

P.E.R.C. NO. 84-86

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF BLOOMFIELD,

Public Employer,

-and-

BLOOMFIELD FIRE CAPTAINS ASSOCIATION,

Docket No. RO-82-135

Petitioner,

-and-

F.M.B.A. LOCAL #19,

Intervenor.

SYNOPSIS

The Public Employment Relations Commission holds that fire captains employed by the Township of Bloomfield should be removed from a negotiations unit containing rank-and-file fire-fighters. The Commission directs a secret ballot election in a unit of all fire captains.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF BLOOMFIELD,

Public Employer,

-and-

BLOOMFIELD FIRE CAPTAINS ASSOCIATION,

Docket No. RO-82-135

Petitioner,

-and-

F.M.B.A. LOCAL #19,

Intervenor.

Appearances:

For the Public Employer, John A. Bukowski, Jr., Esq.

For the Petitioner, Shapiro & Berardi, Esqs.
(Terry L. Shapiro, of Counsel)

For the Intervenor, Fox and Fox, Esquires
(David I. Fox, of Counsel)

DECISION AND DIRECTION OF ELECTION

On January 20, 1982, the Bloomfield Fire Captains Association ("Association") filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission. The Association seeks to represent a negotiations unit of all fire captains employed by the Township of Bloomfield ("Township"). The petition acknowledges that F.M.B.A. Local #19 ("FMBA") represents these fire captains as part of a unit consisting of all firefighters, excluding the deputy chiefs and chief.

The FMBA has intervened pursuant to N.J.A.C. 19:11-2.7. It objects to the captains' severance from its unit. The Township has entered an appearance, but has not taken a position on the petition's appropriateness.

On June 18, 1982, the Director of Representation issued a Notice of Hearing. On October 18, 1982, January 25 and 26, and February 23 and 24, 1983, Hearing Officer Joan Kane Josephson conducted hearings. The parties examined witnesses, presented exhibits and argued orally. Both parties submitted post-hearing briefs.

On September 1, 1983, the Hearing Officer issued her report and recommendation. H.O. No. 84-5, 9 NJPER 569 (¶14238 1983) (copy attached). She found that the fire captains should be removed from the FMBA's unit pursuant to In re City of Union City, P.E.R.C. No. 70 (1972) ("Union City") and that an election should be conducted in a separate unit of fire captains.

On October 26, 1983, the FMBA, after receiving an extension of time, filed exceptions and an accompanying brief. The FMBA asserts that the Hearing Officer erred in finding that fire captains supervised and disciplined rank-and-file firefighters and concluding that a separate unit of fire captains is appropriate. The FMBA also requests that in the event an election is ordered in a separate unit of fire captains, that FMBA, Local No. 19A be placed on the ballot.

Pursuant to N.J.A.C. 19:11-8.6, the Commission has transferred this case to itself for appropriate action.

We have reviewed the record. The Hearing Officer's findings of fact (pp. 2-9) are accurate. We adopt and incorporate them here.^{1/}

In Board of Education of West Orange v. Wilton, 57 N.J. 404, 425-27 (1971) ("Wilton"), the New Jersey Supreme Court held that public employees who exercise significant power and responsibilities over other personnel should not be included in the same negotiations unit as their subordinates because of the conflict of interest between these employees and supervisors. In In re City of Camden, P.E.R.C. No. 52 (1971) ("Camden"), we applied Wilton and held that fire captains and other officers should generally not be included in the same negotiations unit as rank-and-file firefighters. In Union City, we elaborated upon our reasons for such a rule:

It is readily observable that the military-like approach to organization and administration and the nature of the service provided (which presumably accounts for that approach) set municipal police and fire departments apart from other governmental services. Normally there exist traditions of discipline regimentation and ritual, and conspicuous reliance on a chain of command all of which tend to accentuate and reinforce the presence of superior-subordinate relationships to a degree not expected to be found in other governmental units and which exist quite apart from the exercise of specific, authorities vested at various levels of the organization. When the Commission is asked to draw the boundaries of common interest in this class of cases, it cannot ignore this background as it examines for

^{1/} We make the following typographical correction: on page 8, the last word on line 10 should be "described" not "discredited."

evidence of whether or not a superior exercises any significant authority over a rank and file subordinate which would or could create a conflict of interest between the two. In our view, where these considerations are real rather than merely apparent, it would be difficult indeed to conclude, in contested cases, that a community of interest exists between the lowest ranking subordinate and his superior, absent exceptional circumstances. We do not intend that this observation extend to those cases where the points of division are so few and so insignificant as to be termed de minimis, such as might not unreasonably be expected to exist in a small police or fire department. We are persuaded, however, after almost four years experience with this statute that unless a de minimis situation is clearly established, the distinction between superior officers and the rank and file should be recognized in unit determination by not including the two groups in the same unit.

Since 1972, the standards set forth in Wilton, Camden, and Union City have been consistently applied. See, e.g., In re City of Elizabeth, P.E.R.C. No. 71 (1972); In re Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977) ("South Plainfield"); and In re Township of East Brunswick, D.R. No. 82-42, 8 NJPER 187 (¶13080 1982). In South Plainfield, the Director of Representation set forth the narrow exceptions to the general rule excluding superior officers from units containing rank-and-file police officers or firefighters:

...in all cases involving police departments, superior officers will normally be severed from rank and file personnel unless it is shown that there is an exceptional circumstance dictating a different result. Examples of such are the following: (1) a department in which there is a very small force, where superior officers perform virtually the same duties as a patrolmen, and where any conflict of interest is de minimis in nature; [or] (2) where it is deter-

mined that superior officers are supervisors the existence of established practice, prior agreement or special circumstances dictate the continued inclusion of superior officers in a unit of rank and file personnel.

This second exception derives from N.J.S.A. 34:13A-5.3, which provides:

...nor, except where established practice, prior agreement or special circumstances dictate to the contrary, shall any supervisor...have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership....

See also, N.J.S.A. 34:13A-6(d)(1). In In re West Paterson Bd. of Ed., P.E.R.C. No. 79 (1973) ("West Paterson"), we held that the statutory exception of established practice requires a pre-Act (July 1, 1968) relationship in which an organization regularly sought, on behalf of a reasonably well-defined group of employees, improvement of employment conditions and resolution of differences through dialogue or negotiations with an employer who engaged in the process with an intent to reach an agreement. Proof of an established practice must be clear and convincing. In re Parsippany-Troy Hills Bd. of Ed., D.R. No. 82-51, 8 NJPER 283 (¶13128 1982); In re Twp. of Teaneck Bd. of Ed., P.E.R.C. No. 23 (1971).

Based on our review of the record, we conclude that Wilton, Camden, and Union City apply here.^{2/} We also find that

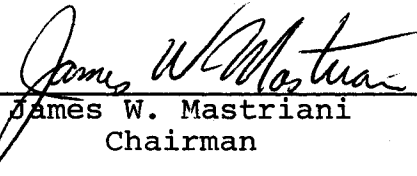
^{2/} We need not consider whether fire captains are technically "supervisors" within the meaning of the Act or whether the FMBA has fairly represented the captains.

the parties did not have a pre-Act negotiations relationship under West Paterson. Accordingly, we hold that fire captains should be removed from the FMBA's unit and that a secret ballot election should be conducted in a unit of all fire captains employed by the Township of Bloomfield Fire Department.^{3/}

ORDER

A secret ballot election is directed in the following unit: all fire captains employed by the Township of Bloomfield, Fire Department. All other firefighters, deputy fire chiefs, and the fire chief are excluded from this unit. The case is remanded to the Administrator of Representation for the holding of this election.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Newbaker, Butch, Suskin and Hipp voted for this decision. None opposed. Commissioners Graves and Hartnett were not present.

DATED: Trenton, New Jersey

January 18, 1984

ISSUED: January 20, 1984

^{3/} In its exceptions, FMBA Local 19 has requested for the first time that its affiliate, FMBA Local 19A, be placed on the ballot. This request should be directed to the Administrator of Representation who will conduct the election proceedings.

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

In the Matter of

TOWNSHIP OF BLOOMFIELD,

Public Employer,

-and-

BLOOMFIELD FIRE CAPTAINS ASSOCIATION,

DOCKET NO. RO-82-135

Petitioner,

-and-

F.M.B.A. LOCAL #19,

Intervenor.

Synopsis

A Hearing Officer of the Public Employment Relations Commission recommends that captains of the Bloomfield Fire Department be found to be supervisors because they have independent authority to discipline firefighters, and that a conflict exists between captains and firefighters because of the para-military structure of the Department. She recommends that a secret ballot election be directed.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The report is submitted to the Director of Representation who reviews the Report, any exceptions thereto filed by the parties and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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

In the Matter of

TOWNSHIP OF BLOOMFIELD,

Public Employer,

-and-

BLOOMFIELD FIRE CAPTAINS ASSOCIATION,

DOCKET NO. RO-82-135

Petitioner,

-and-

F.M.B.A. LOCAL #19,

Intervenor.

Appearances:

For the Public Employer
John A. Bukowski, Jr., Esquire

For the Petitioner
Shapiro and Berardi, Esquires
(Terry L. Shapiro, of Counsel)

For the Intervenor
Rinaldo and Rinaldo, Esquires
(John L. Maddalena, of Counsel)

HEARING OFFICER'S
REPORT AND RECOMMENDATION

On January 26, 1982 a Petition for Certification of Public Employee Representative, supported by an adequate showing of interest, was timely filed ^{1/} with the Public Employment Relations Commission ("Commission") by the Bloomfield Fire Captains Association ("Captains Association") seeking to represent "all fire captains employed by the

1/ The collective negotiations agreement covering these employees expired on December 31, 1981. On October 27, 1982 an interest arbitrator issued an award covering these employees retroactively back to January 1, 1982.

Township of Bloomfield ("Township").

The majority representative of the captains is the Intervenor in this matter, F.M.B.A. Local #19 ("F.M.B.A."), in a negotiations unit that includes firefighters and captains. The intervenor objects to the severance of the captains from the existing negotiations unit. The public employer entered an appearance in this matter but did not take a position on the appropriateness of the petition.

Pursuant to a Notice of Hearing issued by the Director of Representation, hearings were held on October 18, 1982, January 25, January 26, February 23 and February 24, 1983. Post hearing briefs were received by May 13, 1983. Based on the entire record in these proceedings, the undersigned finds:

1. The Township of Bloomfield is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), is subject to its provisions and is the employer of the employees who are the subject of this proceeding.

2. The Bloomfield Fire Captains Association and F.M.B.A. Local #19 are public employee representatives within the meaning of the Act and are subject to its provisions.

The F.M.B.A. is the majority representative of a negotiations unit including all captains and firefighters and excluding all deputy chiefs and the chief. Bloomfield employs in its fire department one chief, four deputy chiefs, 27 captains and 72 firefighters; 24 of the captains are line officers and the other three are fire prevention officer, training officer and the departmental mechanic.

The Bloomfield Fire Department has a four platoon (shift) system. Each platoon is headed by a deputy chief. The Department has one fire headquarters and three fire houses. There are six pieces of fire apparatus and on each shift each piece of apparatus has one captain and two firefighters assigned to it. Over the years, the number of firefighters assigned to each apparatus has decreased.

The Rules and Regulations of the Bloomfield Fire Department codifies in detail the duties of all members of the department.

Article VII applies to captains. This Article provides:

1. Captains in the Fire Department shall rank next below the Deputy Chief of the Department, and they shall have command of their stations and be responsible for their condition and the discipline and efficiency of the men, subject, however, to the supervision of their superior officers.
2. They shall respond to all alarms of fire in conformity to the schedule prescribed in the running chart.
3. They shall ride as near as possible to the driver in answering alarms of fire and shall direct the driver's operation of apparatus.
4. They shall see that all men and officers ride on apparatus on alarms of fire, and shall not permit racing or reckless driving or the passing of other Department apparatus unless disabled, and shall not permit a speed at any time which may cause accidents.
5. They shall promptly report their arrival to the Officer in command of the fire.
6. They shall assume command at fires when first to arrive and exercise control until a superior officer appears and takes charge.
7. They shall see that no apparatus, or other vehicle, is driven over any line of hose except in case of necessity.
8. They shall see that every member of their command has a copy of the Rule and Regulations of the Department and that the same are thoroughly understood and obeyed by each member of their command.
9. They shall promptly investigate any incapacity, inefficiency, neglect of duty, disobedience of order,

or the violation of any rule or regulation of the Fire Department by any member of their command, and shall report the same in writing to the Chief of the Department, through channels, stating the name of the offender, the nature of the offense, the time and place of its occurrence, and the names of the witnesses.

10. They shall see that all general orders and memoranda of the Department are kept on file where upon request they will be accessible to all members at all times.

11. They shall cause all the men on duty in their command to assemble on apparatus floor at the sounding of the 0800 and 1800 test signals, read all orders and instructions received since last tour of duty, issue any verbal instructions necessary and instruct the men before dismissing them.

12. Upon the visit of any superior officer for the purpose of inspection, the Captain shall assemble the men and report to the inspecting officer.

13. They shall have full control of the apparatus and equipment entrusted to the care of their command, and shall be responsible for its care, upkeep and safety.

14. The Captain on duty at any fire station shall be responsible for the building and accessory equipment and the Captain assigned will be responsible for coordinating the station work and the ordering of supplies.

15. They shall keep an accurate written inventory of all property entrusted to their care and shall check this inventory by physical count at least once a year. They shall not surrender any property belonging to the Department without first receiving an order therefore from a superior officer.

16. (a) They shall see that the Station Journal is promptly and neatly written up at all times and that all the events of the day and all data required by regulations are properly entered. (b) They shall see that the time of leaving for and of returning from an alarm of fire is entered in the Station Journal.

(c) After every alarm of fire they shall immediately enter or cause to be entered in the Station Journal a report stating the time the alarm was received, location of the fire, description of the property, owner and occupant, number of box and location, amount of equipment used, length of time hydrant used, names of men present and officer in command at the fire. The company officer or officers responding to

the fire shall sign the journal as evidence that the above information has been properly entered, and then relay the information to Headquarters.

17. After any accident, involving any apparatus or men of their command, they shall immediately investigate the circumstances and submit a written report to the Chief of the Department, giving the time, place and nature of the accident, the names of the person involved, the names and address of witnesses, and any necessary comments, and they shall also promptly report such accident to the Police Department and Town Clerk.

18. They shall see that the fire prevention inspection prescribed for their station districts are promptly and efficiently made and that all reports concerning the same are properly made out and promptly forwarded to the Chief of the Fire Prevention Bureau.

19. They shall see that no trash is permitted to accumulate about quarters.

20. They shall always have on duty a driver for each piece of motor apparatus and enough firefighters to perform duty properly at fires.

21. They shall see that visitors are courteously received, but shall not permit any habitual lounging about quarters.

22. They shall not permit visitors or member of the Department to speak disrespectfully of superiors.

23. They shall see that the dormitory is kept clean and neat and well aired and that all beds are made up and quarters throughout are clean and ready for inspection by 10:00 A.M.

24. In case any apparatus needs repairing or adjustment, they shall immediately notify the Chief of the Department and note the fact in the Station Journal.

25. They shall submit on the first day of each month a monthly report of the total mileage run by all apparatus under their command, the quantity of gasoline, oil and grease consumed by each piece of apparatus, and the repairs and adjustments made on the same.

26. They shall see that all extinguishers are kept freshly charged and that all apparatus is tested frequently enough to ensure its proper operation at all times.

27. They shall see that the building, sidewalk, gutters and streets in front of their quarters are kept clean and free from snow and ice and other encumbrances.

28. They shall familiarize themselves, and see that their men do likewise, with all the buildings in

their fire district, with the hydrants and the streets and the best routes to follow, and with the water main locations and pressures.

29. They shall see that a proper record is kept of all the hose on hand, that it is always dry and properly cared for after use, that the required amount is on hand or ordered, that it is properly marked, and that it is changed on the apparatus after every fire or as designated by directives. The date of changing is to be entered in the Station Journal each time.

30. They shall report any lost tools or equipment immediately to his superior officer with a statement of the circumstances.

31. They shall perform such duties as may be required of them by their superior officers.

32. They shall see that at least two men in each of their companies are instructed in the duties of driver and that the duty of driving back to quarters and drilling with the apparatus is alternated between them.

33. They shall see that the members of their command are constantly drilled and instructed in all matters pertaining to firefighting, and records of same sent to the training officer as required.

34. After an alarm of fire, when the commanding officer gives the order to return to quarters, the company officer, or in the absence of the company officer, the firefighter assuming command will via radio code his apparatus back in service.

35. They shall see that the front doors of their quarters are kept closed at all times unless otherwise directed by the Chief.

36. The Chief of the Department shall designate one Captain from each Station as Station Commander.

37. The Station Commander shall be responsible for the coordination and implimentation of all house duties.

Article VIII provides the following rules for firefighters:

1. The grade of Firefighter in the Fire Department shall include all the members of the Fire Department exclusive of the officers.

2. In the absence of the officer in charge the designated acting officer will assume command. In the designated acting officer's absence the senior firefighter, in point of service, shall assume command and shall immediately report to the Deputy Chief in Command at the time.

3. They shall promptly perform all duties of Firefighters as may be established by the Chief of the Department and their commanding officers.

4. When temporarily assigned to another company or other duty than their own, they shall immediately conform to the directions of their new officers.

5. No firefighter shall give a blood transfusion more than once in any twelve month period unless granted permission by the Town Physician.

Article VI provides the following rules for deputy chiefs:

1. The Deputy Chief of the Fire Department shall rank next below the Chief of the Department, and it shall be his duty to carry out the orders and instructions of the Chief of the Department with respect to his command in a prompt and efficient manner.

2. During the absence of the Chief of the Department from duty, due to sickness, or absence, from the Town of Bloomfield, on leave, or special duty, the Deputy Chief assigned shall assume the duties of the Chief of the Department and during such period he shall exercise the same powers, perform the same duties and be subject to the same rules and regulations as the Chief of the Department. He shall not, however, issue any orders, making any transfers or assignments or in any way interfere with the general policy of the Department without the approval of the Chief or Town Administrator.

3. A Deputy Chief shall be in charge of each group.

4. He shall attend all fires in conformity to the schedule prescribed in the running chart while on duty and promptly report his arrival to the officer in command. When at a fire he shall assume command and have full control until the arrival of the Chief of the Department and shall direct the movements of the officers and men so as to extinguish the fire with the least possible damage from fire, water or otherwise.

5. He shall cause all men and apparatus not needed at fires to return to quarters.

6. He shall see that all reports and records required from his shift are properly made.

7. He shall promptly and fully investigate all violations of the rules and regulations of the Fire Department or any neglect of duty that may come to his notice and shall make a full report thereon to the Chief of the Department.

8. He shall promptly and officially report to the Chief of the Department if he is for any reason unable to perform his duty.

9. On going off duty he shall make a full report to the Chief of all important events in the Fire Department during his tour of duty.

Chief of the Fire Department, John H. Flaherty, testified credibly that fire captains have independent authority to impose minor disciplinary action (Tr. 2/23/83 p. 95). This is consistent with the provision of section 1 of the captains rules above. The Chief discredited such discipline as follows:

Q. Give me an example of what discipline, if any, a captain can impose.

A. Well, company punishment is such that it would be carried out within the framework of the working company at the time, it is something that wouldn't take away from the man's schedule, it wouldn't take away from his vacation schedule or things of this nature. He cannot put penalties on a man that would take anything away from him.

Q. What examples of discipline may a captain impose?

A. The list varies. He could give extra watch duties. He can give him extra training sessions. He can give him a number of different ways. He can even give him possibly extra duties in the house such as cleaning duties, things of this nature.

Q. What would the nature of the infractions normally be if you can render an opinion that would call for that kind of discipline?

A. If an individual is not performing to the expectations of the captain we have an on-going training session and maybe the man isn't doing well enough in learning the streets and how you get there and where

the streets are located, if the man isn't producing fast enough in the captain's opinion or he isn't shaping up fast enough or if he is not doing the job he should do maybe he is not putting as much attention to the duties assigned to him as he should, then the captain has the right of bringing this little pressure to bear, to make him a better fireman. (Tr. 2/23/83 pp. 95, 96).

Captains have independently assigned extra watch to firefighters who are not performing adequately in their Captain's opinion. (Tr. 1/25/83 p. 30; Tr. 1/26/83 pp. 26, 38, 39, 41, 91; Tr. 2/23/83 p. 8). Chief Flaherty and Deputy Chief Robert Melillo both testified they considered captains to operate in a supervisory capacity as to firefighters. (Tr. 2/23/83 pp. 106 and 74 respectively).

Captains direct firefighters at a fire to locate, confine and extinguish fires. As section 6 provides, they assume command at fires when first to arrive and exercise control until a superior officer appears and takes charge.

There is a reliance on a chain of command and a tradition of discipline and regimentation in Bloomfield that accentuates the superior subordinate relationship between captains and firefighters.

The first written collective negotiations agreement between the parties was in 1976. The collective negotiations unit has always included captains and firefighters. Collective negotiations between the parties did not exist prior to 1968. ^{2/}

^{2/} Minutes of a March 2, 1966 FMBA meeting contain the following information concerning pay raises: "Our President spoke to Councilman Russoman about our raise, and he said that just what was in the paper is what we should expect. \$200.00 for the first grade fireman, \$400.00 for the top grade fireman, a percentage of the \$400.00 will be included in the annual increments of the men in between starting pay and top pay. Officers will receive a percentage over and above this amount." This was the only evidence of prior history presented.

The undersigned recommends that the Director find that the fire captains are supervisors who should not be included in a negotiations unit with nonsupervisors and that he direct that an election be conducted among the petitioned-for employees -- the captains. ^{3/}

Counsel for the F.M.B.A. argues that the assignment of extra duties by captains to firefighters and/or an oral reprimand do not constitute discipline. He also notes that such extra assignments are rarely imposed and some captains never imposed extra duties. ^{4/}

Counsel for the F.M.B.A. has carefully analyzed a number of cases from other jurisdictions that examine the role of fire captains vis-a-vis firefighters. While these cases are certainly on point, and while I commend counsel for his thorough research and analysis, the undersigned feels there are Commission decisions dealing with superior officer issues that should be applied to the instant matter. In Township of East Brunswick, D.R. No. 82-42, 8 NJPER 187 (¶13080 1982) the Director reaffirmed the standard to be applied in evaluating the inclusion of fire and police personnel in negotiations units with employees whom they may have a conflict. In quoting In re City of Union City, P.E.R.C. No. 70 (1970) he said:

It is readily observable that the military-like approach to organization and administration and the nature of the service provided (which presumably accounts for that approach)

^{3/} Since I did not find that there was a bargaining history that preceded 1968, I do not find that the statutory exceptions embodied in N.J.S.A. 34:13A-5.3 which permits supervisors to be included in units with nonsupervisors to be applicable.

^{4/} Six of the 27 captains testified at the hearing; one testified he had never assigned an extra duty.

set municipal police and fire departments apart from other governmental services. Normally there exist traditions of discipline regimentation and ritual, and conspicuous reliance on a chain of command all of which tend to accentuate and reinforce the presence of superior-subordinate relationships to a degree not expected to be found in other governmental units and which exist quite apart from the exercise of specific, formal authorities vested at various levels of the organization. When the Commission is asked to draw the boundaries of common interest in this class of cases, it cannot ignore this background as it examines for evidence of whether or not a superior exercises any significant authority over a rank and file subordinate which would or could create a conflict of interest between the two. In our view, where these considerations are real rather than merely apparent, it would be difficult indeed to conclude, in contested cases, that a community of interest exists between the lowest ranking subordinate and his superior, absent exceptional circumstances. We do not intend that this observation extend to those cases where the points of division are so few and so insignificant as to be termed de minimus, such as might not unreasonably be expected to exist in a small police or fire department. We are persuaded, however, after almost four years experience with this statute that unless a de minimis situation is clearly established, the distinction between superior officers and the rank and file should be recognized in unit determination by not including the two groups in the same unit.

This is not a small fire department; Bloomfield has the fourth largest fire department in Essex County. The "chain of command" and "discipline, regimentation and ritual" of this department are clearly identified in the rules and regulations of the department, some of which are set forth above. The undersigned believes, therefore, that the facts of this case should be applied to the standard set out by the Commission in East Brunswick rather than the standard used in another jurisdiction.

There was a great deal of testimony in this case concerning disputes surrounding negotiations proposals over several years. These disputes concerned wage proposals for captains compared to wage proposals for firefighters. This issue was often incorrectly characterized as a "conflict of interest" issue. As Counsel for the F.M.B.A. correctly points out, the Commission defines conflict of interest as a situation where an employee has divided loyalties between duties and obligations owed to management and loyalty owed to the other members of their negotiations unit. There was no evidence that the captains duties to the employer were comprised or difficult to perform because of membership in the F.M.B.A.

The facts presented concerning the history of the wage proposals concern whether or not the majority representative may have breached its duty of fair representation. While it is not necessary to decide this issue in order to determine whether the captains should be severed from this unit, I note that the Commission has held that a negotiated agreement that results in a detriment to one group does not establish a breach of the duty of fair representation by the majority representative. In Hamilton Township Board of Education, D.U.P. No. 82-24, 8 NJPER 199 (¶13083 1982), the Commission applied the standard used by the United States Supreme Court and the New Jersey Courts in determining whether the duty of fair representation has been breached. The Hamilton decision quoted Ford Motor v. Hoffman, 345 U.S. 330, 337-338 (1953) as follows:

Any authority to negotiate derives its principal strength from a delegation to the negotia-

tors of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals.

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. Compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiations. Differences in wages, hours and conditions of employment reflect countless variables. (emphasis added) 5/

While there were heated disputes among the members during the negotiations over wage proposals, the facts and the ultimate contracts are not sufficient to ground an unfair representations claim. 6/

RECOMMENDATIONS

Based on the foregoing, I recommend the following:

1. The position of Bloomfield Fire Captain is a supervisory position within the meaning of the Act which should not appropriately be included in F.M.B.A. Local #19.

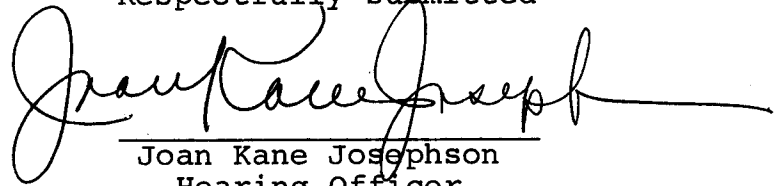
2. That a secret ballot election be directed wherein eligible

5/ See also; Belen v. Woodbridge Tp. Bd. of Ed., 142 NJ Super 486, 2 NJPER 266 (1976), certif. den., 72 NJ 458 (1976); In re N.J. Turnpike Authority (Kaczmarek), P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); In re Council #1, AFSCME, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1979); In re Red Bank Bd. of Ed., D.U.P. No. 79-17, 5 NJPER 56 (¶10037 1979); cf. Vaca v. Sipes, 386 U.S. 171 (1967)

6/ There is no evidence that the FMBA has refused to process grievances for captains.

employees shall vote as to whether they wish to be represented by the Petitioner.

Respectfully submitted

A handwritten signature in cursive script, reading "Joan Kane Josephson", written over a horizontal line.

Joan Kane Josephson
Hearing Officer

DATED: September 1, 1983
Trenton, New Jersey