

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Public Employer-
Petitioner,

-and-

Docket No. CU-80-75

NEWARK SUPERIOR OFFICERS
ASSOCIATION,

Employee Representa-
tive.

CITY OF NEWARK,

Public Employer,

-and-

Docket No. CU-81-7

NEWARK SUPERIOR OFFICERS
ASSOCIATION,

Employee Representa-
tive-Petitioner.

SYNOPSIS

The Public Employment Relations Commission denies a Request for Review which the Newark Superior Officers Association had filed concerning the Director of Representation's determination that the Newark Chief of Police and Deputy Chiefs of Police were managerial executives and thus outside the coverage of the New Jersey Employer-Employee Relations Act. In re City of Newark, D.R. No. 82-21, 7 NJPER 645 (¶12291 1981). The Commission finds that the Hearing Officer developed a complete record and that the Director did not err in not reopening the record.

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Appearances:

For the Public Employer, John J. Teare, Corporation
Counsel (Rosalind L. Bressler, Assistant Corporation
Counsel)

For the Employee Representative, Whipple, Schneider
& Ross, Esqs. (Lawrence A. Whipple, Jr., of Counsel)

DECISION ON REQUEST FOR REVIEW

On April 22, 1980, the City of Newark ("City") filed a
Petition for Clarification of Unit with the Public Employment
Relations Commission. The City claimed that the title of Deputy
Chief should be removed from the collective negotiations unit
represented by the Newark Superior Officers Association ("Asso-
ciation").^{1/} The City alleged that Deputy Chiefs are managerial

1/ Pursuant to the recognition clause of the parties' collective
negotiations agreement, the Association represents:

(Continued)

executives^{2/} or confidential employees within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). Alternatively, the City alleged that a conflict of interest exists between the Deputy Chiefs and the other superior officers in the Association's unit.

On August 6, 1980, the Association filed its own Petition for Clarification of Unit. The Association sought to include the Chief of Police and to retain the Deputy Chiefs in the unit. It alleged that the Chief of Police and the Deputy Chiefs were neither managerial executives nor confidential employees and that no conflict of interest with other superior officers would result from their inclusion in the unit.

Pursuant to an Order Consolidating Cases and a Notice of Hearing, Commission Hearing Officer Dennis J. Alessi conducted hearings on September 17 and 18, 1980. After Hearing Officer Alessi left the employ of the Commission, the Director of Representation, pursuant to N.J.A.C. 19:11-6.4, assigned Hearing Officer Arnold H. Zudick to complete the hearing. He did so on December 16, 1980.

All parties were given an opportunity to examine and cross-examine witnesses and present evidence. The City called the Chief of Police as its only witness. The City then rested,

1/ (Continued) "...all Superior Officers employed by the City in the positions of Sergeant, Lieutenant, Captain, Inspector, Legal Analyst, Deputy Chief and excluding Police Officers and other nonsupervisory employees, clerical employees, managerial executives, craft employees, professional employees and all others."
2/ N.J.S.A. 34:13A-(3)(f) states in part: "Managerial executives of a public employer means persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices...."

but reserved the right to call the Director of Police as a rebuttal witness. The Association rested without calling any witnesses, despite having subpoenaed eight Deputy Chiefs, four of whom attended the December 16, 1980 hearing.

At the conclusion of the Association's case, the Association's attorney asked if the Hearing Officer intended to call any witnesses himself; if so, the attorney wanted to reserve the right to offer rebuttal testimony. The Hearing Officer, after acknowledging that, in light of his recent appointment, he had not yet studied the transcript of the first two days of hearing and exhibits in detail, stated that he would reopen the record if he believed that facts necessary to resolution of the issues were missing. The Hearing Officer, however, made it clear that the record would not be reopened unless absolutely necessary. The Hearing Officer, with the agreement of the parties, then set a briefing schedule. The schedule was not conditioned on an explicit determination that the record would not be reopened. Neither party argued orally. The record was then closed.

On January 12, 1981, the City submitted its brief. The Association did not submit a brief.

The Hearing Officer determined that the record was complete and issued his report on May 18, 1981. H.O. No. 81-13, 7 NJPER 305 (¶12134 1981). He concluded that the Chief and Deputy Chiefs of Police in the City of Newark were managerial executives and that a conflict of interest existed between the Chief and Deputy Chiefs and the other superior officers in the

unit. Accordingly, he recommended that the Chiefs and the Deputy Chiefs be excluded from the unit.

Neither the City nor the Association filed exceptions. However, the Association did file an application for a new hearing in which it contended that the Hearing Officer erred in not re-opening the hearing.

On November 2, 1981, the Director of Representation denied the Association's application and adopted the Hearing Officer's findings of fact and conclusions of law. In re City of Newark, D.R. No. 82-21, 7 NJPER 645 (¶12291 1981). The Director found the record adequate for resolution of the issues. He stressed that the Association elected not to present any direct testimony on either petition, even though it had brought four Deputy Chiefs to the December 16, 1980 hearing. He also stated that the Association had not disclosed who would additionally testify, how the additional testimony would differ or add to the testimony already in the record, or why that evidence was not produced at the time the record was open. Finally, the Director agreed with the Hearing Officer that the Chief of Police and the Deputy Chiefs of Police were managerial executives. Accordingly, he granted the City's Petition, thus removing the Deputy Chiefs from the unit, and denied the Association's Petition to include the Chief of Police.

On November 13, 1981, the Association filed a Request for Review pursuant to N.J.A.C. 19:11-8.2(a)(2).^{3/} The Associa-

^{3/} N.J.A.C. 19:11-8.2(a)(2) provides: "(a) The commission will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

2. That the director of representation's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the party seeking review."

tion argues that the Hearing Officer and the Director failed to develop a complete factual record, that the Hearing Officer was required to call additional witnesses, that the Hearing Officer unequivocally indicated that further hearings would be held before briefs were to be filed, and that it was unaware of an "offer of proof" requirement when it filed its application for a new hearing. For these reasons, the Association requests that the record be reopened and further testimony taken.

We believe that the grounds set forth do not raise substantial legal and factual issues warranting review. The Association does not contend that the record is insufficient to establish that the Chief of Police and the Deputy Chiefs are managerial executives or that the Director and the Hearing Officer misapplied the Commission's guidelines for determining who is a managerial executive. In re Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507, 508 (¶11259 1980); compare In re Upper Providence Twp., 11 PPER 161 (¶11087 1980) (Pennsylvania Labor Relations Board finds that Township Chief and Deputy Chiefs are managerial executives). The only question is a procedural one: did the Director err in not reopening the record? We are satisfied that he did not.

N.J.A.C. 19:11-6.2 provides that hearings in representation matters are investigatory, not adversarial. Their purpose is to develop a complete record upon which the Director of Representation and the Commission may discharge duties under N.J.S.A. 34:13A-6. N.J.A.C. 19:11-6.3 makes it the duty of the Hearing Officer to inquire fully into the facts as they relate to the

matter under consideration.^{4/} Both rules have been fulfilled in this case.

The City called the Chief of Police. He gave a full description of his and the Deputy Chiefs' duties and responsibilities. This description fully warranted their designations as managerial executives. Because of the comprehensive nature of the Chief's testimony, we do not believe the Hearing Officer was required to call any additional witnesses on his own.^{5/}

The record demonstrates that the Hearing Officer did not assure the Association he would reopen the hearing at some later date. Rather, the Hearing Officer specifically stated that he would only reopen the hearing if, on review of the record, he believed there were facts pertinent to a final decision not in the record. Further, the briefing schedule which the Hearing Officer set, with the agreement of both parties, did not depend upon a decision not to reopen the record. Thus, the Hearing Officer did not mislead the parties.^{6/}

^{4/} Contrast unfair practice proceedings in which the Charging Party has the burden of proving the allegations of the Complaint by a preponderance of the evidence, N.J.A.C. 19:14-6.8, and the Hearing Examiner has no duty to make a complete record. In re Township of Jackson, P.E.R.C. No. 82-79, 8 NJPER ____ (¶ ____ 1982).

^{5/} Specifically, the Hearing Officer was not required to call the four Deputy Chiefs the Association elected not to call. The Association had apparently planned to call the Deputy Chiefs to rebut the unfavorable testimony it expected the Director of Police to give. The Director of Police, however, did not testify. Had the Director confirmed the Chief's testimony, the Association's position would only have been worse.

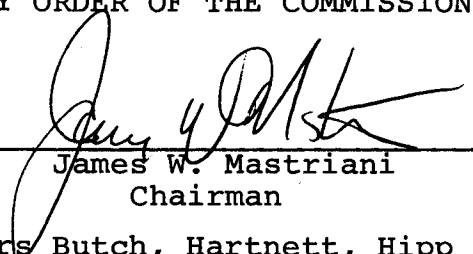
^{6/} We will not consider allegations of off-the-record assurances that the record was going to be reopened. Parties may not impeach a clear record which they have helped establish on the basis of alleged discussions which they have decided to keep off-the-record.

Because we find no prejudicial error and no compelling reasons for review, we deny the Request for Review.

ORDER

The Newark Superior Officers Association's Request for Review is denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Hipp and Suskin voted in favor of this decision. None opposed. Commissioner Graves abstained. Commissioner Newbaker was not present.

DATED: Trenton, New Jersey
May 4, 1982
ISSUED: May 5, 1982