial. In addition to interviewing the client, typical investigations may also include interviewing victims and witnesses, reviewing discovery materials, following up on leads, taking photographs, making diagrams and measurements of the crime scene, and requesting experts to review the crime scene (1T37, 3T20).

15. Requests for investigations also come from outside "pool attorneys" or attorneys from other regions handling "conflict cases."^{9/} The investigators are also periodically assigned to handle "service requests" -- tasks which are not part of a specific case investigation -- such as subpoena service, file deliveries, and client transport (2T24). Service requests may come from the attorneys, the deputy or headquarters. The chief or assistant chief investigator assigns these based upon investigators' availability (3T25, 3T11).

16. The method of assigning investigators varies from office to office. In some offices, a new case is assigned directly to an investigator and an attorney on a rotational basis (1T20, 1T36). But in most offices, the head investigator assigns investigations cases to the investigative staff directly. The

^{9/} Conflict cases occur when there are multiple defendants. The first defendant is assigned to the attorney in that regional office, while other defendants are assigned to an attorney from another regional office or contracted out to a pool attorney (5T45).

assignment decision is based on the nature and complexity of the investigation requested and the investigator's experience and caseload (1T19, 1T36, 3T19, 5T54-5T55, 6T25). The head investigator maintains a log of the investigation assignments (2T23).

Review of Investigations

17. The head investigator insures that the investigations are completed on time. Assistant Chief John Collins, the head investigator in the Somerset County region, sets a completion deadline for his investigators (6T25). Hudson County's head investigator Noreen Caterino requires her investigators to give the assigned attorney a status report on outstanding cases beyond their requested return date, explaining why the investigation has not been completed (3T106).

Further, the head investigator insures the quality of the investigations and written reports (3T19, 3T109).

18. The investigator completes a summary of the investigation on the request form (P-1), a full investigatory report (P-2), and an activity sheet (P-3) accounting for his time for billing purposes (3T98, 6T19-6T20, 6T54). The head investigator signs each investigation report, on a standard form which was developed by the headquarter's Operations Committee (3T17, 3T100). Caterino reviews each investigator's report, while Collins checks them randomly (3T19, 3T10). When Caterino feels that the investigation is incomplete or the report deficient, she returns it to the investigator for further investigation. When she is

satisfied, she closes the investigation and submits the report to the assigned attorney (3T19-3T20, 3T98). In Somerset, if the attorney wants additional investigation or further interviews, Assistant Chief Collins returns the file to the investigator (6T26, 6T59).

19. Investigators may have 35 to 40 open investigation cases (1T38). The chief or the assistant chief investigator meets regularly with the investigators to review the status of their cases and give assistance and direction (1T38, 3T26). He may suggest solutions for problem witnesses or suggest a conference with the assigned attorney to get clarification on a request. For example, Caterino will meet individually with an investigator if she believes he is carrying too many outstanding investigations (3T107). Sometimes as a result of this meeting, Caterino directs a course of action for the investigator to get old cases closed. To keep cases moving, the chief or assistant chief may decide that continuing investigation would be unproductive and may close the investigation (1T39, 2T110). These meetings also enable the head investigators to address an inequitable distribution of assignments (2T23).

20. The chiefs and assistants periodically meet with their investigative staffs collectively to discuss office and call-in procedures, vouchers submission, mileage tracking, vehicle maintenance and assignment, attorney complaints, and problems over obtaining information (3T27, 3T29). Chief Caterino meets with her investigative staff monthly (3T50).

Interface with Attorneys.

21. The chief or assistant chief acts as a liaison between the investigative staff and the attorneys (1T57). Chief Caterino often consults with attorneys concerning problems with investigations (3T50).

22. If the assigned attorney seeks additional investigation, that request is made through the chief or assistant chief, who would likely assign the same investigator to the second investigation. Central Office policy dictates that such a request be honored (1T49, 1T94, 3T23).

The chief or assistant chief also acts as a liaison between the investigators and the attorneys in court; attorneys frequently call the chief to request that an investigator serve subpoenas or transport witnesses (1T57).

23. When the head investigator cannot directly resolve conflicts between the attorneys and investigative staff, he may ask the deputy to intervene, or he may bring the problem to Gevers' attention (3T21-3T22). For instance, an attorney will sometimes ask to reopen an investigation after the chief authorizes its closing (3T108). Another such problem occurs when the attorneys do not give the investigators enough time to complete the investigations (3T28). When Caterino felt that the attorneys were too frequently tying up her investigators with rush jobs, she asked the deputy to remedy the problem. The deputy addressed the issue with the attorneys in a staff meeting (3T109, 3T110). If the deputy does not

resolve the problem to the head investigator's satisfaction, the head investigator may contact Gevers about it (3T120).

24. Requests to have an investigation reassigned to another regional office because of a conflict of interest between clients and witnesses must be brought to Gevers' attention. Assistant Chief Collins had such a situation in the Somerset region, and Gevers reassigned the investigation to another office (6T22-6T23).

The head investigator also consults with the assigned attorney or the deputy about the need for experts (2T102).

Reporting to Gevers

25. Gevers has divided the regional offices geographically into three sections for better control. He and his assistants each supervise a section of the State. As a result, Gevers has direct contact with the chiefs and assistant chiefs in the northern area (1T31). Gevers works closely with the chiefs and assistant chiefs and regularly speaks with them by phone (2T80, 1T33, 3T122-3T123). Gevers or his assistant occasionally visits the regional offices (2T32, 2T76, 7T80). The chiefs and assistant chiefs call Gevers for decisions, advice or information concerning such matters as personnel problems, equipment, cars, expert witnesses and assigning investigators from other regions to handle multi-defendant cases (1T31). Gevers sometimes refers complaints from clients to the appropriate chief or assistant chief to handle (1T32).

26. Gevers occasionally visits the regional offices in his geographic section to meet with the chiefs and assistant chiefs and discuss office operations, staffing shortages, ways of meeting the workload demands and any problems they may be having.^{10/}

Gevers' last visit to the Hudson regional office was precipitated by a client's complaint about access to the investigator's work (4T47). Gevers met with the assigned investigator, the chief, and the deputy (4T47). The result was that Gevers instructed the deputy to have the attorneys submit written requests for investigation through the chief instead of directly to the investigators (4T48).

27. The chief or assistant chief investigator for each regional office submits a monthly activity summary (R-32 through R-37) to Gevers showing the investigations staff workload for the month, including the number and type of investigations requested, number completed, and number and type of service requests handled (1T30, 1T52, 6T55). In larger regions, the chiefs delegate this task to their assistant chiefs, then prepare a consolidated report (3T42-3T43).

28. While the deputy public defender is in charge of a regional office, the extent of the deputy's involvement with the

^{10/} Gevers testified that he also occasionally discusses "policies" and "management of the investigations operations" with them, and reviews some investigations files "just to get a feel for what is going on" (1T64). This statement is too generic to be given any real weight in showing the chiefs have input into policy.

investigations staff is to coordinate investigative problems through the head investigator, handle complaints about investigations, and keep the investigations staff up to date about procedural changes (1T48-1T49). Deputy Patricia Kay in the Morris region expects her chief investigator to take responsibility for the day-to-day supervision of the investigative staff, but she also expects to be apprised of problems as they occur (5T114-5T115).

Deputy Kay's involvement with the chief investigator concerns specific investigation cases and personnel problems (5T36). She mediates disputes between the attorneys and the investigative staff over requests which the investigators feel they given inadequate time to complete (5T36).

The deputy is also responsible for time records of the regional office staff, including investigators (2T117).

29. In some instances, the deputy has overridden the chief's assignment of an investigation. In Essex, when an attorney expressed concern over the assignment of an inexperienced investigator, the deputy mediated the disputed assignment with the chief ((5T49, 5T50-5T51). The deputy has the authority to override a chief's assignment of an investigation, but the chief could discuss the matter with Gevers (5T52). As deputy, Kay has only become involved in the assignment of investigation cases five or six times (5T66).

30. The Hudson region deputy has also become involved with the assignment of investigators. The chief and the deputy discussed

whether the assignment of investigators to court runs would be done rotationally or permanently assigned (5T56, 5T126). In another situation, the deputy told the chief to change the procedures of assigning service requests because the deputy believed the existing procedure was ineffective (5T57). Deputy Kay also interceded in an assignment of an investigator to the CJP court when the chief wanted to rotate the assignment; Kay told the chief that the timing was inappropriate and directed him to wait (5T58, 5T128-5T130).

Evaluations (PARS)

31. Investigators are evaluated twice annually (6T77). The PAR evaluation format was created by the State Department of Personnel. The PAR evaluation criteria against which investigators are measured was developed by Gevers and his assistant, together with a personnel officer (2T111). The assistant chief or the chief serves as the "rater" for investigators' evaluations. The rater may add items to the standardized evaluation criteria to consider an investigator's special assignments or area of specialization (2T111, 2T120, 2T122). After the rater completes the investigator's evaluation, it is then submitted to the deputy for review, then to Gevers and to the Department's personnel office (1T47, 2T54, 2T58-2T59, 6T63).

Personnel Actions

32. Chiefs and assistant chiefs do not have independent hiring authority. Candidates for investigator positions are either appointed from a civil service list or hired provisionally from

applications and resumes sent to headquarters (1T122). The hiring criteria for investigators is set by the State Department of Personnel and is included in the approved job description (1T106). Gevers or his assistant conducts initial interviews with the applicants and then sends approved candidates to a regional office for an interview with the deputy and the head investigator (1T104, 1T106, 3T74, 5T98). The deputy and the chief or assistant chief provide Gevers with feedback after the interview (3T73, 3T76-3T78, 5T100).

33. The public defender recently approved a policy of aggressively recruiting latino investigators by creating a bilingual variant of the investigator title with the Department of Personnel approval. Gevers is responsible for implementing this policy (1T120).

34. Once hired, new investigators are given an orientation by the deputy and the region's head investigator (5T102). The head investigator is responsible for developing the new hire's on-the-job training and will ordinarily assigns a senior member of the investigative staff to act as mentor to the new employee (5T103).

35. Investigators are promoted frequently from one regional office to another, either permanently or provisionally (1T120-1T121). Head investigators have input into the decision to promote investigators. Caterino has written letters to Gevers recommending the provisional promotion of certain investigators (4T37). Gevers makes a recommendation to Smith on all promotions,

who passes the recommendation on to the public defender for final approval (1T103-1T104).

36. The chiefs and assistant chiefs have no power to impose discipline; all discipline, including reprimands and referrals for counselling, must come through Smith and must be approved by the public defender (1T74, 7T83-7T86). The chief may recommend to the deputy that an investigator be disciplined (1T72). If the deputy agrees, the matter would be referred through Smith to the public defender (1T73).

The public defender's current policy with regard to compensating overtime is to give the employee compensatory time off, not cash payment (2T16). The chiefs and assistant chiefs frequently approve investigators for overtime work (2T16). The investigators' use of their compensatory time off is arranged through the chief or assistant chief (2T17, 2T116). The head investigator approves the investigators' use of sick, vacation and personal leave time (2T19), although requests for long-term leaves must be approved by the Operating Committee in headquarters (2T20).

Budgeting

Chiefs and assistant chiefs have only negligible input into the budgeting process. The development and monitoring of the public defender's budget is done State-wide through the operations staff in headquarters to maximize resources. Each regional office does not prepare nor are they given a separate budget (5T36).

The deputies heading each regional office are asked for a "wish list" of potential budget items (1T79, 1T86). The deputies may ask for input from their head investigators in preparing the wish list (1T89, 3T65).

Staffing

Decisions on the allocation of staff to the regional offices are made by Smith (5T82). For example, Deputy Kay has no authority to make decisions on investigator staffing levels or other personnel matters -- those decisions are made by Smith and his two assistant public defenders, with input from Gevers (5T9-5T11, 5T24, 5T18). Smith and his assistants have set staffing ratios for the regional offices which key the number of staff positions to the number of sitting criminal judges (5T19). When the Essex office was operating below this ratio, the courts complained that cases were not being promptly assigned. The chief and assistant chiefs, and even the regional deputies, have little effective input into staffing decisions.

37. Gevers reviews the monthly activity forms, including the case load numbers, completed by each regional office to determine whether the regional offices are sufficiently staffed (2T21). If a regional office appears understaffed, Gevers contacts the head investigator to discuss staffing (2T21).

38. If the head investigator feels his staff is insufficient to keep pace with workflow, he may discuss the problem with the deputy or ask Gevers for more staff (1T98). However, the

record shows that their staff requests were usually denied (3T130).^{11/}

39. Decisions on implementing a staff reduction are also made at the headquarters level. The most recent lay-off involving investigative staff occurred in 1992. The public defender asked Smith to work with other central office management and develop a plan. Smith looked at regional office caseloads and also solicited input from Gevers to decide where to reduce staff. The chiefs and assistant chiefs were not consulted (1T76-1T77).

40. Gevers recently recommended through Smith that the public defender seek Department of Personnel approval for bilingual variants of the investigator titles (2T112, 4T13-4T14). Gevers also recently recommended that mediators in other sections of the former Public Advocate's Office be reclassified into the investigator titles series (2T112). Further, Gevers and Smith recommended that the investigators in the recently abolished Parole Bureau be

^{11/} Gevers testified that he could temporarily reallocate investigators from another office or, with Smith's approval, hire temporary workers (1T98-1T100). However, the record does not show that the chiefs' requests for additional staff have ever been granted. Over the last three years, Assistant Chief Collins repeatedly asked Gevers to assign an additional investigator to the Somerset office because a member of his staff functions virtually full-time as the State-wide polygraph expert. Collins' requests have been denied (6T69). Caterino testified that her role in staffing has been limited to "whining to headquarters" that she needs more investigators (3T71). When one of the Hudson investigators resigned, Caterino asked for a replacement employee. Although Gevers initially supplied her candidates from a lay-off list to interview, he subsequently advised her that the positions would have to remain unfilled (4T16).

reassigned and integrated with other investigators staff. The public defender implemented these recommendations. Chiefs and assistants did not contribute input towards these decisions (2T114).

41. Shortly after Caterino was appointed chief in the Hudson region, an assistant chief position was created based upon a recommendation from Gevers to Smith. Caterino had no input into the decision to create that position nor what role that new position would take, such as whether the assistant would carry a caseload. Chief Caterino does not believe she has the authority to reduce the assistant's caseload without first consulting with Gevers (3T133, 4T17).

42. Chiefs have had input into decisions made by deputies to arrange the attorneys and investigators into work teams. For example, the Essex deputy decided to rearrange the investigations staff into work units, each headed by an assistant chief and teamed with a unit of attorneys to make workflow more manageable (3T125). The deputies have relied on the chief's input with regard to consideration of the investigators' skills, experience levels and bilingual abilities (5T104-5T105).

Training

43. Training for investigators consists of some formal training provided by headquarters and on-the-job training. The Training Committee, chaired by Investigation's Assistant Director Jim Davis, is composed of chiefs and assistant chiefs which are selected by Gevers and serve rotationally. The Training Committee

develops the training program curriculum, including course outlines, and the training schedule. Gevers reviews and submits the training curriculum and schedule to Smith for approval (1T27, 6T42). The first level of formal training is taught by senior investigators,^{12/} and covers the basics involved in criminal defense, law, and evidence (1T26, 3T33). Investigators are given hand-out materials and a manual detailing the points to cover in an investigation (4T11). There are also advanced training courses for senior, experienced investigative staff members, including principal investigators, assistant chiefs, and chiefs. Specialty training for experienced investigators, such as DNA training, identification, arson, drugs, and pathology, are performed by outside trainers (1T109-1T110, 6T43). The Training Committee also has input into the selection of trainers, e.g., outside specialists, staff attorneys, and members of the senior investigative staff (1T29, 2T82, 2T85-2T88, 4T11, 4T18-4T19). The Training Committee is currently developing training for report writing (2T91).

44. The chief and assistant chief design on-the-job training for new investigators (4T10-4T11). The chief or assistant chief assigns a senior investigative staff member to act as mentor to train new investigators about methods of delivering subpoenas, interviewing techniques, dealing with clients, and interfacing with court personnel (2T64, 2T121, 3T33-3T35).

^{12/} The last formal training for new investigators was done by principal and senior investigators using a panel format (4T52).

Operations Committee

The Operations Committee today is a group of managers, chaired by Investigation's Assistant Director Jim Irving. This committee makes recommendations to the public defender on administrative matters, and is composed of central office personnel (1T111). At one time, chiefs and assistant chiefs participated on an "operating committee." While Caterino was a member of that committee, it worked on standardizing the exit interview process for Department personnel. Caterino was unaware of whether the project was ever completed. This committee also created a universal subpoena form (P-4) and a new file jacket format (4T54). However, that operating committee has not met for a number of years^{13/} (1T645, 2T20-2T21, 3T78-3T80).

Control of Equipment/Supplies

45. The purchase of equipment and supplies is done by a requisition process through headquarters (1T116). The chiefs and assistant chiefs have no purchasing authority. The deputy must sign a reimbursement voucher even for petty cash expenses such as photographic film and keys (1T117, 2T109, 3T65-3T66, 5T39). Chiefs may ask for equipment replacement such as tape recorders through

^{13/} I believe that the operating committee that Caterino served on is not the same in purpose or structure as the committee now referred to by Gevers as the "operations committee", composed of central office personnel and making policy recommendations to the public defender.

headquarters, but the requests are not always granted.^{14/} The deputies are authorized to order supplies through the Department's director of administration in headquarters. However, these orders are not always approved (5T39). The deputies may order court transcripts when they believe it is appropriate (1T116, 5T40-5T41). The deputies can commit to expert witnesses only after approval from Smith (5T40). Investigator's out-of-State travel to interview witnesses must be cleared through Smith (1T95). Travel reimbursement vouchers must be approved by the deputies (3T68, 4T42).

46. The chiefs and assistant chiefs have no say about the allocation of State cars to their regional office (3T28). When one of her region's two assigned cars was lost to an accident, Caterino asked Gevers to have the car replaced; her request was denied (3T139, 4T44-4T45). The chief is responsible for the daily assignment of the available State cars to staff (1T59, 3T28).

47. When a head investigator needs the services of an expert as part of an investigation, he makes a request to Gevers' to secure an expert from another regional office or to hire an outside consultant (2T34). The Public Defender's Office has in-house experts in narcotics, fingerprint, video, arson, polygraphs, scattered throughout the State. Gevers or his assistant authorizes the use of investigative experts depending on

^{14/} Caterino testified that every time she tries to order equipment such as tape recorders, she is told she cannot have it (3T67).

availability, technical expertise, and financial considerations (1T96, 2T35, 2T97-2T99, 4T49, 4T57). Smith has final approval on the use of outside experts (2T35).

Staff Meetings

48. Gevers does not hold regular meetings with his staff (2T26). He occasionally conducts a staff meeting among the chiefs and assistants to discuss pending personnel matters, budget situations, court decisions, and administrative matters (2T26-2T27, 6T48, 6T62; R-38 & R-39). One such meeting involved a explanation of the impact of State travel policies on regional offices and the use and assignment of State cars (2T23, R-38).

At another staff meeting, Gevers discussed administrative fees and cost-saving measures with the chiefs and assistant chiefs (2T30, 6T46; R-39). At a recent staff meeting, Gevers, Davis, Irving and representatives from the agency's personnel department reviewed the proper technique for completing PAR evaluations with the chiefs and assistant chiefs (6T45). The most recent meeting involved a discussion of the merger of the field representative titles with the investigator titles (6T50); however, that decision had already been made without input from the chiefs or assistants (3T62). Staff meetings are primarily informational; recommendations by chiefs and assistant chiefs are rarely solicited (6T75, 3T63-3T64).

The chiefs and assistant chiefs are occasionally asked to attend meetings with the deputy commissioner or Smith when

State-wide issues are discussed (5T41). For example, when the Department decided to impose an administrative fee on clients to open a file, a meeting was held to discuss the amount of the fee, and the methods of collecting the money (5T43, 5T131-5T132). The procedures for collecting the fee was left up to the deputies in each region, as it is a function of who sees the client first (5T133-5T134).

Policy Decisions

There is no State-wide procedures manual on how investigations are to be conducted or reports written, although guidelines are handed out to new investigators during their training. The head investigator has authority to direct his or her investigations staff unless it impacts on some other area (1T111, 3T105, 3T138). But the chiefs and assistants have no authority to prioritize the level of investigation cases, suspend field investigations, or limit participation in CJP court without approval of the deputy (3T71).

49. Caterino described her input into policy decisions as factual. For example, as an assistant chief, she informed Gevers that the investigative unit in Essex was seriously understaffed. Gevers decided that the Bergen and Essex regions would share an investigator. The Chiefs in each region worked out the scheduling of the investigator's time (3T91-3T92).

50. John Collins testified that regional office procedures are dictated in part by the methods by which the courts function in

that County (6T68). To seek a change in procedures, the chief or assistant would make a recommendation to the deputy (6T56-6T57). For example, Collins has no authority to change the communications lines between attorneys and investigative staff to require the attorneys to only communicate with him. Such a decision would have to come from the deputy (6T74). As an assistant chief, Collins has not changed procedures (6T74).

51. When Caterino became chief in Hudson, she recommended to the deputy that investigators be paired into teams with the attorneys, clerks and court personnel. The deputy agreed to implement the team approach experimentally for six months (3T52-3T53, 4T28). Chiefs and assistant chiefs have no authority to change the method of assigning investigations without the deputy's approval (3T54). They may decide procedural matters; they could require investigators to call in more often, they could review investigators' work more often. Chiefs and assistant chiefs could change requirements about the use of State cars, change procedures on opening files or method of conducting investigations (3T54). Decisions concerning the allocation of investigators to CJP court would require the deputy's approval (3T54).

Memoranda are frequently issued from headquarters concerning such policy issues as conflict of interest, political activities, and accepting gifts (6T65).

52. The chiefs and assistants had no involvement in the Department's policies about staff conflicts of interest. A

recently adopted policy about investigators' contacts with the press was ordered by the Commissioner's Office; the chiefs had no input (3T84, 4T41). The chiefs were not involved in developing the policy to recruit bilingual investigators (3T86, 3T90).

53. In 1992, Gevers recommended that the field representative supervisors in other divisions of the Public Advocate's Office should be consolidated with the chief and assistant chief titles to provide a career ladder for field representatives. The chiefs and assistant chiefs had no voice in that decision. The Commissioner and the State Department of Personnel approved the decision (2T74, 2T75).

CJP Court

54. In Hudson, Chief Caterino coordinates the investigative staff's interaction with the County Central Judicial Processing ("CJP") Court and meets regularly with the County jail and Prosecutor's personnel to resolve problems with that program, which involves the use of a video linking system to conduct the initial interview of the defendants prior to arraignment (3T46-3T49). Caterino directly supervises the interns and investigators assigned to the CJP court (3T44).^{15/}

Caterino is working with the deputy to iron out the logistical problems associated with investigations being done by

^{15/} Inmates are kept at the County jail and meet with investigators through video link-up. They are arraigned before a judge and bail is set, also through video link-up (4T20).

this method (4T27, 3T43-3T44). Caterino assigned an investigator to the CJP court, but will recommend greater use of student interns to take over some of the CJP client investigations (3T44, 4T21). This decision needs the deputy's approval (4T50). Caterino also expanded the scope of work given to student interns to include a greater share of the ministerial work such as doing mail runs, some initial interviews, some clerical work, and serving subpoenas (4T23, 3T45).

Chiefs and Assistants As First-Level Supervisors

55. Although the principal investigators are represented in CWA's primary level supervisors unit, they are not the first line of supervision for the investigative staff -- the chief or assistant chiefs are. As experienced investigators, the principal investigators handle more complex and serious cases. They need little direction. The principals train new investigators and do some administrative work such as coordinating the collection of the administrative fees and supervising unpaid interns and aides (1T25, 1T45, 2T55, 4T72-4T73). Principals may take charge in the absence of the assistant chief, and have limited authority when they are the highest ranking employee in the office.^{16/}

The chief or assistant chief serves as the contractual "first level supervisor" to hear CWA grievances by investigators (4T7).

^{16/} Rolando Velazquez, a principal investigator in the Essex Adult Region, testified that as a principal, he has no authority to assign, review, supervise, or evaluate work of less senior investigators, even in the absence of the assistant chief (4T58, 4T61, 4T69, 4T77).

Other Divisions

56. The Division of Mental Health Advocacy, formerly a division of the Office of the Public Advocate, became part of the Public Defenders' Office July 1, 1994 (2T6). MHA represents mentally ill persons in hearings before courts and psychiatric boards (2T6, 6T107-6T108). There are six regional offices, each having a staff of attorneys, investigators, and clerks. MHA is headed by the Division Director Lily DeYoung, who reports to the public defender (7T12, 6T88). DeYoung is assisted by Deputy Director Reilly. A deputy public advocate II heads each regional office. An assistant chief is in charge of the investigations staff in each regional office. The assistant chief reports to the deputy public advocate II (R-24; 2T6-2T8).

57. The Law Guardian Unit represents juvenile clients to protect their interests in matters before the courts, such as abuse cases and children committed to institutions (2T7-2T8). The 13 investigators working for the Law Guardian Unit report to an assistant chief (2T8).

58. The Division of Developmental Disabilities, another division formerly in the Public Advocate Department, represents disabled persons, both institutionalized and in society, to protect their interests. This division is headed by Division Director Sarah Mitchell. Two assistant chiefs report to Mitchell and supervise the division's investigations staff. Gevers only has oversight in terms of administrative and personnel matters (R-26; 2T10).

Investigations in the Division of Developmental Disabilities involve review of hospital charts, interviews with hospital staff and client's relatives, and writing investigation reports which the attorney uses as a basis for representing the client in a hearing (6T109-6T110). There are 60-70 commitment hearings held a week (6T110).

59. Gevers is responsible for the investigative staff in these two divisions in terms of administrative and personnel matters (2T8). The assistant chiefs in these divisions have similar responsibilities in terms of overseeing investigations staff as other areas of Public Defender's Office (2T9).

60. James Levister is an assistant chief investigator in the Mental Health Division. He reports to Gormley, the deputy II in the Mercer regional office (6T88). Levister was formerly a field representative I, the highest ranking field representative in the Mental Health regional offices, and similarly supervised investigators in that title (6T90, 6T92-6T93).

As an assistant chief, Levister currently supervises three investigators. He also carries a caseload. He assigns investigation cases, reviews investigation reports, and handles problems and complaints from attorneys about those investigations (6T95, 6T99-6T100). He meets with his investigators weekly to assign incoming cases and schedule the workload (6T96-6T97). This method of assigning cases was developed by the managing attorney (6T123). In addition, miscellaneous inquiries are generated by

telephone calls and in-person visits from clients. These inquiries are assigned to investigators on a rotating basis. Levister checks the investigators' work and directs them on particularly difficult cases or new issues (6T98-6T99).

Deputy Gormley completes the PAR evaluations for investigators based upon input and recommendations from Levister (6T100). Director DeYoung acts as the reviewer (6T100, 6T103).

The assistant chiefs in these sections participate with other chiefs and assistants in State-wide departmental meetings conducted by Gevers (6T111-6T112). However, practically speaking, the investigative staff does not report to Gevers for day-to-day supervision; they continue to report to the managing attorney and the regional deputy (6T118).^{17/} However, the staff formerly from the Public Advocate's Office are gradually being assimilated into the new organizational structure (7T9).

ANALYSIS

N.J.S.A. 34:13A-5.3 gives public employees the right "to form, join and assist any employee organization..." However, the statutory right to organize and negotiate collectively does not extend to managerial executives. N.J.S.A. 34:13A-5.3. The State asserts that chief investigators and assistant chief investigators are managerial executives and therefore are ineligible for union representation.

^{17/} Levister testified that he was never informed that investigative staff would now report to Gevers (6T118).

The Act defines managerial executives as:

...persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices....
N.J.S.A. 34:13A-3(f).

In Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980), the Commission discussed its standards for determining whether an employee formulates or directs the effectuation of policy within the statutory definition. It stated:

a person formulates policies when he develops a particular set of objectives designed to further the mission of the governmental unit and when he selects a course of action from among available alternatives[;]

directs...the effectuation of policy when he is charged with developing the methods, means and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors..., [and,]

...possess[es] and exercise[es] a level of authority and independent judgment sufficient to affect broadly the organization's purpose or its means of effectuation of these purposes...
6 NJPER at 508, 509.

The Commission also added that the determination should focus upon the interrelationship of three factors:

"...(1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises..."
6 NJPER at 509.

Recently, however, in N.J. Tpk. Auth. and PERC and AFSCME, P.E.R.C. No. 94-24, 19 NJPER 461 (¶24218 1993), rev'd and rem'd 289

N.J. Super. 23, 22 NJPER 114 (127060 App. Div. 1996), certif. granted ___ N.J. ___ (1996), the Appellate Division found that the Commission misconstrued the statutory definition of "managerial executive" in finding the Turnpike's middle level managers not to be managerial executives and, therefore, eligible for union representation.

First, the Appellate Division approved the parts of the Montvale test which define "formulating" and "directing" policies, but added a reference to "practices" as well as policies. 289 N.J. Super. at 34. Second, the Court observed that a managerial executive "need not formulate policies and practices and be responsible for directing the effectuation of policies and practices. One or the other is sufficient." 289 N.J. Super. at 35.

Third, the Appellate Division noted that "...the term 'formulate' is not the equivalent of 'adopt' and would seem to encompass the responsibility for recommending policies and practices, particularly where the manager's recommendations form a key component of the ultimate determination." 289 N.J. Super. 36.

However, the Court specifically rejected part three of the Montvale standard, requiring a managerial executive to "possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes." The Court said,

It is not only agency heads and their directors, i.e., the top level managers who possess the

necessary statutory qualities. There is nothing in the definition of managerial executive which excludes middle level managers from its scope if those employees possess the necessary qualities....Whether or not an employee is a high level manager and whether or not what he or she does broadly affects the agency are not dispositive. 289 N.J. Super 35.

Finally, the Court approved the Montvale factors that we generally look to in deciding managerial executive status: the employee's position in the hierarchy, functions and responsibilities, and extent of discretion the employee exercises. 289 N.J. Super. at 34. .

* * * *

Applying the statute and standards as set forth in Turnpike, the first criteria is position in the organizational hierarchy. The chiefs and assistant chiefs, where they function as head investigators in a regional office of the public defender, are four steps down in the Departmental hierarchy. They are, effectively, the first level of supervision over investigators. They organize and assign the investigators' work. They review their work for timeliness and quality. They evaluate the investigators, recommend promotions, initiate disciplinary actions, and serve as the first level supervisor in the grievance process. They do not, as the Montvale test requires, "direct the effectuation of policy" by "oversee[ing] or coordinat[ing] policy implementation by line supervisors." The chiefs and assistant chiefs are the line supervisors.

Second, they do not formulate policies, nor do they even have effective input into policy development. Policies effecting the delivery of service -- representing the clients -- are made in headquarters at least at Smith's level, and often require approval of the public defender.

Personnel policies such as discipline, overtime, employee titling and compensation, and training programs are all controlled from above, as are policies effecting the conduct of investigations. Policies which emanate from headquarters have included requiring continuing investigation if the attorney so desires, the ability to call experts in an investigation, the press policy, the assessment of an administrative fee to clients, and the pairing of investigative staff and attorneys into teams. The chiefs and assistants have had no significant involvement in or recommendations to any of the Department's policy decisions.

Third, the chiefs and assistant chiefs have exercised discretion only in limited areas which are primarily ministerial -- methods of tracking case assignments, whether to review every investigation file or randomly check them, and what criteria, if any, to add to the investigators' standardized evaluation. The exercise of this level of discretion is typically exercised by a supervisor, particularly one supervising professional employees.

Finally and notably, the chiefs and assistant chiefs lack any authority in the area of budgeting and staffing. Under the Montvale test as approved by the Court in Turnpike, a managerial

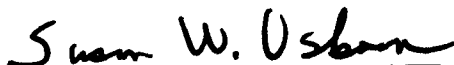
executive "directs effectuation of policy when he...develops the methods, means, and extent of reaching a policy objective." The chiefs and assistants lack the authority to control or even effectively influence decisions on budget expenditures, except to submit a request to headquarters. Moreover, these requests, including such items as equipment and cars, are often rejected.

Similarly, they lack authority for staffing. They do not effectively decide, or even recommend, staffing levels, or the type of staff, such as bilinguals, generalists or specialists. These decisions are made at Smith's level or above, with recommendations from Gevers. The "input" from the chiefs and assistants is limited to the statistical information they supply on a monthly report.

Thus, it is clear that the chiefs and assistant chiefs do not effectively control the policies or the means by which this agency accomplishes its mission.

RECOMMENDATIONS

Accordingly, I recommend that the Commission find that the chief investigators and assistant chief investigators, Office of the Public Defender, are not managerial executives within the meaning of the Act.



Susan Wood Osborn
Hearing Officer

DATED: March 7, 1997
Trenton, New Jersey