P.E.R.C. NO. 52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CAMDEN
DEPARTMENT OF PUBLIC SAFETY, DIVISION OF FIRE
Public Employer

and Docket No. RO-14

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS
LOCAL 788, AFL-CIO
Petitioner

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CITY OF CAMDEN
DEPARTMENT OF PUBLIC SAFETY, DIVISION OF FIRE
Public Employer

and Docket No. RO-166

CAMDEN FIRE OFFICERS' ASSOCIATION
Petitioner

DECISION AND DIRECTION OF ELECTIONS

Pursuant to a Notice of Hearing to resolve a question concerning representation, a hearing was held on December 15, 1969 before ad hoc Hearing Officer Alexander M. Freund on a petition filed by International Association of Fire Fighters, Local 788, AFL-CIO seeking to represent in one unit all fire officers and firemen of the City of Camden. Subsequently, in his Report the Hearing Officer recommended that the unit sought be found an appropriate unit. Upon consideration of the record and that Report, the Commission remanded the case for further hearing on the question of the supervisory status of the officers. Thereafter, a petition was filed by the Camden Fire Officers Association seeking to represent the officers, including the Chief, in a separate unit. The two petitions were consolidated and the hearing on remand took place on September 8, 1970. The Hearing Officer issued his second Report on December 2, 1970. Both the Employer and the Camden Fire Officers Association have filed exceptions to that second Report. The Commission has considered the entire record, the Hearing Officer's Reports and Recommendations and the exceptions and finds on the facts in these consolidated cases:

1. The City of Camden, Department of Public Safety, Division of Fire, is a public employer within the meaning of the Act and is subject to the provisions of the Act.
2. The International Association of Fire Fighters, Local 788, AFL-CIO, is an employee representative within the meaning of the Act.
3. The Camden Fire Officers Association is an employee representative within the meaning of the Act.
4. In his second Report the Hearing Officer found that only the Fire Chief was a supervisor; he recommended that all other officers be included

with the firemen in one unit. The Employer and Camden Fire Officers' Association except on similar grounds: the officers are supervisory personnel within the meaning of the Act and, even if not, there exists a potential conflict of interest between them and the firemen which requires the establishment of separate units.

Subsequent to the Hearing Officer's second Report, the Supreme Court issued its decision in Board of Education of the Town of West Orange v. Elizabeth Wilton et al, _____N.J._____(January 26, 1971). In an earlier disposition of that same case, the Commission had found appropriate a unit of supervisors including the Director of Elementary Education who was the highest ranking supervisor below the Superintendent. The inclusion of the Director was disputed and became the issue on appeal. In its decision, the Court examined at length the problems attending the establishment of negotiating units consistent with the purposes of the Act and its provisions. The Court recognized that at least with respect to the treatment of supervisors the legislative intent to be gleaned from the Act was not entirely free from doubt. 1/ There is no express provision which would resolve the central question of whether gradations of supervisory authority are to be ignored in determining which supervisors may properly be grouped together for purposes of negotiations. The Court concluded that it was error to group supervisors in a single unit without regard to their relative proximity to management and to their employer delegated authorities over other supervisors in the same unit. In arriving at that conclusion the Court referred to the policy declaration in the Act, i.e., the establishment and promotion of fair and harmonious public employer-employee relations, in the public interest. It referred to certain fundamental and generally accepted considerations in labor-management relations, e.g., unit determinations should not incorporate actual or potential conflicts of interest between or among segments of the unit; when parties approach the negotiating table, each side requires and is entitled to the undivided loyalty and allegiance of its constituents.

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1/ The Court did not define the word "supervisor". Definition was not an issue. However, the Court did recite the definitions found in other state and federal statutes which govern employer-employee relations. New Jersey's statute does not contain such a definition. In the absence of such the Commission has felt constrained to rely upon, for definition purposes, certain attributes which the Legislature coupled with the word "supervisor", and by construction the Commission has concluded that a supervisor is one having the authority to hire, discharge, discipline or effectively recommend such action. Frequently, perhaps typically, in public administration the authority to hire, fire or discipline is rigidly circumscribed by regulation and tends to be vested only in a few, possibly just one administrator at the top of the organization or beyond him to a board of control. Also the authority or responsibility to make effective recommendations on such matters tends not to be far removed from the one exercising final authority. In
(continued on page 4)

The Court referred to the pertinent provisions of the statute and the necessary implications thereof: "community of interest", which presumes a unity and harmony of interest; the general exclusion whereby managerial executives are denied representation rights and supervisors (absent certain exceptional situations) may not be represented by an organization which admits non-supervisory personnel to membership; and the reasonable implication to be drawn from such language that those exercising supervisory authority over other supervisors should be separated whenever such exercise gives rise to substantial conflict of interest. Observing that the Director of Elementary Education was duty-bound to supervise the work of school principals (supervisors) and to evaluate their performance for the purpose of reporting and making recommendations to the Superintendent with respect to salary increases and tenure for them, and that the Director was part of the grievance committee established to speak for other supervisors, the Court went on to hold that:

> "...where a substantial actual or potential conflict of interest exists among supervisors with respect to their duties and obligations to the employer in relation to each other, the requisite community of interest among them is lacking, and that a unit which undertakes to include all of them is not an appropriate negotiating unit within the intendment of the statute."

The Court remanded the case to the Commission for further hearing and application of the quoted standard to whatever facts were adduced at the hearing.

In the instant case neither the Employer nor the Association, both of whom contend that officers are supervisors and in any event should be confined to a separate unit, claims that there exists or should exist a distinction among or between classes of officers which would warrant or require the establishment of several units of officers according to class, levels of authority or any other characteristic. The Hearing Officer found, in reliance on past decisions of the Commission, that none of the officer group, save the Chief, has or exercises the authority to hire, discharge, discipline or effectively recommend regarding such matters, and therefore they are not supervisors. We agree that his factual determination is supported by the record and that his conclusion is consistent with the Commission's prior treatment of the same issue. Thereupon, the Hearing Officer recommended, again in reliance on past commission decisions, that all non-supervisory employees be included in a single unit. It is the Commission's opinion that the Supreme Court's rationale in the Wilton case, supra, requires a re-examination of that approach. To be sure, we are not confronted here with the issue of the stratification of supervisory powers within the Commission's definition of "supervisor". Nor are

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1/ (continued) consequence of a definition which is narrow by comparison to those in like statutes of other jurisdictions and in further consequence of the prevailing administrative pattern, there result findings like those of the Hearing Officer in the instant case: in a unit of some 280 employees, there is only one supervisor.

we involved with the separation of "supervisors" from non-supervisors within the meaning of those terms as heretofore used by the Commission. But notwithstanding the absence of these issues, it is evident that we are involved with the same fundamental considerations looked to by the Court in Wilton. Just as the Court observed that a community of interest does not necessarily exist simply because all the employees involved are found to be supervisory, and indeed can be negated by a showing that as to one or some there is a closer alliance of interest with the Employer by virtue of supervisory duties exercised on the Employer's behalf over fellow supervisors, so also it would seem to follow that merely finding officers not to be supervisory does not necessarily mean that they enjoy a community of interest with firemen. The supervisor v. non-supervisor distinction is not the only boundary to be considered when diagramming the area of common interest on an organization chart. One may have various authorities over other employees, still not be a supervisor as the Commission defines that term, yet be disqualified from unit inclusion because by their nature and exercise such authorities preclude a common bond. Seen from another view, such authorities, though not legally supervisory in character, may nevertheless be so intimately related to service of the management interest that failure to recognize such in making a unit determination would tend to or would in fact compromise that interest.

The record reveals that the Camden Division of Fire has a complement of 280 men, including 51 captains, 12 Battalion Chiefs, 4 Deputy Chiefs and the Fire Chief. The Division maintains 9 fire houses.

As a group the officers are said to be in charge of the equipment and personnel assigned to them, they re-assign or transfer personnel, schedule hours of work and grant time off. In addition, the Hearing Officer found that a Deputy Chief interviews applicants referred by Civil Service for the fireman position, reviews the questionaire compiled by the applicant, investigates and "determines" whether the applicant has a "bad" police or military record and makes a recommendation to the Director of Public Safety. A recruit begins employment with a 3 months probation period under the direction first of a Battalion Chief at the Academy and thereafter under a Captain in the field. These officers record his progress or lack thereof, proficiency, etc. and report their observations ultimately to the Chief. The Hearing Officer found in effect that these reports are essentially factual accounts of whether the employee has demonstrated the capacity to meet the job's requirements rather than a conclusionary recommendation on the ultimate question of retention.

The Hearing Officer also found that Captains and Battalion Chiefs can and do initiate disciplinary proceedings by submitting the facts of the incident with a recommendation that discipline follow. Apparently the Chief decides whether the complaint will be formally

prosecuted and a hearing convened. In the event he agrees, the complaining officer testifies against the firemen in the presence of the Chief, the Deputy and Battalion Chiefs of the Company involved, and the Personnel Officer. These latter four then privately discuss the case, the Chief decides the merits and, if need be, the penalty (within certain limits).

In view of the above, it is questionable whether an officer's recommendation is effective. In matters of discipline the recommendation is subject to an independent investigation of the facts. In matters of hiring, the established procedure permits few options and none calling for an officer's independent judgment except perhaps his assessment that the applicant has a "bad" record. But it would also seem from the evidence that the hiring authority has no greater options. Regarding the probationary employee and the reports submitted by the officer, there is a fine question whether a merely factual account of ability and accomplishments does not, without saying so, amount to a recommendation which inevitably becomes effective. But the evidence here does not establish an affirmative answer.

The record does establish, however, that by virtue of their responsibility and authority in matters of hiring, probation and discipline (even though not supervisory authority by definition), officers are so closely associated and identified with the Employer's interest that a substantial conflict exists in relation to the interest of the firemen. The prospect of a Captain testifying as the complainant against a fireman in a disciplinary proceeding before a board of even higher ranking officers graphically demonstrates the basic incompatability of interest. The requisite community of interest is lacking. Accordingly, it is inappropriate to include the officers in the unit of firemen.

This conclusion of inappropriateness is not overcome by the fact of the 10 or more year history of dealings between Local 788, IAFF and the City of Camden referred to by the Hearing Officer in his first Report. While the record demonstrates that Local 788 has over the years been active in efforts to advance the interests of its members, the relationship with the Employer which evolved does not constitute an "established practice" or history of collective negotiations which would require or warrant the continued joint representation of officers and firefighters. Much of Local 788's significant effort was made on behalf of both fire and policemen and in some cases on behalf of all city employees even though its membership was obviously confined to the Division of Fire. But more importantly the record fails to demonstrate a pattern of negotiations with two sides coming to the table, intent upon resolving differences and reaching agreement (even oral agreement) by compromise or otherwise. Witnesses testified in conclusionary terms that "negotiations" took place, but the details recited indicate that, typically, a request was made for improvement in a particular condition or redress of a grievance, that such request was taken under advisement, then simply approved, rejected or modified

by the Employer or legislative body, and the final result communicated to the Local. Generally, it does not appear that the negotiating process - as that term is understood in labor-management relations - was responsible for the end product. Without this essential element, there is no basis for continuing to combine officers and firefighters especially in view of the present finding that there does in fact exist a substantial conflict of interest between the two groups.

Rather than dismiss the petition of Local 788 on the ground that the unit it sought (officers and firefighters) has now been found inappropriate, and require that organization to file a new petition for an appropriate unit, an election shall be directed in a unit limited to firefighters since such is an appropriate unit. With respect to the officers, the Camden Fire Officer's Association seeks to represent them separately. The Hearing Officer has found only the Fire Chief to to be a supervisor and has recommended his separation from non-supervisors on that basis. No exception has been filed to that particular recommendation. Although Deputy Chiefs are found to be non-supervisory, they shall also be excluded from an officer's unit on the basis that, since a deputy by definition and job requirement acts in the stead of the Chief in the latter's absence, there clearly exists between the deputy and lesser ranks that substantial conflict of interest, actual and potential, which the Supreme Court has held precludes the existence of the requisite community of interest.

By extension it must be concluded that the same reasons which compel a unit separation of officers from firemen, also require that the same organization not be permitted to represent both units. The specific language of the Act raises that prohibition only with respect to supervisors having the authority to hire, discharge, discipline or effectively recommend same. But the Court drew from that language "by reasonable implication" the premise to support its conclusion in Wilton. It seems to the Commission, therefore, that if its extension of Wilton to the case at hand is correct in terms of unit determination, it must by the same kind of reasonable implication raise a bar to the representation by the same organization of those who have now been placed in a separate unit because a substantial conflict of interest has been found to exist. There would be little logic in finding separate units because of a conflict situation, yet providing the opportunity for common representation. As the Court indicated, the controlling factor in unit determination is not what the employee or the employer desires but what will serve the purpose of the Act.

5. The Commission finds appropriate the following units:
   1. "All firefighters employed by the City of Camden, Department of Public Safety, Division of Fire, excluding office clerical, craft and professional employees, police, managerial executives, officers and supervisors within the meaning of the Act."
   2. "All officers employed by the City of Camden, Department of Public Safety, Division of Fire, excluding firemen, the Chief and Deputy Chiefs, office clerical, craft and professional employees, police, managerial executives and other supervisors within the meaning of the Act."
6. The Commission directs that elections by secret ballot shall be conducted among the employees in the units found appropriate. The election shall

be conducted as soon as possible but no later than 30 days from the date set forth below.

Eligible to vote are employees in the units described in Section 5 above who were employed during the payroll period immediately preceding the date below, including the employees who did not work during that period because they were out ill, or on vacation, or on leave of absence, or temporarily laid off, including those in military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Those eligible to vote in Unit No. 1 shall vote on whether or not they desire to be represented for purposes of collective negotiations by the International Association of Fire Fighters Local 788, AFL-CIO. Those eligible to vote in Unit No. 2 shall vote on whether or not they desire to be represented for purposes of collective negotiations by the Camden Fire Officers' Association.

BY ORDER OF THE COMMISSION

William L. Kirchner, Jr.
Acting Chairman

DATED: February 25, 1971
Trenton, New Jersey

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| In the Matter of the Representation Dispute involving<br><br>CITY OF CAMDEN<br><br>and<br><br>INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, Local 788, AFL-CIO<br><br>Docket No. RO-14 | HEARING OFFICER'S<br><br>REPORT<br><br>and<br><br>RECOMMENDATIONS |
| CITY OF CAMDEN<br><br>and<br><br>CAMDEN FIRE OFFICERS ASSOCIATION<br><br>Docket No. RO-166 | |

APPEARANCES:

For the City of Camden:

Isaiah Steinberg, Esq., City Attorney
William Yeager, Director of Public Safety

For the International Association of Fire Fighters, Local 788:

Alfred R. Pierce, Esq., Counsel
James R. Asher, President, Local 788
Kenneth M. Clark, State Delegate
Robert E. Briggs

For the Camden Fire Officers Association

Lee B. Laskin, Esq., Counsel
Frank J. Deal, President
Theodore L. Primas, Acting Deputy Chief
Biaggie P. Ardire, Battalion Chief
Roy R. Moffa, Captain

## Background

Docket No. RO-14, in which the undersigned Hearing Officer issued a Report February 3, 1970 recommending that all uniformed members of the Camden City Fire Department, including officers, be designated as an appropriate unit for collective negotiation, was remanded to him by the Public Employment Relations Commission (hereinafter referred to as the Commission) for the purpose of taking additional evidence on the question of the supervisory status of the officers in the Camden Fire Department. Subsequently, June 26, 1970, this case was consolidated with Docket No. RO-166, in which the Camden Fire Officers Association seeks certification as exclusive representative of all officers of the Camden Fire Department: Chief of Department, Deputy Chiefs, Battalion Chiefs and Captains.

In a letter of clarification, dated July 14, 1970, the Executive Director of the Commission, Louis Aronin, advised all parties that the hearing scheduled in the consolidated cases was being held "...pursuant to an order of remand by the Commission for the limited

purpose of '...taking additional evidence on the question of the supervisory status of the officers in the Camden Fire Department.'"

The Hearing Officer met in Camden, New Jersey on September 8, 1970 with representatives of the parties involved: the City of Camden (hereinafter referred to as the Employer, the International Association of Fire Fighters, Local 788 (hereinafter referred to as the Union) and the Camden Fire Officers Association (hereinafter referred to as the Association).

## Discussion and Findings

The Employer and Association, in support of their position that officers are supervisors, refer to several kinds of authority that officers exercise in the performance of their duties. Thus, according to these two parties' testimony, officers are in charge of the equipment and personnel within their respective jurisdictions at the scene of a fire and at the firehouse; delegate duties; reassign or transfer personnel; schedule hours of work; excuse men for duty for personal errands, etc. However, the Commission has interpreted the term supervisor to mean one "having the authority to hire, discharge, discipline or to effectively recommend the same." (Cherry Hill Township, Department of Public Works, P.E.R.C. No. 30, January 9, 1970.) Accordingly, any other attributes of a supervisor, such as those cited by the Employer

and Association, do not establish an officer as a supervisor within the meaning of Chapter 303, Laws of 1968 (hereinafter referred to as the Act).

With respect to the exercise of the kinds of authority which define a supervisor under this Act, there is testimony from the witnesses of the Employer and Association to the effect that officers effectively recommend who shall be hired to fill vacancies in the fireman position. According to this testimony, an employment or hiring board, usually consisting of the Fire Chief, a Deputy Chief, a Battalion Chief and a Captain, interviewed and investigated applicants and made recommendations as to who should be hired to the Director of Public Safety, under whose jurisdiction the Fire and Police Departments fall. Currently, and apparently prior to July 1, 1969, only Deputy Chiefs perform this interviewing and investigative function.

In any event, it is evident from even the Association's testimony that fireman vacancies are filled from among applicants in accordance with the ratings achieved in the Civil Service examination for the position of fireman. Thus, as Deputy Fire Chief Frank Deal testified, "...when the list from the Civil Service is handed down to us, we start with the number one man on the list, by notifying him to come in to Fire Headquarters, and pick up a questionnaire..." (Tr. 55).

Accordingly, an applicant's entitlement to a fireman position derives from his score in the Civil Service examination--not from the recommendation of the interviewing officers.*

It is true, of course, that appointments from the list are made subject to a physical examination and an investigation. But as the following testimony by Chief Deal makes apparent, a physician determines whether the appointee is physically fit, and the purpose of the investigation is to find out whether an employee has a "record" (Tr. 136-7):

> "THE WITNESS: If they pass an interview, then they are examined by the doctor.
>
> If the doctor finds them unfit, then we have to make out our report, which is sent to the Civil Service, as to why the man is to be removed from the Civil Service list.
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> HEARING OFFICER: What constitutes passing the interview?
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> THE WITNESS: Well, let me say this: they fill out a questionnaire. This is notarized by a Notary Public.
>
> We review it.
>
> This states the employment record, the background complete, the time in service, and so forth.
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> * * * *

*The record reveals also that vacancies in all the officer positions, are filled from the eligibility lists (those who passed the Civil Service examinations for the position involved) in accordance with rank of the applicants on the list. Thus no recommendations are made in connection with promotions, the highest man on the list at the time the vacancy occurs receiving the promotion.

"We will say, for instance, that an applicant has a bad police record.

* * * *

or, a bad military record.

Then it's the function of this interviewing board to recommend that this man does not be hired.

HEARING OFFICER: So, you look at the questionnaire, and - to check to see whether there is anything unsatisfactory, or detrimental in their background?

THE WITNESS: Right."

Accordingly, the "recommendations" that result from these interviews and investigations are not within the meaning of "effectively recommend."

The Employer and Association maintain also that officers have an area for effective recommendation in connection with the requirement that new hires serve a probationary period before their appointments are made permanent. The three-month probationary period is served under a Captain at one of the firehouses, except for an eight-week training period at the Fire Academy, which is under the direction of a Battalion Chief, assisted by a Captain. According to the Employer's and Association's testimony, the officers in charge of the training school and the Captain under whom the new appointee serves his probationary period recomend to the Fire Chief whether or not the appointment shall be made permanent.

The record reveals that the new fireman is graded upon completing his training program, the marks he received being entered in his personnel file (Tr. 61). And when the three-month probationary period is completed, the Captain under whom the new appointee has served makes the initial report and recommendation, which are forwarded up the chain of command to the Fire Chief. He reports whether or not the new fireman has fulfilled his duties properly, is neat in his appearance, does his work conscientiously. In no instance, according to Chief Deal, has a Captain ever recommended that a probationary employee not be retained, although there have been occasions where a Captain has recommended that the probationary period be extended because the three-month period was not adequate for an evaluation of the new hire (Tr. 59-60).

Thus the function the officers are performing with respect to a fireman's probationary period, including his training period at the Academy, is to observe his work with a view to determining whether he has the ability to learn and perform the duties of a fireman's job. However, as pointed out previously, the Commission has construed the term supervisor to mean one "having the authority to hire, discharge, discipline or to effectively recommend the same." Therefore, the fact that officers evaluate their new men in terms of whether they are able to meet the requirements of the Fire Department does not satisfy the

criteria of a "supervisor" as set forth in this Act. (See: Middlesex County Welfare Board, P.E.R.B. No. 10, August 20, 1969.)

As to the authority to discipline, including discharge, or to effectively recommend the same, the Association submits in evidence job descriptions for the positions of Fire Chief, Deputy Fire Chief, Battalion Fire Chief and Fire Captain, taken from the Civil Service Job Classification Manual for the City of Camden. The job descriptions speak broadly of the responsibility of these positions for discipline. Thus the definition of the Deputy Fire Chief job reads: "Under the direction of the Fire Chief assists in the management and discipline of the Fire Department..." The Battalion Fire Chief position is defined as follows: "Under the direction of the Fire Chief or a Deputy Fire Chief, assists in the management and discipline of the municipal uniformed fire department by supervising a group of fire companies engaged in providing fire protection..." And among the example of work given in the Fire Captain job description is the following: "preserves order and discipline among subordinates."

The implementation of this broad language concerning discipline in the day-to-day operation of the Fire Department is spelled out in the testimony of the Director of Public Safety William Yeager and Chief Deal, who is President of the Association. Yeager, the Employer's

witness, had held the position of Public Safety Director for only five months as of the date of the hearing and had not yet had occasion to participate in any disciplinary cases (except to review by request some that had occurred prior to his appointment as Director). Deal, a Deputy Chief, has been assigned since 1966 to personnel work including disciplinary matters. The Union relies on the evidence it presented at the first hearing and offers no new testimony.

It is undisputed that none of the officers, including the Fire Chief, may suspend (that is, discipline an employee by loss of pay) or fire.* However, Captains and Battalion Chiefs can initiate disciplinary action by submitting a written report to their immediate superiors, setting forth the details of the incident or complaint, and recommending that disciplinary action be taken. These reports go up the chain of command to the Fire Chief.

The Employer and Association claim that these reports constitute effective recommendations to discipline, as evidenced by the fact that they are rarely overruled by the Fire Chief or Director of

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*According to Chief Deal, no employee has ever been discharged from the Fire Department; on the occasions that it has been determined that an employee warranted discharge, he has been given, and has accepted, the opportunity to resign.

Public Safety. There is also testimony by Public Safety Director Yeager that he would give great weight to the recommendations for disciplinary action made by officers. However, the Employer's and Association's claim cannot be supported in the light of Chief Deal's testimony concerning the procedure that is followed after the recommendation for disciplinary action is received by the Fire Chief (Tr. 114-7). In the example Deal uses to describe the procedure a Captain has recommended that disciplinary action be taken against a fireman who has been tardy in reporting to work on a number of occasions.

The Fireman is notified of the charges, and the Fire Chief conducts a hearing, of which a transcript is taken. Both the fireman and officer testify. Also present at the hearing are the Battalion Chief responsible for the Company involved and his Deputy Chief. They also testify, concerning the charge, if they have knowledge of it, or the fireman's work and past record. After all the testimony is in, the Fire Chief dismisses the fireman and Captain, advising them that they will be notified at a later date of his decision. The Fire Chief then discusses his findings with the Battalion Chief and Deputy Chief and Deal, who is the personnel officer, and arrives at a decision. Deal adds that in cases of tardiness the Fire Chief has been lenient at times, where the offender has been a satisfactory worker and has

good recommendations from his Battalion Chief and Deputy Chief, and meted out a verbal reprimand to be entered into the fireman's record.

The Fire Chief has authority to suspend for a period of one to a maximum of five days with the approval of the Director of Public Safety. If a longer disciplinary suspension is contemplated, the Director of Public Safety holds a departmental hearing in accordance with Civil Service requirements.

It is readily apparent that recommendations from officers to the Fire Chief for disciplinary action are subject to a procedure which provides for independent investigation of the facts and determination of the appropriate disciplinary action. Thus the report and recommendations of the officer initiating the disciplinary action carry weight with the Fire Chief only to the extent that they are confirmed by the facts developed at the hearing. (See: Town of West Orange and Local 692, International Association of Fire Fighters, E.D. No. 6, June 12, 1970.) In fact, this is what Personnel Officer Deal states when he is asked how frequently recommendations from Captains for disciplinary action have been overruled by the Fire Chief (Tr. 97):

> "Well, not that many.
>
> The Chief normally goes by what the recommendations of the Captain are.

> "But, in his findings, or the findings of the other two Chiefs - namely, the Battalion Chief, or the Deputy Chief - if they find that everything maybe in the Captain's report isn't according to what happened, then there is a cause for a lesser punishment, or the case can be thrown out completely."

As pointed out above, the Fire Chief may suspend for one to five days subject to the approval of the Public Safety Director. And the recommendations of the Fire Chief have been overruled by the Public Safety Director on rare occasions, according to Deal's testimony. However, the fact remains that a procedure has been provided for the Fire Chief to determine independently by means of a hearing which of the disciplinary actions recommended by his subordinates are warranted. It therefore appears that the Fire Chief does have the authority to effectively recommend disciplinary penalties of up to a maximum of a five-day suspension.

As to the remaining testimony concerning discipline, the record reveals, as in the first hearing, that a Captain or Battalion Chief can send home a fireman who reports to work intoxicated. But even according to the testimony of Public Safety Director Yeager, this is an emergency measure, taken to prevent harm to the employee or his fellow workers, and is similar to an action taken to release any physically unfit employee from duty (Tr. 14-5). Nor does it appear that the employee

sent home for the day under such circumstances loses any pay.

A Captain also has the authority to "dress down" a fireman, that is, reprimand him, according to Chief Deal. But such reprimands are not entered into his personnel file. Indeed, it is a significant commentary on the authority of officers in the area of discipline that even so minor a disciplinary action as a verbal reprimand may not be made a part of a fireman's file unless it has been meted out as the result of a hearing.

On the basis of the foregoing discussion it is found that none of the Fire Department officers have the power to hire, fire or discipline or to effectively recommend the same except that the Fire Chief may effectively recommend discipline. Accordingly, only the Fire Chief is a supervisor within the meaning of the Act.

## RECOMMENDATIONS

It is recommended to the Commission that all uniformed members of the Camden City Fire Department, including Deputy Chiefs, Battalion Chiefs and Captains, but excluding the Fire Chief, be designated as an appropriate unit for collective negotiation.

Alexander M. Freund
Hearing Officer

Dated: December 2, 1970

STATE OF NEW JERSEY

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| In the Matter of the Representation Dispute between<br><br>CITY OF CAMDEN<br><br>and<br><br>INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, Local 788<br><br>Docket No. RO-14 | HEARING OFFICER'S REPORT and RECOMMENDATIONS |

APPEARANCES:

For the City of Camden:

Isaiah Steinberg, Esq., City Attorney.

For the International Association of Fire Fighters, Local 788:

Alfred R. Pierce, Esq., Counsel
James R. Asher, President of Local 788
Robert P. Olesiewicz, Secretary
Phillip C. Bocelli, Treasurer
Kenneth M. Clark, State Delegate
Also: Joseph J. Anderson, Spencer H. Smith, Jr., Harry Vogel and William B. Young.

## Background

Pursuant to a notice of hearing issued by the Public Employment Relations Commission (hereinafter called the Commission), the undersigned

hearing Officer met with representatives of the parties in Camden, New Jersey on December 15, 1969. A transcript of the proceeding was taken, which was received by the undersigned January 7, 1970.

The International Association of Fire Fighters, Local 788 (hereinafter referred to as the Union) seeks certification as the exclusive representative of: "All Uniformed Fire Fighting and Fire Prevention Personnel Privates 1st and 2nd yr., Captains, Battalion Chiefs, Deputy Chiefs, Chief of Department, Drillmaster, and any other Uniformed member of the Camden Fire Department" (from Petition, dated October 3, 1969). According to the Union's testimony, 280 firemen are employed in the Camden Fire Department, of whom 68 are officers including the Chief of the Fire Department and four Deputy Chiefs. The lowest ranking officers are Captains, the next higher ranking firemen being Battalion Chiefs, of whom there are twelve.

The City of Camden (hereinafter referred to as the Employer) objects to the inclusion of officers in the same unit with privates as contrary to Chapter 303, Laws of 1968 (hereinafter referred to as the Act). The Employer requests that the appropriate unit for collective negotiation be determined in accordance with the principles of the Act, specifically, the prohibition against the inclusion of supervisory and non-supervisory personnel in the same unit.

It is undisputed that the Union is an employee representative within the meaning of the Act or that the Employer is a public employer within the meaning of the Act.

## Discussion and Findings

The relevant portions of the Act are:

Section 5.3

> "...except where established practice, prior agreement or special circumstances, dictate to the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership, and the fact that any organization has such supervisory employees as members shall not deny the right of that organization to represent the appropriate unit in collective negotiations..."

Section 6(d)

> "...The division [of public employment relations of the Commission] shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and nonsupervisors, (2) both professional and non-professional employees unless a majority of such professional employees vote for inclusion in such unit or, (3) both craft and noncraft employees unless a majority of such craft employees vote for inclusion in such unit...."

As the above-quoted provisions of the Act clearly state, supervisors who are empowered to hire, fire, discipline or recommend effectively such actions may not be represented in collective negotiations by employee organizations that admit non-supervisory employees to membership nor may they be included with such employees in the same unit in

the absence of established practice, prior agreement or special circumstances. The Union admits to membership both privates and officers; and the parties agree that privates correspond to non-supervisory employees and officers to supervisors. The Union contends, however, that officers do not have the "power to hire, discharge, discipline, or to effectively recommend the same" and that furthermore, the situation here is covered by the exception language of the Act. The Employer holds to the contrary in both respects.

As to its claim under the exception language, the Union contends that for at least the past ten years it has been recognized and accepted by the Employer as representing officers as well as privates in negotiations on terms and conditions of employment, and that this past practice constitutes an agreement between Employer and firemen. Battalion Chief James Asher, who has been President of the Union for over ten years, testified concerning the various terms and conditions of employment which, he says, the Union has negotiated with the Employer on behalf of both officers and privates. In support of the testimony the Union submits in evidence correspondence between the Union and the Employer's representatives, resolutions and other documents relating to terms and conditions of employment of firemen (Exhibits P-1 through P-17). There is also testimony from Captains Robert Olesiewicz and Kenneth Clark, who are respectively Secretary and State Delegate of the Union, to the effect that in none of the discussions, negotiations or deliberations between

the Union and the Mayor, Directors of Public Safety or Business Administrators has the Union ever been told that it does not speak for both officers and privates.

According to Asher's testimony, he was a member of committees which sometime prior to July 1, 1961 negotiated a paid hospital and surgical insurance plan (Blue Cross-Blue Shield) for all members of the Fire Department and their dependents and an increase of $150.00 in clothing allowance for all firemen (Exhibits P-3 and 4). He was also a member of a committee, Asher stated, which negotiated in 1962 the grievance procedure which is still in effect for all ranks in the Fire Department (Exhibit P-8).

Among other working conditions concerning which the Union has negotiated with the Employer on behalf of all firemen, according to Chief Asher's testimony, are: change in salary payments from semi-monthly to bi-weekly payments with Thursday as the regular pay day (Exhibit P-2); a special payroll disbursement of two days' wages in 1969 so that the total salary and wages paid employees in that year would be equal to the amount provided in the current ordinance establishing pay scales (Exhibit P-5); leaves of absences including sick time in 1964 (Exhibit P-6); change in clothing inspection procedure in 1968 to avoid men reporting back to fire stations for inspection on their time off; amendment of ordinance to provide that injuries incurred in line of duty not be charged against sick leave; delay in putting into effect

the current 42-hour work week ordinance (Exhibit P-10); payment of certain benefits to the family of a deceased officer (Captain F. Bendzyn); and finally, payroll deduction of Union dues, requested in 1962 (Exhibit P-9).

In evidence from the Union are a set of payroll sheets for the pay period ending November 14, 1969, obtained from the Controller's office, which shows payroll deductions for Union dues for all firemen who belong to the Union. According to the testimony of Private Phillip Bocelli, the Union's treasurer, which is not disputed by the Employer, currently 261 of the 280 Fire Department employees have their Union dues deducted; and of the 68 who are officers, 59, including the Chief of the Fire Department and the four Deputy Chiefs, have their Union dues deducted from their salary checks.

Finally, there is testimony from Alfred R. Pierce, who was Mayor of the City of Camden from May 19, 1959 to July 1, 1969, concerning the relationship between the Union and the City administration during his tenure. Until July 1, 1961, during which period the City was governed by the commission form of government, Pierce served as one of the five Commissioners and also as Director of Public Safety, under whose jurisdiction the Fire and Police Departments fall. And from July 1, 1961 to July 1, 1969 Pierce served as Mayor under the Faulkner Act, Plan B type of government, which places the executive power of a city in the Mayor. (Tr. 108-9.)

Pierce testified that under the latter form of government, he, as Mayor, made the final determination of policies in the executive branch

of the government; that during his tenure of office he refused to enter into a collective bargaining agreement with the Union because he had been advised by the City's legal department that such an agreement would be unconstitutional; that pursuant to the State's constitution, he established the policy that the City would negotiate terms and conditions of employment for firemen with the Union or any other employee group that sought representation regardless of the number of employees for whom it spoke; that the only employee organization that ever made any claim to representing the majority of the employees of the Fire Department, including both officers and privates, was this Union; that all of the administrators that served during his tenure were ordered by him to meet with the Union on behalf of the firemen they represented, including officers and privates; and that there were never any departures from this practice to his knowledge. It was stipulated by the Employer and the Union that if Thomas E. Gramigna, who was Business Administrator for the City of Camden from January 1967 to April 1969, were present at the hearing, his testimony would be the same in all respects as that of former Mayor Pierce.

The Employer presents no testimony on past practice; and in the cross-examination of the Union's witnesses there is no challenge of the factual account of the practice as set forth in the Union's testimony. However, the Employer interprets the past practice differently from the Union, arguing that it represented a policy of "accommodation," established to permit any employee or organization to speak to the City

administration regarding grievances or terms of employment; that such discussions were not conducted with the intent of entering into a collective bargaining agreement and, in fact, no such agreement was ever concluded; that, therefore, the discussions between the Employer and this Union do not constitute a past practice of entering into negotiations, if they may be called that, with the Union with intent to recognize the appropriate unit for collective negotiation as one which includes supervisors.

In connection with the question raised concerning the nature of the discussions held with the Union, the Employer points out that some of the Union's requests, such as paid Blue Cross-Blue Shield benefits, were made on behalf of all City employees, and others were made on behalf of both firemen and policemen. Also, the Employer contends that salary increases have never been gained by collective negotiation, such pay increases being granted only by the vote of the people.

It is true, of course, that changes in some terms and conditions of employment as, for example, in wage and salary scales or in the length of the work week, require legislative action to implement the agreement reached by a public employer and employee organization. In some instances further ratification of the agreement may be required in the form of a vote of the people of the political subdivision involved. And where an employee organization seeks a change in working conditions which affects all public employees of the political subdivision involved such as a change in pay levels to meet the increase in cost of living or

fringe benefits like pensions or paid hospitalization; or where a regulation or ordinance affects certain employee groups in common as in the case of firemen and policemen, obviously the change in working conditions must be sought by the employee organization on behalf of all affected employees.

However, these are conditions which are inherent in the public service and continue to exist, of course, under the Act. Thus the Employer seems to imply that an employee organization cannot engage in collective negotiation with a public employer because major working conditions can be changed only by legislative action and such changes must be made on behalf of all affected employees within the political subdivision involved. Obviously, such a position is untenable. The fact is that discussions between an employee organization and a public employer concerning the former's requests concerning terms and conditions of employment are nonetheless a process of negotiation because legislative action is required to implement the changes sought or the changed condition has to be instituted for employees in other agencies of the governmental unit involved.

It is true also, as the Employer contends, that none of the discussions or negotiations with the Union resulted in the execution of a collective bargaining agreement. But a public employer could not be required to enter into a collective bargaining agreement prior to the enactment of Chapter 303 in September 1968, in which it was provided that:

"When agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative." And it was generally the opinion of public employers, as in the case of the Employer involved here, that they were prohibited from entering into collective bargaining agreements. Thus in maintaining that there cannot be an "established practice" within the meaning of the exception language of the Act where no collective bargaining agreement has been concluded, the Employer in effect nullifies the exception language.

Furthermore, in this argument the Employer overlooks the fact that as a result of the discussions between the Union and the Employer concerning terms and conditions of employment, a number of the Union's requests were granted by the Employer and put into effect even though no collective bargaining agreement was executed. Thus the Employer agreed to fully paid Blue Cross-Blue Shield benefits, a cost-of-living increase in uniform allowance, payroll deduction for Union dues, the institution of a grievance procedure, etc. and put them into effect. Accordingly, there is no basis in the Employer's contentions for finding that its interpretation of the past practice as an "accommodation" is correct.

To the contrary, the uncontested Union testimony is that it has been accepted and recognized for at least the past ten years as representing both the officers and privates in negotiations concerning terms and conditions of employment. Those requests which were successfully

negotiated by the Union were put into effect, by administrative action or by ordinance, as required for implementation of the agreements. As a striking demonstration of the fact that the Union was recognized as speaking for officers as well as privates is the fact that it negotiated the payroll deduction of Union dues for both these groups of employees. And although the City administration would have had to meet with any employee organization who purported to speak for firemen on working conditions, it is undisputed that no other employee organization negotiated with the Employer on behalf of privates or officers as separate groups during this ten-year period. Accordingly, it must be found that the Union may represent officers as well as privates within the same unit because there exists an established practice within the meaning of Sections 5.3 and 6(d), which dictates exceptions to the prohibitions against the inclusion of supervisors and non-supervisors in the same unit for collective negotiation and the representation of supervisors in negotiations by an employee organization which admits non-supervisory employees to membership.

With respect to the question whether or not officers have the "power to hire, discharge, discipline, or to effectively recommend the same," the Union argues that the Faulkner Act, Plan B form of government, under which the Employer operates, vests all effective power to hire, fire and discipline in the Mayor, the Business Administrator and the Directors of departments; that the policy which has been applied is that only the Directors of departments may discharge or suspend, after a review and with the consent of the Business Administrator; and that

the purpose of this policy was to prevent the use of disciplinary action for political purposes.

According to the testimony of Battalion Chief Asher, the policy has been applied in the Fire Department as follows. Any infraction of the rules is investigated by the Battalion Chief under whose jurisdiction it falls and a report made out, in which he presents his findings of fact but makes no recommendations as to disciplinary action. The Battalion Chief submits his report through a Deputy Chief to the Chief of the Fire Department, who determines on the basis of the report, and possibly the reports of other officers who may be involved, whether or not an offense has been committed. If the Fire Chief finds that an offense was committed, the matter is referred to the Director of Public Safety for a hearing and, if required, disciplinary action. (Tr. 144-51.)

The Employer had arranged to have Director of Public Safety Harold Melleby testify on the issue of the disciplinary powers of officers, but he did not appear at the hearing (Tr. 122-8). Had he been present, Employer's counsel stated, he would have testified that Captains and Batallion Chiefs have the power to discipline in that they send employees home for the day who report for work late or in an intoxicated condition (Tr. 129, 153).

The Union agrees that a Battalion Chief (not a Captain) has the power to send home a fireman who is intoxicated, after he has had him examined by a competent medical officer to determine whether he is, in fact, intoxicated. The Union claims he performs this action as an

emergency measure. However, the Union challenges the Employer's statement that Captains or Battalion Chiefs may send employees home who show up late for work; and its testimony, by Captain Joseph Anderson, who was disciplined for lateness when he was a private, appears to refute the Employer's contention.

According to this testimony (Tr. 139-41), an employee who is late a few times is orally reprimanded by a Captain or Battalion Chief. If he does not correct his conduct, his continued lateness is reported to the Director of Public Safety (after passing through channels), who metes out the disciplinary action. In Anderson's case, the Director suspended him for one day without pay.

In summary, on the question of whether or not officers are supervisory employees within the meaning of the Act, the Employer does not claim that officers may hire or discharge or effectively recommend such actions. The Union's testimony that officers do not have the power to recommend effectively discipline was not rebutted. In fact, the Employer's offer of proof in the absence of its witness did not extend to a claim that officers may effectively recommend discipline. Thus the Employer's case rests solely on its contention that Captains and Battalion Chiefs have the power to send home employees who report to work intoxicated or late (Tr. 153-4).

On the latter point, however, the record establishes that Captains or Battalion Chiefs may only orally reprimand an employee who fails to

report promptly for work; and that should he continue to be late, he may be suspended without pay only by the Director of Public Safety. And as to an employee who shows up for work intoxicated, the action of sending him home appears to be an emergency measure which the Battalion Chief has to be empowered to make in a line of work which is so hazardous in order to prevent harm to himself or his fellow firemen. (In fact, it is not at all clear that such an employee loses pay for the day, the Employer appearing to contend that it is a disciplinary action whether or not he loses pay /Tr. 143/.) On the basis of this record it is found that officers are not supervisors having the power to discipline or recommend effectively such action.

Accordingly, the Union's petition to represent officers as well as privates of the Camden City Fire Department may be granted on the basis of its claim that officers are not supervisors as defined in the Act and/or its claim that established practice dictates exceptions to the Act's prohibitions against the inclusion of supervisors and non-supervisors in the same unit and the representation of supervisors in negotiations by an employee organization which admits non-supervisory employees to membership.

## RECOMMENDATIONS

It is recommended to the Commission that all uniformed members of the Camden City Fire Department, including officers, be designated as an appropriate unit for collective negotiation.

Alexander M. Freund
Hearing Officer

Dated: February 3, 1970