

P.E.R.C. NO. 87-146

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF MARGATE,

Public Employer,

-and-

Docket No. CU-87-22

MARGATE CITY LIFEGUARDS
ASSOCIATION,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission clarifies a negotiation unit of lifeguards employed by the City of Margate and represented by the Margate City Lifeguards Association to exclude the Chief of lifeguards. The Commission finds that he is a supervisor and should not be in a unit with non-supervisory lifeguards.

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ASSOCIATION,

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Appearances:

For the Public Employer, Pachman & Glickman, P.A.
(Martin R. Pachman, of counsel)

For the Petitioner, Employee Representatives Inc.
(Myron Plotkin)

DECISION AND ORDER

On November 17, 1986, the Margate City Lifeguards Association ("Association") filed a Petition for Clarification of Unit. It seeks to include the chief of lifeguards in the negotiations unit of lifeguards and officers employed by the City of Margate ("City").^{1/} The City opposes this petition, asserting

^{1/} The Association had previously filed a representation petition and an amended petition seeking to represent, respectively, a unit of all City lifeguards and a unit of all lifeguards, lieutenants, other officers and the chief. The City then agreed to recognize the Association as the majority representative of all lifeguards, officers and lieutenants and to have the chief's inclusion or exclusion determined by this litigation.

that the chief is a "supervisor" and a "confidential employee" within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

Hearing Officer Ira W. Mintz conducted a hearing. The parties examined witnesses, introduced exhibits, argued orally and filed briefs and reply briefs. The last brief was received March 18, 1987.

On April 8, the Hearing Officer issued a report recommending that the chief be included in the Association's unit since, under the circumstances presented in the record, he found him neither a supervisor nor a confidential employee. H.O. No. 87-12, 13 NJPER 149 (¶18067 1987).

The Hearing Officer served his report on the parties and informed them that exceptions were due on or before April 22.^{2/} No extensions were requested and the City did not file its exceptions until May 1. The Association objected to this submission as untimely and unexcused under N.J.A.C. 19:11-7.3. We agree. However, while we will not entertain the exceptions, we will discharge our duty to review the record and to make our own independent findings of fact and conclusions of law. In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979).

^{2/} The Commission, on its own motion, transferred this case to itself. N.J.A.C. 19:11-8.8.

We have reviewed the record. The Hearing Officer's findings of fact (pp. 2-9) are generally accurate. We adopt and incorporate them here, with these modifications.

Finding of fact no. 4 states that Commissioner Rimm ultimately adopts the budget and informs Gallagher. That is what Gallagher testified to, but we are cognizant the Commissioners as a whole must adopt the budget.

Finding of fact no. 5 discusses rookie training school. We add that if the budget allowed, Rimm would tell Gallagher to start the school and that, as Rimm wanted and Gallagher concurred, the most senior guards taught this school. In particular, Slattery has taught rookie school since before Gallagher was a captain or a chief and Martinelli has either assisted him or ran it when Slattery could not. Gallagher decides whether one or two lifeguards are needed and has himself helped out as needed.

Lifeguards set up the beach stands each year. Since World War II, the tradition has been that the most senior guards do this work.

Gallagher has not judged the performance tests for new guards except once or twice. He does not interview applicants or discuss them with Rimm.

At the end of the summer, Gallagher on occasion might ask Rimm for permission to hire someone who had been too young to take the test at the beginning of the summer. This person would be tested on rowing and swimming and if hired would be on the beach patrol for the rest of the summer and/or next summer.

Rimm asked Gallagher whether Woody Thompson should be taken back as a guard. Gallagher said yes, but Rimm disagreed. The matter was settled in court.

We add to finding no. 6 that before City carpenters started repairing lifeguard equipment in 1986, lifeguards were asked to do this work by seniority depending on Boothby's assessment of workload.

We agree with the resolution in finding no. 7 of the testimonial conflict between Rimm or Gallagher about who determined the specific salary rate within a salary range. Rimm granted a raise in the daily rate in 1983 but the daily rate has not changed since, despite increases requested on behalf of the guards.

We add to finding no. 9 that Gallagher is not assigned to a lifeguard stand, but he estimated that he is on the beach between 1:30 and 4:30 p.m. He considers this time a major part of his responsibilities.

We add to finding no. 10 that R-2 states, in part, that unexcused absences or tardiness will result (probably) in a one day suspension for the first incident, a two day suspension for the second and a one week suspension or dismissal for the third incident. R-1 is issued on Rimm's stationery and is signed "Jim" over Gallagher's name and title; Gallagher testified that he did not sign R-1. Gallagher has obtained a substitute if a lifeguard is more than fifteen minutes late without calling in first; once a substitute has been obtained Gallagher will not let the lifeguard work.

The rules pertaining to solar radiation and protective equipment (R-2) were typed on Rimm's stationery and unsigned. Rimm approved Martinelli's proposed rules before they were distributed.

We add this finding. Lifeguards have worn the same uniform for years. Rimm chose the color. Rimm instructed Gallagher to choose the least expensive uniforms; Gallagher then ordered the uniform after checking around and consulting with Rimm.

We first consider whether Gallagher is a supervisor within the meaning of the Act and thus ineligible for inclusion in the Association's unit. N.J.S.A. 34:13A-5.3 defines a supervisor as "having the power to hire, discharge, discipline, or to effectively recommend the same." We must review all the circumstances of a particular case to determine whether the employee has and regularly exercises such power. Cherry Hill Tp. DPW, P.E.R.C. No. 30 (1970); Somerset Cty. Guidance Center, D.R. No. 77-4, 2 NJPER 358 (1976).

We first consider Gallagher's role in hiring. Lifeguards are normally hired in June after a test of their skills; Gallagher chooses the judge but has no other role in these hiring determinations. Gallagher thus does not screen applications or interview candidates. The test results are forwarded to Rimm who then decides whom to hire, without discussing the candidates with Gallagher. By contrast to the main hiring effort at the beginning of the summer, Rimm has occasionally permitted Gallagher to hire a lifeguard or two at the end of the summer without Rimm reviewing each individual. The record indicated there was one rehiring

decision: Gallagher recommended rehiring Martinelli, after a three year hiatus, as a lieutenant but Rimm rejected this recommendation and rehired him as a guard.^{3/} Under all these circumstances, we conclude that Gallagher does not have and regularly exercise the power to make effective recommendations concerning hiring.

We next consider Gallagher's role in discharging employees. We have just decided a case where Rimm rejected Gallagher's recommendations and discharged two lifeguards because they had sought pension benefits. City of Margate, P.E.R.C. No. 87-___, 13 NJPER ___ (¶___ 1987). Rimm also rejected Gallagher's recommendation to retain Woody Thompson and decided to discharge another lifeguard for profanity after the incident was reported to him by someone besides Gallagher. Under all these circumstances, we conclude that Gallagher does not have or regularly exercise the power to make effective recommendations concerning discharges.

We next consider Gallagher's role in discipline. Rimm decides questions of major discipline, such as the discharge of the guard who swore and the season suspensions of the two guards who smoked marijuana. Gallagher, however, is responsible for monitoring daily beach operations and overseeing about 60 lifeguards. As part of his responsibilities, he investigates and reports incidents of alleged misconduct. Moreover, beach patrol rules, in effect since 1970 and reissued yearly by Gallagher, provide that unexcused

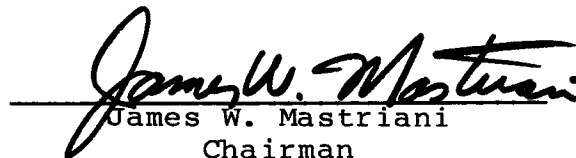
^{3/} Gallagher plays a role in assigning lifeguards already on the patrol to teach rookie school and repair equipment, but these are not hiring determinations.

absences or tardiness will probably result in a one day suspension the first time, a two day suspension the second time or a one week suspension or dismissal the third time. Gallagher in fact has not permitted lifeguards to work if they report more than 15 minutes late without an excuse and a substitute has been hired. Given the rules' warning of suspensions or dismissals for tardiness, Gallagher's sending the employees home should be considered disciplinary. Under all these circumstances, we conclude that Gallagher has and has regularly exercised the power to discipline employees. Accordingly, we hold that Gallagher is a supervisor and should be excluded from the Association's negotiations unit.^{4/}

ORDER

The Public Employment Relations Commission declares that the chief of lifeguards is not in the negotiations unit represented by the Margate City Lifeguards Association.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, and Wenzler voted in favor of this decision. Commissioners Bertolino and Reid were opposed.

DATED: Trenton, New Jersey
May 20, 1987
ISSUED: May 21, 1987

^{4/} We agree with the Hearing Officer that Gallagher is not a confidential employee on this record. His input on salary issues, for example, has been on behalf of the guards rather than as a negotiator on behalf of the City or a supplier of confidential information to Rimm.

H.O. NO. 87-12

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

In the Matter of

CITY OF MARGATE,

Public Employer,

-and-

Docket No. CU-87-22

MARGATE CITY LIFEGUARDS
ASSOCIATION,

Petitioner.

SYNOPSIS

A Hearing Officer recommends that the Public Employment Relations Commission find the chief of lifeguards of the City of Margate beach patrol is not a supervisor or a confidential employee within the meaning of the Act. The Hearing Officer found that the chief does not have the authority to hire, discharge, discipline or effectively recommend the same or functional responsibilities or knowledge in connection with the collective negotiations process. He further recommends the unit represented by the Margate City Lifeguards Association be clarified to include the title chief of lifeguards.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommendations, any exception 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.

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Appearances:

For the Public Employer, Pachman & Glickman, P.A.
(Martin R. Pachman, of counsel)

For the Petitioner, Employee Representatives Incorporated
(Myron Plotkin)

HEARING OFFICER'S
RECOMMENDED REPORT AND DECISION

On November 17, 1986, the Margate City Lifeguards Association ("Association") filed a Petition for Clarification of Unit seeking to include the chief of lifeguards in the unit of lifeguards and officers employed by the City of Margate ("City"). Immediately before the petition was filed, the City had recognized the Association as the exclusive representative for all lifeguards excluding the chief. The Director of Representation issued a Notice of Hearing scheduling a hearing for that same day.^{1/}

^{1/} On July 3, 1986, the Association filed a Petition for Certification of Employee Representative seeking to represent
(Footnote continued on next page)

At the hearing, the parties examined witnesses, introduced exhibits and argued orally. At the conclusion of the oral argument, I gave both parties the opportunity to file briefs because the City first raised the issue of confidentiality in its closing remarks.^{2/}

Because of a delay in the receipt of the transcripts, briefs were not filed until March 9, 1986. Reply briefs were filed by March 18.

Findings of Fact

1. The City of Margate is a public employer within the meaning of the Act.

2. The Margate City Lifeguards Association, Inc. is an employee organization within the meaning of the Act. It represents

(Footnote continued from previous page)

1/ all lifeguards. On August 8, it filed an amended petition seeking to represent all lifeguards, lieutenants and other officers and the chief. On September 25, the Director of Representation issued a Notice of Hearing. Before the hearing, the City agreed to recognize a unit of all lifeguards except the chief. The Association then filed this petition. The parties waived any rights with regard to time limits and the filing of statements in order that a hearing on the new petition be held that same day.

2/ The City refused to make an opening statement, "leaving [the Association]...to their proofs." (T8) The City objected to the request for briefs because it had agreed to argue orally only after the parties indicated they would not file briefs. I nonetheless requested briefs to permit a full exploration of the confidentiality issue.

all lifeguards employed by the City excluding only the position of chief. In 1986, there were 56-60 lifeguards employed by the City (T12).

3. James Gallagher has been the chief of the Margate beach patrol for about ten years. Before that, he was the captain, the highest rank at the time. The chief is the highest ranking employee responsible for the day-to-day operation of the beach patrol (T10). There is no written job description for the chief (T107).

4. Beginning each January, the chief prepares for the coming summer. He meets with the Commissioner of Public Safety, Sigmund S. Rimm, monthly until the start of the season. They discuss the budget, salaries, uniforms, equipment and the number of returning guards (T13). Rimm ultimately adopts the budget and informs the chief (T17).

5. During the winter, letters are sent to the previous year's guards inviting them to return (T72). Rimm testified that he asks the chief if there are any guards he would recommend not be rehired. However, he did not remember if the chief had ever recommended a letter not be sent out to someone (T125). By late May, the City knows who is coming back. It then hires new employees, if necessary.

With Rimm's permission, the chief sets up a rookie training school to teach high school and college students how to row boats in preparation for a pre-employment test. The school is taught by senior guards (T24). Gallagher decides whether one or two

instructors are needed (T103). During the third week in June, the City conducts a performance test for new guards. The chief chooses the judge. If he cannot find one, he is the judge (T34, T36-T37). He does not screen applicants: whoever shows up takes the test. Candidates are ranked and the scores are transmitted to Rimm who has the final hiring authority (T114-T117).

At the end of the summer, the chief might ask Rimm permission to hire someone for the balance of the summer or the following year (T108-T109). In 1986 Gallagher's brother and Mark Boothby were not rehired despite Gallagher's recommendation. Also, Gallagher recommended that Joseph Martinelli return to the patrol as a lieutenant after a hiatus. Rimm rehired him, but as a guard (T70-T71).

6. Before 1986, Gallagher conferred with Boothby during the winter about needed equipment repairs. Lifeguards would do the repair work in the spring. Boothby would decide how many and who would work depending on the workload (T31-T32). Since 1986, most repairs are done by city carpenters. The chief informs Rimm so that appropriate allocations can be made (T12-T14).

7. Salary ranges for lifeguards are set by ordinance (R-3). For example, a first year guard's range might be from \$26-\$28 per day. Gallagher testified the exact amount within the range that all first year guards would receive is set by Rimm (T20-T21, T86). Rimm claimed that Gallagher could set the dollar amount as long as it fell within budget and ordinance limits and

met staffing requirements (T101-T103). When asked if he had explicitly given Gallagher the authority to set salaries within the range, he responded, "[i]t has been, to my understanding," though not in writing (T120).

Each year, Gallagher meets with Rimm to discuss the budget and salaries. Gallagher characterized the discussions as negotiations for the guards and lieutenants. Sometimes, he would present the previous year's salary ordinance. In 1983, Gallagher and the lieutenants presented Rimm with a salary proposal comparing salaries in similar beach patrols (P-1). The Margate guards were not at the top of their range in the ordinance. Their proposal would have raised the daily salary. Rimm denied their request due to a budget cap. Salaries for lifeguards have not changed since then (T20, T75-T79). However, returning guards have gotten longevity increases (T20-T21, T133).

I credit Gallagher's testimony regarding the setting of salaries within the range. He clearly and unequivocally denied having the authority to set salaries. Rimm contradicted himself on this point. First, he said he did not set the daily rates. Later, he stated that it was merely his "understanding" that the chief had the authority. He testified that he could not recall whether either the range or salaries had changed since 1983, yet he recalled that he froze salaries due to a budget cap. In addition, the guards' 1983 salary proposal to Rimm addressed the daily rates; something

that would not have been necessary if the chief had the authority to set rates.

8. Assignments to specific work stations have traditionally been controlled by seniority. However, if experience is needed in certain areas, the chief will ask senior guards to go to other areas (T42). In 1986, there were three lieutenants. Each was responsible for four stands. They were assigned by Gallagher who gave Rimm a diagram which he approved. Lieutenants make assignment adjustments if there is absenteeism. They try to maintain a balance of experienced and less experienced guards at each stand.

In September 1986, no officers were available to open the beach. Gallagher recommended Martinelli do it. Rimm rejected the recommendation and assigned a less experienced guard. Rimm testified he had no confidence in Martinelli's judgment due to an earlier incident concerning the wearing of Association t-shirts during work hours.

9. The beach patrol has a headquarters which includes a medical room and chief's office. A telephone system links it to the 12 stands. The chief spends most of his time in the headquarters answering the telephone and filing, although on busy days, during emergencies or when there is a staff shortage near the end of the summer, he will spend some time doing regular lifeguard duties (T41). Whoever has telephone duty records in a daily log which and when employees arrive at work. The chief certifies the records for

payroll purposes (T46-T47, T63). Serious incidents are also reported in the daily log (T47-T49).

10. Each year, the chief issues a memorandum captioned "MCBP Lifeguards: Rules, Regulations, Policies." (R-1, T50-T51) The same rules have been distributed or posted since the early 1970's. They establish starting and quitting times, absence/tardiness policies, uniform and workout requirements, that certain conduct is cause for dismissal and that guards must qualify in CPR. Gallagher has never "suspended" anyone for a violation of the rules.

While there have been few instances of discipline and those were initiated by Rimm, Gallagher apparently has the discretion to deny tardy employees the ability to work and the authority to threaten discipline. On rare occasions, employees who are 15 minutes late have already been replaced by a substitute and are not permitted to work the day. The chief exercises some discretion when enforcing this rule. For example, he would hold a spot for a lifeguard who calls to report that he will be late. He could not recall sending anybody home in 1986, but when he does, he does not call Rimm to authorize the replacement or "docking" (T51, T79-T80, T82-83, T-84-85, T97-T98). Rimm claimed that the chief has the authority to discipline although he expects to be informed afterwards and has the final say (T105). Gallagher flatly denied having the authority to independently discipline a lifeguard (T69). However, Gallagher testified the lieutenants would tell a guard who

violated the rules that "if it happens again you will be disciplined." He stated that his involvement would be to "just tell them not to let it happen again, please" (T88).

One guard was not rehired because he swore at a resident. The incident had been reported to Rimm, who informed Gallagher that he did not want him back (T52-T53). Two guards were caught smoking marijuana. Gallagher conducted an investigation and then contacted Rimm because he felt he had a duty to report the incident and find out what Rimm wanted to do about it. Rimm suspended them for the remainder of the season (T92-T97).

Rimm told Gallagher to buy sunscreen and that the guards should use it and umbrellas for safety reasons. Gallagher asked Martinelli to write rules which Martinelli passed out. Rimm was given a copy before distribution (T54-T57).

Rimm asked Gallagher to write plans for the removal of equipment in case of a serious storm. If there is a storm, the chief is responsible to safeguard the equipment. Gallagher and Rimm decide whether to close the beach (T58-T60).

11. There are no formal evaluations of either the lifeguards or the officers (T71-T72).

12. Rimm testified that the City needs the chief in the collective negotiations process. Rimm's entire testimony regarding collective negotiations was as follows:

Q. Would you tell us, please, if you would feel sufficiently conversant in the day-to-day operation of the beach patrol to participate in those negotiations without assistance information and reliance upon someone with more hands on --

A. I would not.

Q. -- operation?

A. No, I would look for that support.

Q. Given the hierarchy of the Margate City Beach Patrol, is there any person, other than the chief, who could fulfill the role that we have just described in the collective negotiations process?

A. No.

Q. When collective negotiations is underway, do you believe that the person -- whoever might be holding the position of chief -- should be part of the city's bargaining team?

A. Yes, I do.

Q. One last question. Other than the chief, is there anyone at the beach patrol to mind the store on behalf of management?

A. No, there is not. [T106-107]

Positions of the Parties

The Association argues that the actual job functions and responsibilities of the chief do not meet the determining criteria and statutory definition of supervisor. It asserts the power to hire, discharge, discipline or effectively recommend the same must be exercised with some regularity, citing Somerset Cty. Guidance Center, D.R. No. 77-4, 2 NJPER 358 (1976). Specifically, it argues the chief does not hire or effectively recommend hiring; does not discharge and was not involved in the City's only decision to discharge; has no role in evaluations; has an irregular and undefined role in discipline; and that providing substitutes for tardy guards is not discipline and if it is, it is de minimus

because it requires no independent judgment. It asserts also that the City has failed to demonstrate any actual, substantial conflict of interest. Finally, it maintains the chief is not a confidential employee because he does not have functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process and there is no reason to believe this will change merely due to the recognition of a lifeguards' negotiations unit. It concludes that to deny the chief the coverage and protections of the Act based on mere speculation about his future role would be unfair at best.

The City argues that the chief is a supervisor because he is in command of his work station, has responsibility for day-to-day discipline and is required to report serious violations to superiors, citing Tp. of Bloomfield, P.E.R.C. No. 84-86, 10 NJPER 117 (¶15060 1984) aff'd App. Div. Dkt. No. A-2850-83T3 (1/24/85). Specifically, it claims the chief does much of the hiring processing, although Rimm has the ultimate hiring responsibility; on occasion requests permission to hire at the end of the season; refuses to allow tardy employees to work; has the authority to orally warn, although major situations are reported to Rimm; assigns duties; issues rules and regulations; and signs the pay log. In addition, the City asserts that under Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 (1971), there is a conflict of interest requiring the beach patrol's chief operating officer not be in a negotiations unit with his subordinates. Finally, the City

maintains the chief is a confidential employee because it is reasonable to presume that he will have access to labor relations material and inescapable that he should be part of the City's negotiating team.

Analysis

The issues are whether the chief of the Margate beach patrol is a supervisor or confidential employee. N.J.S.A. 34:13A-5.3 provides, in part, that:

[P]ublic 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; provided, however, that this right shall not extend to ...confidential employees...nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership.

If the chief is a supervisor, he cannot be represented by the Association. If he is a confidential employee, he has no right under the Act to join any employee organization.

I begin with a discussion of his alleged supervisory status. I agree with the Association that the cases cited by the City, Tp. of Bloomfield, Atlantic City Convention Center Authority, P.E.R.C. No. 85-108, 11 NJPER 303 (¶16107 1985) and Cty. of Middlesex, D.R. No. 80-14, 5 NJPER 517 (¶10267 1979) dealt with

different circumstances and do not control here.^{3/} In this regard, the Commission has stated in City of Elizabeth, P.E.R.C. No. 71 (1971):

Required is a complete examination of the nature of authority over subordinates, the nature of responsibilities to superiors, and the context in which they function. It is more a question of relationships and proximities within a given case than distinctions or comparisons with another case whose fact setting will inevitably be somewhat different.

I look then to the unique facts of this case.

There is no dispute that Rimm, not Gallagher has the final authority to hire. Veteran lifeguards are sent letters inviting them to return, and Rimm could not remember if the chief had ever recommended a letter not be sent to someone. All prospective employees who want to take the lifeguard test can, and Rimm decides how many and whom to hire.

^{3/} In Bloomfield, the Commission removed five captains from a unit of all firefighters based on Wilton, City of Camden, P.E.R.C. No. 52 (1971) and City of Union City, P.E.R.C. No. 70 (1971) but did not decide whether they were supervisors. In Atlantic City Convention Center Authority, the Commission found a chief engineer to be a supervisor because he had the authority to make effective recommendations concerning hiring and discipline. He had recommended discipline and suspended an employee who was ultimately discharged. In Cty. of Middlesex, the Director of Representation adopted, in the absence of exceptions, a Hearing Officer's recommendation that the County's chief sanitary inspector and senior sanitary inspectors were supervisors.

The budget and salaries are set by Rimm. The chief discusses salaries with Rimm each year, but has no input into the final determinations.^{4/}

Because there is no formal evaluation process, the chief has no traditional supervisory function of providing evaluative input into promotion, increments, discipline or discharge.

This case ultimately turns on the chief's day-to-day role in controlling the beach patrol. Assignments, while generally controlled by seniority, are the chief's initial responsibility. He adjusts assignments to equalize experience and assigns instructors for the rookie school. Rimm, however, ultimately approves the assignment diagram.

The general rules the chief promulgates are not his own. They preceded his tenure as chief and have not changed in over a decade.

He has never fired or even suspended long-term any of his subordinates. He has the authority to find replacements for employees who are 10-15 minutes late. He exercises that authority with discretion and without prior consultation, but only rarely.

^{4/} Even if the chief's role is viewed as negotiating for himself and the guards, as maintained by the Association, that does not touch directly on his supervisory status. Supervisors can meet with their superiors on behalf of those they supervise. Such meetings do not preclude their being supervisors.

That, however, is not discipline.^{5/} The chief is simply fulfilling his responsibility to staff adequately each lifeguard stand. There is no indication employees are otherwise penalized for being late. Gallagher acknowledges the lieutenants have threatened discipline and I therefore assume he could do the same. However, the record shows that the chief has never taken disciplinary action on his own and may not even have that authority. He reports serious incidents to Rimm so that action can be taken. Rimm then makes an independent judgment whether discipline is warranted.

While I would expect that a 60 person beach patrol would have a full-time supervisor, the facts show that the Commissioner of Public Safety has assumed that role. The chief does not exercise any of the traditional supervisory functions warranting exclusion from a rank-and-file unit. However, I must also consider the question posed by the Supreme Court in Wilton. "To what extent does the reasonable and good faith performance of the obligations a superior owes to his employer have capacity, actual or potential, to create a conflict of interest with other[s]...he is obliged to oversee and evaluate for his employer." Id. at 417. While Wilton concerned conflicts between supervisors, similar considerations could apply here. Wilton's conflict of interest analysis is merely

^{5/} This is not to suggest that the employee has not been disciplined for purposes of grievance arbitration. That question is not before me. It requires an examination of the rule's impact on the employee, rather than simply the chief's role in applying it.

the flipside of the community of interest analysis that must be done in any unit determination. N.J.S.A. 34:13A-5.3. I must determine if there is "a substantial actual or potential conflict of interest." Id. at 427.

The chief has the ultimate responsibility to oversee the day-to-day operation of the beach patrol. When two lifeguards were caught smoking marijuana, the chief reported the incident to Rimm. This type of reporting of misconduct is the strongest reason it would be inappropriate to clarify the Association's unit to include the title chief of lifeguards. However, it has only happened once. I have previously found that the chief does not hire, fire, discipline or effectively recommend the same. He is not a supervisor within the meaning of the Act. In addition, the beach patrol does not have a military-like approach to organization and administration that, like police and fire departments, sets it aside from other governmental services. See Union City. While the chief and the lifeguards may not have an identity of interest, in that the chief may report certain infractions to Rimm for possible action, that is not the standard. The standard is community of interest, or the lack of a substantial, potential or actual conflict of interest. One incident of reporting an infraction, absent a history of discipline or effective recommendation, does not present a substantial potential or actual conflict of interest requiring exclusion.

The City also argues that the chief is a confidential employee and should continue to be excluded from the unit on that basis.

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

"Confidential employees" of a public employer means employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

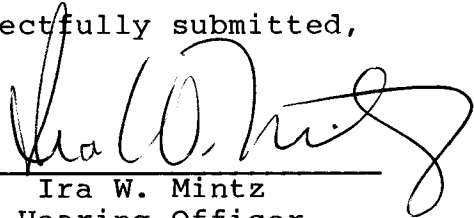
The City's confidentiality argument is based solely on Rimm's testimony he would need the chief's assistance in negotiations and that the chief should be part of the City's negotiations team. The chief does not hire, fire, discipline, set salaries, develop the budget or effectively recommend the same. In addition, none of his duties to date compel the conclusion that the chief has or will inevitably have information or responsibilities incompatible with membership in a collective negotiations unit. Any unit member can provide information to an employer for purposes of negotiations without necessarily becoming part of the employer's negotiations team or privy to confidential labor relations material. I appreciate that the timing of the hearing precludes a finding as to the post-recognition composition of the City's negotiations team. However, I note that the City presented no evidence concerning any confidential duties during the post-petition, pre-recognition proceedings and that both parties agreed to an expedited hearing. The implications to the effected

employee of a finding of confidentiality are great and therefore that finding should not rest on speculation alone. Accordingly, I find that, under the facts of this case, the chief of lifeguards of the Margate City beach patrol is not a confidential employee and that it would be appropriate to clarify the Association's unit to include the title chief of lifeguards.

Recommendation

I recommend the Commission clarify the negotiations unit to include the title chief of lifeguards.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Ira W. Mintz", is written over a horizontal line.

Ira W. Mintz
Hearing Officer

DATED: Trenton, New Jersey
April 8, 1987