

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
CITY OF ELIZABETH

Public Employer

and

ELIZABETH POLICE SUPERIOR OFFICERS
ASSOCIATION, INC.

Docket No. R-131

Petitioner

DECISION AND DIRECTION OF ELECTION

Pursuant to a Notice of Hearing to resolve a question concerning the representation of certain employees of the City of Elizabeth, a hearing was held on October 1, 1969 before Hearing Officer Jeffrey B. Tener at which all parties were given the opportunity to present evidence, examine and cross-examine witnesses and argue orally. Thereafter, on December 23, 1969, the Hearing Officer issued his Report and Recommendations.^{1/} Exceptions were filed by the Petitioner. The Commission has considered the record, the Hearing Officer's Report and Recommendations, the Exceptions and on the facts in this case finds:

1. The City of Elizabeth is a public employer within the meaning of the Act and is subject to its provisions.
2. The Elizabeth Police Superior Officers Association, Inc. is an employee representative^{2/} within the meaning of the Act.
3. The employer refuses to recognize petitioner as the exclusive negotiating representative for certain of its employees; accordingly,

1/ Attached hereto and made a part hereof.

2/ We affirm the hearing officer's finding that since the Patrolmen's Benevolent Association has failed to intervene it was not a party to this proceeding.

a question concerning the representation of public employees exists and the matter is properly before the Commission for determination.

4. The Hearing Officer's findings and recommendations are hereby adopted with the following modifications:

The Petitioner objects to the Hearing Officer's finding that the Chief and Deputy Chief of the Elizabeth Police Department are not employees within the meaning of the Act.

The Act, as noted by the Hearing Officer, specifically excludes from the description of a public employee "heads and deputy heads of departments and agencies..." Additionally, the Act, in granting the right to a public employee to join or assist any employee organization or to refrain from any such activity, provides "that this right shall not extend to any managerial executive".

The City of Elizabeth administration code, in pertinent part, states:

"3.3. The head of each department shall be a director who shall be appointed by the Mayor with the advice and consent of the council.department heads shall appoint subordinate officers and employees within their respective department and may, with the approval of the Mayor, remove any such officer or employee" Section 14.1 provides: "The head of each department, under the supervision of the Mayor and subject to the Charter and code, shall:

(a) Prescribe the internal organization of the department and the duties of subordinate officers and employees within the department;

(b) assign functions, powers and duties to subordinate officers and employees, and modify such assignments as need appears;

(c) supervise the work of the department...."

The code sets forth specifically that "there shall be a police department, the head of which shall be the director...."

The code does not designate a deputy or assistant head of the department. The evidence reveals that the chief, who is subordinate to the director, does not automatically assume the director's role in the absence of the head of the police department. In fact, a lesser officer has on occasion been designated acting director to fill that vacancy. The job description of the police chief does not indicate that he is involved in the establishment of management policy but rather reveals his role as one charged with effectuating such policy made by the director. Since there is neither a designated deputy head or de facto deputy head of the department, we shall exclude only the director as the head of the department.

To find, as does the Hearing Officer, that the title per se constitutes the basis for exclusion of the deputy chief is unrealistic.

The Hearing Officer, in reliance upon the job description of the "deputy police chief", found him to be the "deputy head" of the department because the deputy "assists the police chief in management and discipline of the municipal police department..." Inasmuch as we have found that the chief is not the "deputy head" of the department, it follows that the "deputy chiefs" are similarly not excludable as a classification.

We now face a second issue: are the chief and deputy chiefs

managerial executives who must be excluded by the terms of the Act. The Act does not define a managerial executive. In the absence of a statutory definition, resort must be had to the general meaning of the term especially as applicable in the field of labor relations. The essential characteristics of the term denote one who determines and executes policy through subordinates in order to achieve the goals of the administrative unit for which he is responsible or for which he shares responsibility. The record reveals that although the chief and deputy chiefs assist in the policy making process of the department their involvement is as subordinates who have been delegated a specific task and whose recommendations are finally passed upon by the director in accordance with the director's responsibilities. The fact that one deputy chief attends City council meetings to discuss budgetary matters is not conclusive of his status. His role in this respect can be considered as the role of an expert or resource person knowledgeable in this area. The end product and policy rest not with the chief or deputy chief but with the director. It is this final responsibility to formulate, determine and effectuate policy and not the initial preparation of a budget or of policy proposals that distinguishes the managerial executive from other staff or line positions. The job descriptions of the chief and deputy chiefs do not give them the requisite ingredient of being responsible for hiring and firing which are vested in the director. Similarly, the deputies are not independent of other administrative authority but are rather responsible to the administrative authority of the director.

Based upon all of the above, the Commission finds that the chief and deputies do not exercise the role of managerial executives.

Accordingly, we find that the chief and deputy chiefs may be included in a unit of other superior officers, all of whom have been stipulated to be supervisors. Therefore the appropriate unit is: "The chief and deputy chiefs, captains, lieutenants and sergeants, but excluding the director of the Elizabeth Police Department and all other employees."

Since the Petitioner neither admits non supervisory personnel or employees other than policemen, it may, in accordance with the provisions of the Act, represent the supervisors of the police department hereinvolved.

5. The Commission directs that a secret-ballot election shall be conducted among the employees in the unit found appropriate. The election shall be conducted as soon as possible but no later than thirty (30) days from the date set forth below.

Those eligible to vote are employees set forth in Section 4 who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or temporarily laid off, including those in military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Those eligible to vote shall vote on whether or not they desire to be represented for the purpose of collective negotiations by the Elizabeth Police Superior Officers Association, Inc.

The election directed herein shall be conducted in accordance with the provisions of the Commission's Rules and Regulations and Statement of Procedure.

BY ORDER OF THE COMMISSION


WILLIAM L. KIRCHNER, JR.
ACTING CHAIRMAN

DATED: March 5, 1970
Trenton, New Jersey

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
CITY OF ELIZABETH

Public Employer

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Docket No. R-131

ELIZABETH POLICE SUPERIOR OFFICERS
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Petitioner

Appearances:

For the Public Employer

Frank P. Trocino, Esq., First Assistant City Attorney

For the Petitioner

Patrick J. Maloney, President

REPORT AND RECOMMENDATIONS

A petition was filed with the Public Employment Relations Commission on August 12, 1969 by the Elizabeth Police Superior Officers Association, Inc., hereinafter the petitioner. Pursuant to a Notice of Hearing dated September 15, 1969 a hearing was held before the undersigned Hearing Officer on October 1, 1969 in Newark, New Jersey at which all parties were given an opportunity to examine and cross-examine witnesses, present evidence, and argue orally. Upon the entire record in this proceeding, the Hearing Officer finds:

1. The City of Elizabeth is a Public Employer within the meaning of the Act and is subject to the provisions of the Act.
2. The Elizabeth Police Superior Officers Association, Inc., is an employee representative within the meaning of the Act.
3. The Public Employer having refused to recognize the employee repre-

sentative as the exclusive representative of certain employees,
a question concerning the representation of public employees exists.

Issues

1. Should the petition be dismissed in view of the fact that the Patrolmen's Benevolent Association (P.B.A.) has asked for recognition as the sole negotiating agent for all uniformed police personnel of the City?
2. If the petition is not dismissed, are the individuals in question managerial executives and, therefore, excluded from coverage under the Act?
3. Although both parties agree that the job classifications in dispute are supervisory positions, the Hearing Officer, in accordance with the Act, must satisfy himself that there is no mixture of supervisors and nonsupervisors unless there is established practice, prior agreement or special circumstances to warrant a combined unit of supervisors and nonsupervisors.
4. Another issue not raised by the parties but which must be answered by the Hearing Officer is whether or not all of the individuals sought by the petitioner are employees as defined in the Act.

Discussion and Findings

The Public Employer questions the action of the Superior Officers Association in filing a petition for representation. Many members of the Superior Officers Association are also members of the Patrolmen's Benevolent Association. The P.B.A. has asked the City for recognition as the representative of all uniformed police personnel. Therefore, the superior officers would in effect be negotiating twice and would get the benefits of whatever gains the P.B.A. achieved through negotiations with the City.

The record reveals that the P.B.A., by letter dated August 14, 1969, did ask the City for recognition to represent all uniformed police personnel. However, the P.B.A. had not, at the time of the hearing, submitted a list of its members to the City.^{1/} This list of members is one of the things that the City Council requires before it will grant recognition. The City is not clear exactly who the P.B.A. wishes to represent but believes that the P.B.A. wants to represent all uniformed personnel which would include all superior officers.

The Superior Officers Association contends that the P.B.A., as indicated by the name of the organization, is a patrolmen's organization. Superior officers may be dues paying members of the P.B.A. but they are non-voting members. They are eligible for several benefits on a contributory basis but these benefits are available to all members of the department, not only to members of the P.B.A. Furthermore, the Superior Officers Association has asked the P.B.A. to indicate what they mean by the term "uniformed personnel". While no answer was received to this written request for clarification, the representative of the Superior Officers Association stated that Mr. Innaccio of the P.B.A. "...has verbally disclaimed any interest in us."

Upon receipt of the petition, the Executive Director of the Public Employment Relations Commission, in a letter dated August 15, 1969 to the City Clerk John Dwyer, asked whether the City would consent to an election and whether it knew of any other employee organization with an

^{1/} On October 27, 1969, the undersigned received a letter from Mr. Trocino with a copy of a letter sent to the City Council President from Michael Iannacio, Pres. of Local 4 of the P.B.A., in which Mr. Iannaccio listed those superior officers that he claimed were represented by the P.B.A.

interest in representing the employees involved in the petition. In answer to the second question, the City replied that P.B.A. Local No. 4 had informed the City of an election which P.B.A. Local No. 4 had held and which resulted in the selection of the P.B.A. as the sole negotiating agent of the uniformed personnel of the Police Department. The Executive Director of the Commission on August 26, 1969 sent a letter to Mr. Iannaccio, President of P.B.A. Local No. 4, asking him to respond within five days if his organization had an interest in any of the employees in the proposed unit. No response to this letter was received.

The parties are in agreement that there is no contract in existence covering any of the employees sought by the petitioner. There is also agreement that no group has been accorded recognition by the City of Elizabeth. The P.B.A. did not respond to the letter of the Executive Director of the Public Employment Relations Commission asking if they wanted to intervene in this proceeding. No party or employee organization moved to intervene at the hearing on this matter. Therefore, the undersigned finds that the Superior Officers Association may represent the employees in the unit described below.

The Petitioner seeks to represent all superior officers of the Police Department. The unit would include the following job titles: sergeant, lieutenant, captain, deputy chief and chief. Before finding such a unit appropriate or inappropriate, several questions must be resolved. These are the last three issues listed above: are the occupants of these positions managerial executives; if the positions are not managerial, are all of them either supervisory or nonsupervisory or, if not, is there established practice, prior agreement or special circumstances to justify a finding that a mixed supervisory and nonsupervisory unit is appropriate; are the

occupants of all the job titles in question public employees as defined in the Act.

Section 7 of the Act provides that, "Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity...." (emphasis supplied). Thus, it is clear that only "public employees" enjoy these rights. The term "public employee" is defined in Section 3 of the Act: "This term shall include public employee, i.e., any person holding a position, by appointment or contract, or employment in the service of a public employer, except elected officials, heads and deputy heads of departments and agencies, and members of boards and commissions...." (emphasis supplied).

The term "head" and "deputy head" are not defined in the Act. But the fact that they are specifically excluded from the definition of "public employee" cannot be ignored.

The City of Elizabeth is governed under Mayor-Council Plan F of the Faulkner Act (N.J.S.A. 40:69A-1 et. seq.) This provides that the City shall have no more than nine departments. The Police Department in Elizabeth is one of the departments. Each of the departments is to be headed by a "director". The City Council of Elizabeth adopted an Administrative Code in 1961 which provides that, "The head of each department shall be a director who shall be appointed by the Mayor with the advice and consent of the council...Subject to the provisions of the Revised Statutes, Title 11, Civil Service, department heads shall appoint subordinate officers

and employees within their respective departments and may, with the approval of the Mayor, remove any such officer or employee." (Administrative Code for the City of Elizabeth, Article 3, Section 3.1).

Neither the Administrative Code nor the Faulkner Act makes any reference to a deputy head of a department. But that code does refer to the "director" of a department as a "department head". Therefore, it does not seem that the legislature was referring to "director" when it excluded heads and deputy heads of departments from the definition of public employees. This conclusion is buttressed by the consideration that it is larger cities such as Elizabeth which have "directors" whereas smaller ones are less likely to have "directors". Since there is no provision for a deputy head of a department with a "director" at the top and since most departments do have deputies, a finding that "directors" are department heads as specified in Chapter 303 would lead to a situation in which only one person, the "director", in a larger city would be excluded but in a smaller city without "directors", the head and deputy head would both be excluded. It is unlikely that the legislature intended that only one person in a department in a larger city would be excluded whereas in a smaller municipality, several people would be excluded.

Additionally, the job description of police chief and deputy police chief support a finding that the incumbents of these positions are head and deputy head of the department as intended by the legislature.

The job description of Police Chief provides that he "has charge of the Police Department...and that he analyzes the police problems of the municipality, determines the internal organization of the Police Department and formulates police rules and regulations, plans the police work so as

to make the best use of the available funds, personnel and equipment, and supplies...". The job description of the Deputy Police Chief provides that he "Assists the Police Chief in management and discipline of the municipal Police Department...". These descriptions lend weight to the finding that the Police Chief and Deputy Police Chiefs are head and deputy heads of departments for purposes of Chapter 303.

For these reasons, the undersigned finds that the Police Chief and Deputy Police Chiefs are not public employees as defined in the Act and may not be included in an appropriate unit for collective negotiations.

Related to the previous discussion is the question of whether or not the holders of the job titles included in the petition are managerial executives. Section 7 of the Act provides that the rights specified above "...shall not extend to any managerial executive...". The term "managerial executive" is not defined in the Act. However, a clue to its meaning is provided by the proviso that "...in a school district the term managerial executive shall mean the superintendent of schools or his equivalent...". Clearly, therefore, the term "managerial executive" is not to be used indiscriminately. There is nothing in the job descriptions of sergeants, lieutenants or captains to warrant a finding that incumbents of these positions are "managerial executives". However, the job descriptions quoted above of the chief and deputy chiefs - there are two deputy chiefs in Elizabeth - do lead to the conclusion that they are "managerial executives". A department such as the Elizabeth Police Department with over 50 superior officers must have several "managerial executives" at the top who provide coordination and policy direction to the department. The record indicates that the deputy chief of administration has a significant role in the budget-making process. The captains submit their budget requests

to the deputy chief who examines all of the requests and makes a recommendation to the chief on the budget. Furthermore, when the director of the department is absent, his position is filled by the Chief. Should both the Director and the Chief be absent simultaneously - and this has occurred in Elizabeth - a deputy chief becomes the head of the Police Department. Therefore, the undersigned finds that sergeants, lieutenants and captains are not managerial executives but that the deputy chiefs and the chief are managerial executives.

The final issue relates to the supervisory status of the employees. This question arises because Section 5.3 of the Act provides "...except where established practice, prior agreement or special circumstances dictate the contrary, shall any supervisor...have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership...". Thus, if some of the positions at issue are found to be supervisory and others are not, then the two categories cannot be combined in a single unit absent established practice, prior agreement or special circumstances. The undersigned has found the chief and deputy chiefs not to be "public employees" and also has found the incumbents of these positions to be "managerial executives". If these findings are adopted by the Commission, then the only positions in question will be those of sergeant, lieutenant and captain. However, in the event that the Commission finds that the deputy chiefs and/or chief are "public employees" and are not "managerial executives", a finding would be required with respect to the supervisory status of the deputy chiefs and the chief as well.

The Act defines a supervisor as one "...having the power to hire,

discharge, discipline, or to effectively recommend the same...".

Both parties are in agreement that all five positions, i.e., sergeant, lieutenant, captain, deputy chief and chief, are supervisory. The President of the City Council testified that, "Superiors do not have the right to hire and fire, but they all certainly do, in Council's opinion, have the right to recommend any action." The representative of the Petitioner, while appearing as a witness, testified that, as a practice in the Police Department, the Director discusses with the appropriate superior officer any contemplated action with regard to hiring, firing and disciplining.


Furthermore, the job descriptions of these positions indicate that the incumbents are supervisors as defined in the Act. The job descriptions of the chief and deputy chief have already been cited. The job description of captain provides, inter alia, that he "...disciplines subordinates for neglect of duty...". Lieutenants are called upon to check "...their (i.e., sergeants and patrolmen) work to see that proper procedures are followed, reasonable standards of workmanship, conduct and output are maintained...". A police sergeant "...takes appropriate action to assure...that patrolmen are doing their work properly...".

Therefore, the undersigned finds that all of the positions at issue are supervisory.

Recommendations

It is recommended that an election be directed among the sergeants, lieutenants and captains of the Elizabeth Police Department to determine whether or not they wish to be represented for purposes of collective negotiations over terms and conditions of employment by the Elizabeth Police

Superior Officers Association. The election should be conducted in accordance with the Rules and Regulations of the Public Employment Relations Commission. The chief and deputy chief should be excluded from the appropriate unit because they are not "public employees" as defined in the Act and because they are "managerial executives". Sergeants, lieutenants and captains are all supervisors as defined in the Act but are not managerial executives and, therefore, do constitute an appropriate unit.


Jeffrey B. Tener
Hearing Officer

DATED: December 23, 1969
Trenton, New Jersey