

P.E.R.C. NO. 2012-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY STATE
(DIVISION OF STATE POLICE),

Public Employer,

-and-

Docket No. RO-2006-087

NEW JERSEY STATE TROOPER
CAPTAINS ASSOCIATION,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Officer's report and recommended decision in a representation petition filed by the New Jersey State Trooper Captains Association seeking to represent a collective negotiations unit of State Police captains employed by the State of New Jersey (Division of State Police). The case was remanded to the Commission by the Appellate Division when the statutory definition of managerial executive and confidential employee changed. The Commission affirms the Hearing Officer's recommendation that a majority of the State Police Captains are eligible for inclusion in the unit.

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, Ballard Spahr, attorneys
(Steven W. Suflas, of counsel)

For the Petitioner, Loccke, Correia, Limsky and
Bukosky, attorneys (Marcia J. Tapia, of counsel)

DECISION

This case comes to us by way of exceptions to a Hearing Officer's supplemental report and recommended decision in a representation case. H.O. 2011-2, ___ NJPER ___ (¶___ 2011). The case was remanded to the Commission by Order of the Superior Court of New Jersey, Appellate Division after the New Jersey Employer-Employee Relations Act's, N.J.S.A., 34:13A-1 et seq. (Act), definitions of "managerial executive" and "confidential employee" for employees in the Executive Branch of State government were amended by P.L. 2009, c. 314. The new definitions were enacted after this Commission issued P.E.R.C. No. 2010-13, 35 NJPER 335 (¶114 2009) which applied the previous

statutory definitions and held some State Police captains are eligible for representation by the New Jersey State Troopers Captains Association ("Association") and others are excluded from the unit as managerial executives, confidential employees, or due to a conflict of interest.

In the supplemental report, the Hearing Officer applied the new statutory definition of managerial executive and determined certain captains employed in the Division of State Police ("Division") are entitled to be represented for collective negotiations finding that their responsibilities, role in policy formulation, and positions in the Division establish that they are not managerial executives. Other captains were found to be managerial executives ineligible for representation because they formulate management policies and practices and are at or above the level of assistant commissioner.

The Division and Association have filed cross-exceptions and responses to the Hearing Officer's Report.

We have reviewed the extensive record. In our prior decision, we summarized the relevant facts regarding the duties of captains and incorporate them here. P.E.R.C. No. 2010-13. We also adopt the findings of fact, with modification, that were found by the Hearing Officer. H.O. 2011-2. We will summarize the new facts as found by the Hearing Officer as they relate to the amended statute.

The Executive Branch of State government is comprised of the 15 principal departments and numerous independent agencies, boards and commissions. The highest or first level in departments is a commissioner or secretary. The second level, reporting directly to a commissioner, is a chief of staff or a deputy commissioner. Assistant commissioners form the third level, typically reporting to a chief of staff or deputy commissioner. These hierarchical relationships are depicted in organization charts. Not all departments utilize assistant commissioners.

At the highest or first level of the Division's organizational structure is the Superintendent/Colonel of the State Police, Superintendent Joseph R. Fuentes (Superintendent or Colonel), a cabinet-level official, who reports to the Attorney General and the Governor.

Reporting to Fuentes is Chief of Staff Lieutenant Colonel Thomas R. Gilbert who is the second-in-command. Organizationally, Gilbert is at the second level of the Division. We modify the Hearing Officer's finding of fact no. 3 to reflect that Lieutenant Col. Gilbert is second in command, but the record does not reflect that the other Lieutenant Colonels and deputy superintendents report to him. Reporting to Fuentes and Gilbert are two lieutenant colonels and three deputy superintendents. They serve at the second level in the Division. Reporting to the

lieutenant colonels and deputy superintendents are approximately 14 majors who form the third organizational level of the Division. Reporting to the majors are approximately 45 captains. Most Captains form the fourth level of the Division's hierarchy.

The Division is organized into four branches: Administration, Investigations, Field Operations and Homeland Security. The Office of the Chief of Staff is equivalent to a fifth branch. Each branch is headed by a lieutenant colonel or deputy superintendent. Branches are further subdivided into sections, supervised by majors, and sections are subdivided into bureaus or offices, supervised by captains.

The captains in the Office of the Superintendent, Office of the Attorney General, Office of Professional Standards, Office of Operation Cease Fire and Office of the Chief of Staff report directly to a lieutenant colonel, deputy superintendent or to the superintendent. The Division is characterized by adherence to the chain of command typical of paramilitary police organizations.

Generally, assistant commissioners in State government are appointed by their commissioners, deputy commissioners or the Governor. According to a Civil Service Commission-generated job specification for assistant commissioners, they report to deputy commissioners or commissioners, placing assistant commissioners at the third level of the hierarchy. Assistant commissioners

supervise others by effectively recommending the hiring, firing and disciplining of their subordinates and they evaluate others' performance.

Assistant commissioners advise commissioners on policies, respond to legislation, develop goals and oversee program evaluation systems, formulate plans and participate on boards, commissions and special purpose committees or teams. Individual assistant commissioners' roles and job duties vary widely.

The annual salaries of all 35 assistant commissioners vary from \$114,558.00 to \$130,168.00 (+/- \$15,600.00 annually), whereas captains' salaries are either \$123,810.02 or \$127,154.73 annually. Captains promoted after mid-2007 receive higher compensation than captains promoted earlier because their salaries advanced higher as lieutenants than the captains' salaries advanced between 2006 and 2011. After this petition was filed in June 2006, the Division did not increase any captain's salary. A majority (58.3%) of assistant commissioners earn more than all captains' average annual salary.

The Hearing Officer summarized the organizational structure of the Departments of Human Services, Corrections, Labor and Workforce Development, Transportation, and Banking and Insurance in her report and concluded that assistant commissioners are subordinate to commissioners and deputy commissioners or chiefs or staff. She determined that the appropriate test under the new statute was a two-part analysis to determine whether a particular

Captain is at or above the level of assistant commissioner and whether the captain formulates management policies and practices. Applying this test, the Hearing Officer revised the findings of this Commission in P.E.R.C. No. 2010-13 and recommended that the Administrative Branch Captains working in the bureaus of fiscal control, budget operations, grants administration and logistics as well as their executive officers should be excluded as managerial executives and the captains in charge of Human Resources Management and the Employee Services Bureau should be excluded as confidential employees. She recommended that all other captains are eligible for representation.

The Division asserts that captains are managerial executives within the meaning of the amended Act and, therefore, are not entitled to representation. It asserts the Legislature "evinced an intent that requires a comparative analysis of the employee group seeking recognition to determine if it is the functional equivalent of an assistant commissioner and that captains are the functional equivalent of assistant commissioners. It advocates that an equivalency test be adopted to determine the similarity of captains and assistant commissioners. Finally, the Division argues that the new definition eliminates the element of formulating management policies and practices for managerial executive employees in the Executive Branch. Thus, it asserts that under the new definition, the sole issue is whether captains

are at or above the level of assistant commissioners and proposes the use of its three-pronged functional analysis.

The Captains Association argues that the new definition requires both that managerial executives formulate management policies and practices and are at or above the level of assistant commissioner. It further argues that most captains are not managerial executives and that the captains assigned to the administration branch, who were previously excluded, should now be included in the negotiations unit.

ANALYSIS

History of Managerial Executive Status

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

From 1968 to 1996, this Commission decided numerous disputed cases about whether particular employees were managerial executives, and under a previous definition, developed interpretive guidelines. In 1996, our Supreme Court examined the guidelines in New Jersey Turnpike Auth. and AFSCME Council 73, 150 N.J. 331 (1997) (Turnpike Authority). That case partially modified, but otherwise approved the long-standing standards set

forth in Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1981) (Montvale).

The Montvale standards 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.

[Turnpike Authority at 337] [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.
[Turnpike Authority at 356]

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

The Court's decision in Turnpike Authority effectively expanded the managerial executive category, and narrowed the category of public employees eligible for collective negotiations rights.

Applying the Turnpike Authority standards to a dispute over State section chiefs in the New Jersey Department of Environmental Protection (DEP), this Commission observed in NJ State (DEP-Section Chiefs), P.E.R.C. No. 99-59, 25 NJPER 48 (¶30021 1998), recon. den. P.E.R.C. No. 2000-34, 25 NJPER 461 (¶30200 1999) (NJDEP):

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

^{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.

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.

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 (¶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. [Id. at 52].

Today, as amended, N.J.S.A. 34:13A-3(f) provides:

Managerial executives of a public employer in the case of the State of New Jersey, means persons who formulate management policies and practices, but shall not mean persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that, in the case of the Executive Branch of the State of New Jersey, "managerial executives" shall include only personnel at or above the level of assistant commissioner.

Division's Exceptions

The Division's primary exception to the Hearing Officer's report is that she did not apply the appropriate test. It argues that in amending the definition of managerial executive, the Legislature intended to limit the analysis of whether an employee in the Executive Branch of the State is excluded from representation to whether the employee occupies a position at or above the level of assistant commissioner. Because the title of assistant commissioner is not used within the Division, it requests we apply a comparative analysis. Based upon the Court's analysis in Turnpike Authority, the Division urges this Commission to adopt the following functional equivalency test:

- 1) reviewing the identification of the basic minimal characteristics of employment shared by assistant commissioners;
- 2) Identify the employment characteristics of captains as a group; and
- 3) make a comparative analysis to determine their similarity.

The Association responds that a one-prong analysis would render the Legislative language superfluous and asserts the Hearing Officer adopted the appropriate test.

We deny this exception. In determining the appropriate test, an issue of first impression, the Hearing Officer observed that the Legislature eliminated the requirement that managerial executives are ". . . personnel who are charged with the responsibility of directing the effectuation of such management

policies and practices . . .”, and added “in the case of the Executive Branch of the State of New Jersey, ‘managerial executives’ shall include only personnel at or above the level of assistant commissioner.” She then reviewed the Senate Labor Committee Statement to conclude the intent was for a two-prong analysis. The Senate Labor Committee statement provides:

By this change in definition, any manager employed by the Executive Branch of State Government at a level below the level of assistant commissioner, and any manager employed by the State who is not involved with formulating management policies and practices, may join employee organizations and through these organizations collectively negotiate salaries and benefits with public employers.

In re Galloway Tp. and City of Bridgeton, 418 N.J. Super. 94, 102 (App. Div. 2011) observed in interpreting a statutory amendment:

When interpreting a statute, our goal "is to interpret the statute consistent with the intent of the Legislature." Oberhand v. Dir., Div. of Taxation, 193 N.J. 558, 568, 940 A.2d 1202 (2008). We should consider "not only the particular statute in question, but also the entire legislative scheme of which it is a part." Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 129, 527 A.2d 1368 (1987). We start with the plain language of the statute. Oberhand, supra, 193 N.J. at 568, 940 A.2d 1202; DiProspero v. Penn, 183 N.J. 477, 492, 874 A.2d 1039 (2005). Each word must be given its proper effect, and we cannot assume that "the Legislature used meaningless language." Med. Soc'y of N.J. v. N.J. Dep't of Law & Pub. Safety, 120 N.J. 18, 26, 575 A.2d 1348 (1990). We examine legislative history only

if the language of the statute is unclear.
Oberhand, *supra*, 193 N.J. at 568, 940 A.2d
1202; DiProspero, *supra*, 183 N.J. at 492-93,
874 A.2d 1039.

Applying the above principles, we find that the Hearing Officer appropriately looked to legislative intent to conclude that the revised definition requires a determination that a managerial executive in the Executive Branch must formulate policy and be at or above the level of assistant commissioner.

We are cognizant that the Division of State Police does not have an Assistant Commissioner title. Thus, we are challenged with determining whether State Police captains are at or above the level of assistant commissioner. We do not accept the functional equivalency test proposed by the Division. Instead, we find that the Legislature intended that an organizational/function approach be taken for each position as is required by Turnpike Authority. As explained below, we find that the majority of State Police Captains are below the level of assistant commissioner and do not formulate management policies and practices. Accordingly, they are not managerial executives within the revised definition of the Act. In doing so, we are mindful that our initial decision in this matter was issued prior to the Legislature's revision of the managerial executive definition. That decision determined a majority of the captains could be represented for collective negotiations purposes under the previous more restrictive definition. If the Legislature did

not intend to permit State Police captains to organize, it could have excluded them as managerial executives when it revised the Act. Instead, it broadened the scope of employees eligible for inclusion in an executive branch negotiations unit.

Having determined that the appropriate is test for managerial executive status is to determine whether the position formulates management policies and is at or above the level of assistant commissioner, we will review the findings of the Hearing Officer as to the State Police Captains.

The Majority of Captains Do Not Formulate Policy

In our prior decision, we thoroughly examined the functions of the captains to determine whether they formulate policy in accordance with the Act. We determined the majority do not and incorporate that analysis in this decision. A fundamental policy embodied in the Act is that public employees have the right 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 Act permits supervisors to organize. N.J.S.A. 34:13A-5.3; N.J.S.A. 34:13A-6(d). By permitting supervisors to organize, the Legislature accepted the view that employees can negotiate over their own wages and working conditions without being disloyal in carrying out their

supervisory responsibilities.^{2/} The Legislature also determined that the employer's interests in ensuring oversight responsibilities are effectuated, without the risk of divided loyalties in decision-making, justified requiring that supervisors be placed in negotiations units apart from the employees they supervise. It also excluded some employees from the Act's protections altogether, among those are managerial executives. The Act thus accommodates the interests of employees in negotiating over terms and conditions of employment and the interests of governmental employers in having policy-making deliberations uncompromised by divided loyalties.

As with many large diverse organizations with higher level supervisor titles, there are exceptions. Some Captains do formulate policy for their division as will be discussed below. Whether Captains Are At or Above the Level of Assistant Commissioner.

The Division excepts to the Hearing Officer's finding that captains are not at or above the level of assistant commissioner. It asserts that captains occupy upper level management positions within four levels of the Superintendent as compared to assistant commissioners who are also generally within four levels below the commissioner. The State points to the Hearing Officer's finding

^{2/} 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.

that the Superintendent's Chief of Staff (Lieutenant Colonel Gilbert) stands alone at a second level of the organizational hierarchy as an error. It argues that the Office of Chief of Staff is equivalent to a fifth branch of the Division on the same level as the other Lieutenant Colonels who are in charge of Administration, Operations, Investigations and Homeland Security.

The Association responds that captains are not at or above the level of assistant commissioner because typically an assistant commissioner will only be in the third level of the organization with a deputy commissioner and commissioner above them. It asserts that captains have an executive officer, a major, a lieutenant colonel, the chief of staff and the superintendent above them. Regardless of whether the Chief of Staff is the same rank as the other lieutenant colonels, the Association argues the evidence established that Lieutenant Colonel Gilbert is considered to be the second in command.

The Hearing Officer found that in the Executive Branch, the highest or first level in the department is the commissioner or secretary. The second level, reporting directly to a commissioner is a chief of staff or a deputy commissioner. Assistant commissioners form the third level, reporting to a chief of staff or deputy commissioner.

In the State Police, the Hearing Officer found the first level in the Division's structure to be Superintendent/Colonel who is a cabinet-level official who reports to the Attorney

General and the Governor. Below the Superintendent is the Chief of Staff who is a Lieutenant Colonel and the second in command and two lieutenant colonels and three deputy superintendents. Reporting to the deputy superintendents are approximately 14 majors. Reporting to the majors are approximately 45 captains.

The Division's primary exception to the Hearing Officer's organizational findings is that she erroneously found the chief of staff to be at the second level of the organization. The Division seeks a modification of this finding and requests that we find the chief of staff and all lieutenant colonels to be at the second level of the organization because they share the same rank.

We grant this exception. We have modified the Hearing Officer's finding that the chief of staff is the second level of the Division Hierarchy.^{3/} The evidence does not clearly establish that the other Lieutenant Colonels are subordinate to the chief of staff. We find the organization of the Division to be similar to those of the other departments the Division introduced into evidence. The chief of staff title is a common secondary level position and the Division has not established how the evidence points to a different result for the State Police. Even finding all lieutenant colonels to be the second level of the

^{3/} We note that we previously found that the chief of staff was the second in command in the Division and the Division did not file an exception to this finding at that time.
P.E.R.C. No. 2010-13.

organization, the captains are the fourth rather than fifth level of the organization with majors and deputy superintendents between them and the lieutenant colonels resulting in the same conclusion that they are not at or above the level of assistant commissioner. We also are persuaded that captains are not at or above the level of assistant commissioner as most assistant commissioners are a single position appointed by the commissioner or the Governor indicating a high level position in government. The 45 captains in the Division of State Police are promoted to the position from the rank of lieutenant and are not appointed. The Colonel and Attorney General are the only appointed positions in the Division.

We are also not persuaded by the Division's arguments that captains must be excluded because they have a broad spectrum of responsibility; are commanding officers; receive the same training as higher ranked officers; are responsible for assessment and evaluation of their subordinates; and have similar salaries to assistant commissioners. We find that all of these factors point to the undisputed conclusion that captains are supervisors, but does not establish that they are at or above the level of assistant commissioner in the Division's organization.

Since we have found assistant commissioners are the third level of a State department and the captains are at least the fourth, we will review the individual captains who the Hearing Officer excluded from the unit as managerial executives because

of their reporting relationship and responsibility in formulating management policies.

Office of State Police Affairs

In her initial decision, the Hearing Officer found that the Superintendent's office consists of 11 staff members including one captain who works in the Office of State Police Affairs. Captain Christopher O'Shea was excluded as a managerial executive because he serves as a liaison between the Division and the Office of the Attorney General and participates in meetings where significant events, policies and major initiatives are discussed. Also present at these meetings are the Superintendent's command staff composed of the chief of staff, lieutenant colonels, deputy superintendents, troop commanders and the captain assigned to strategic initiatives. Because of his attendance at these meetings and his duties as a liaison, the Hearing Officer inferred that O'Shea formulated managerial policies. We affirm that finding as the Association has not contested it. We also hold that due to his unique reporting relationship to the upper command of the Division, Captain O'Shea functions at a level at or above that of an assistant commissioner and find the captain position assigned to the Office of State Police Affairs is a managerial executive excluded from the unit.

Office of Public Information

The Hearing Officer excluded Captain Albert Della Fave, who is in charge of the Office of Public Information, because he

regularly reports directly to Superintendent Fuentes and Lieutenant Colonel Gilbert. Since he often functions independently from the majors to whom he reports and formulates policy, the record indicates that he is functionally at or above the level of assistant commissioner. Accordingly, we find the title ineligible for inclusion in the unit due to its unique position and duties, including the reporting relationship.

Budget Operations, Fiscal Control, Grants and Administration & Logistics

The captains in charge of budget operations, fiscal control, grants and administration, and logistics bureaus were found to be managerial executives because they formulate or recommend policies concerning the Division's acquisition, accounting, budgeting, and spending of funds and property. While these captains met the prior definition of managerial executive, the record does not indicate that they have a higher level of authority or independence to conclude they are at or above the level of assistant commissioner. The Hearing Officer found three to four levels between them and the Superintendent and administrator in the Department of Law and Public Safety. We hold that the captains in charge of budget operations, fiscal control, grants and administration, and logistics bureaus are not managerial executives and are eligible for inclusion in the unit.

Operation Cease Fire

The Hearing Officer found Captain Andreychak who is in charge of Operation Cease Fire to be a managerial executive because he reports to a deputy superintendent and is two steps away from the superintendent. We agree that Captain Andreychak plays an important role in the Division, creating a unique reporting relationship as well as re-affirm our prior holding that he formulates policy for his operation. Thus, we conclude the captain in charge of Operation Cease Fire is a managerial executive ineligible for inclusion in the unit.

Office of Strategic Initiatives

The Hearing Officer excluded the captain in charge of the Office of Strategic Initiatives, formerly Captain Roselle, due to his role in facilitating monthly management accountability conferences (MACs) and his tracking of individual performance and employment data. The information he provides to superior officers can be placed in evaluations. We do not find that Captain Roselle's former position meets the new definition of managerial executive as nothing in the record indicates he formulates policy and is at or above the level of assistant commissioner.

We do find that this captain represents the chief of staff to other Division personnel in following through on tasks identified in MACs which creates for him the potential for a

substantial conflict of interest with other captains.^{4/} In West Orange Bd. of Ed. v. Wilton, 57 N.J. 404 (1971), the Supreme Court determined that where "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," then a unit which includes all of the supervisors is not appropriate. The Act promotes broad horizontal units. Thus, courts have sanctioned employer-wide units, even if it means having one unit for all professional employees throughout the State. State v. Prof. Ass'n of N.J. (Dept. of Ed), 64 N.J. 231 (1974). But the Act does not promote deep vertical units that foster supervisory conflicts of interest. It specifically precludes units of supervisors and non-supervisors. And West Orange prohibits conflicts of interest between supervisors in the same unit. Because this is a petition for a new unit, any determination that there is a potential for a conflict of interest between captains will not disturb an existing unit structure and destabilize labor-management relations. Contrast Town of Harrison, P.E.R.C. No. 93-104, 19 NJPER 268 (¶24134 1993) Because the captain in charge of the Office of Strategic Initiatives has an enhanced supervisory role that includes the evaluation of other captain's performance, we exclude the

^{4/} For the same reasons, we find that the Captain assigned to the Regional Operations and Intelligence Center Task Force is excluded.

position from the unit due to a conflict of interest. West Orange.

Office of Recruiting and EEO

The Hearing Officer found that the captain in charge of the Office of Recruiting and Equal Employment Opportunity is a managerial executive. Captain Timothy Gross was excluded from the unit because of his significant role in formulating the Division's hiring, recruiting and testing policies and his direct reporting relationship to the chief of staff. He is a member of a joint State Police- OAG Committee. We find that Captain Gross continues to meet the revised definition of managerial executive due to his formulation of policy and his unique reporting relationship. We further find that his role in addressing discrimination, equal opportunity and affirmative action as well as his supervision of five EEO investigators places him in a position for substantial conflict with other captains. West Orange.

Public Policy

The Division has also filed exceptions to the Hearing Officer and this Commission's rejection of its argument that permitting the captains to organize presents the potential for divided loyalty. We reject this exception. First, we reviewed this argument in our prior decision and rely on that analysis. P.E.R.C. No. 2010-13 at 36-37. Second, the Division has not pointed to evidence in the record to establish that the current

economic climate is creating divided loyalties among public sector employees and the State to warrant us to ignore the Supreme Court's holding in Turnpike Auth.^{5/} If there is evidence beyond the speculation presented by the Division as to issues of divided loyalties with the other State Police employee organizations, the Division did not present it to support its argument.

The Association's Exceptions

The definition of "confidential employee" was amended at the same time the definition of "managerial executive" was amended. The Act previously defined confidential employee as an employee "whose functional responsibilities or knowledge in connection with issues involved in the collective negotiations process would make their membership in any appropriate negotiations unit incompatible with their official duties." P.L. 2009, c. 314 revised the definition as follows:

"Confidential employees" of the State of New Jersey means employees who have direct involvement in representing the State in the collective negotiations process making their membership in any appropriate negotiating unit incompatible with their official duties.

[N.J.S.A. 34:13A-3(g)]

5/ We reject the remaining exceptions of the Division as we exhaustively reviewed its arguments regarding strategic planning and the rate at which captains transfer assignments in our prior decision. We note that our review has further expanded the unit with the exception of the specialized higher level captains, so logistic concerns regarding transfers should be diminished.

The Association asserts that the Hearing Officer erred when she did not apply the new definition of confidential employee to the captains she previously excluded. Specifically, the Association requests that we find that the captains in charge of the Human Resources Management Bureau and Employee Services Bureau no longer meet the definition of confidential employee.

The Division responds that the Appellate Division issued a narrow remand to the Commission to apply the new "managerial executive" definition and that no request was made by the Association to expand the review on remand to the definition of confidential employee. It also asserts that there was not evidence presented to the Hearing Officer regarding the captains' confidential status.

In the decision on remand, the Hearing Officer stated in footnote seven, "In the earlier phases of this case, the captains in charge of the Human Resources Management Bureau and Employee Services Bureau were found to be confidential. This case does not alter that finding." These captains were excluded as the Hearing Officer determined that the captains reporting to the executive officers in the OPS are confidential employees because of the conflicts created by their role in the disciplinary process. On review, this Commission also found the executive officers in OPS to be confidential employees.

We reject this exception. The captains whom the Association seeks to have included were excluded as confidential employees because they were either involved in grievances, labor relations matters, promotional processes and/or career counseling. Despite the Division's argument to the contrary, the remand from the Appellate Division did not narrowly direct the Commission to review its prior findings as to only managerial executives as not confidential employees. It is true that an inferior tribunal is "under a peremptory duty to obey in the particular case the mandate of the appellate court precisely as it is written." Special Care of N.J., Inc. v. Bd. of Review, 327 N.J. Super. 197, 204, (App. Div. 200) *quoting* Flanigan v. McFeely, 20 N.J. 414, 420, (1956), *certif. denied*, 164 N.J. 190, (2000). This rule is not inflexible, particularly when new controlling authority issues. Atlantic Employers Ins. Co., v. Chartwell Manor School, 280 N.J. Super. 457, 470 (App. Div. 1995). Both definitions were amended at the same time and no direction was given to the Hearing Officer from the appellate court as to our confidential findings or managerial executive findings. No evidence has been placed in the record on remand as to the confidential status of these employees. Thus, we must reject this exception.

The May 26, 2010 Order of the Appellate Division remanded the case back to this Commission for a new hearing and stayed the Division's obligation to negotiate pending a final determination

on the matter. In the supplemental section of the Order, the Court wrote:

PERC's decision and order of September 24, 2009 is stayed pending a final determination by PERC following a new evidentiary hearing to be conducted within 45 days. We do not retain jurisdiction.

As the Court did not limit the scope of the remand and did not retain jurisdiction, we find that the Hearing Officer could have examined the confidential status of the employees. However, at this stage of the proceeding, it is not as simple an inquiry as the Association asserts. There is no evidence in the record as to the duties, if any, of employees who have direct involvement in representing the State in the collective negotiations process. If the record does not establish that captains have direct involvement in representing the State in the collective negotiations process, a separate inquiry would still need to be made as to whether a conflict exists for these employees. West Orange.

We do not find it in the interest of our statutory mission or to the benefit of either party to seek an additional remand to the Hearing Officer in this representation matter. This petition was filed on June 7, 2006 and the parties' relationship has been in limbo since that time as to the terms and conditions of employment for the Staten Police Captains. If the Association seeks to include the current confidential captains in the unit,

it may file a clarification of unit petition. See N.J.A.C. 19:11-1.5.^{6/}

As we have further expanded the petitioned-for unit and a significant amount of time has passed, we remand this petition to the Deputy Director of Representation to determine whether a majority of employees in the appropriate unit wish to be represented for purposes of collective negotiations by the New Jersey State Troopers Captains Association. See N.J.A.C. 19:10-1.1. (Authorization cards should be signed and dated by employees within six months of filing a representation petition).

ORDER

The case is remanded to the Deputy Director of Representation only to determine whether a majority of the eligible employees desire to be represented by the New Jersey State Trooper Captains Association.

The New Jersey State Troopers Captains Association has petitioned for an appropriate higher-level supervisory unit. The appropriate unit is:

Included: All captains employed by the Division of State Police, including, but not limited to the captains in the Identification and Information Technology Section (Administration Branch), Intelligence Services Section (Investigations Branch), Investigations Section (Investigations

^{6/} The Division concedes in its brief that a Clarification of Unit Petition would be the appropriate proceeding to resolve this issue. The Division has not waived its right to argue that these employees are confidential in those proceedings.

Branch), Field Operations Section, Troops A, B, C, D and E, Homeland Security Branch, and executive officers in the Identification and Information Technology Section, Intelligence Section, Special Investigations Section, Field Operations Section, Emergency Management Section, Special operations Section, and captains in the Bureaus of Fiscal Control, Budget Operations, Grants Administration and Logistics.

Excluded: Managerial Executives, confidential employees, non-supervisory employees, non-police civilian employees, captains in the following offices and bureaus: Office of Strategic Initiatives, Office of State Police Affairs, Office of Public Information, Operation Cease Fire, Regional Operations and Intelligence Center Task Force, Office of Recruiting and EEO, Internal Affairs Investigations Bureau (OPS), Internal Affairs Intake and Adjudication Bureau (OPS), Human Resources Management Bureau, Employee Services Bureau, employees represented in other negotiations units, lieutenants, sergeants first class, sergeants, detectives, and all troopers.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Jones recused himself. Commissioner Wall was not present.

ISSUED: June 28, 2012

Trenton, New Jersey