

PUBLIC SAFETY ADMINISTRATION NEWSLETTER

Health Check: Enabling Ordinance

On March 29, 2001, the New Jersey Supreme Court issued a **landmark decision requiring specific details of a police department table of organization to be in a police ordinance**. The Supreme Court recognized that its interpretation of the statutory requirements was both so significant and at the same time so contrary to the then-prevailing interpretation that retroactively applying these requirements would undermine and invalidate a tremendous number of police appointments and promotions across the state. While the New Jersey Supreme Court thus gave its decision only prospective application, the court made no bones about the fact that police appointments and promotions from March 29, 2001 forward are invalid if the municipal police ordinance does not conform to the court's surprising interpretation of the statutory requirements.

The case was Reuter v. Borough of Fort Lee. As factual background, Fort Lee had a fairly typical police ordinance provision allowing for the number of positions in the police force to be changed from time to time by municipal resolution. In fact, many municipalities have had police ordinances that allow for changes in the composition of the police force simply by leaving positions intentionally vacant upon retirements, promotions, etc., even without so much as a formal resolution. Fort Lee's police ordinance, however, created only the position of police chief, and gave the mayor and council discretion to create and fill whatever other positions in the line of command they deemed necessary by resolution. Apparently, the ordinance further provided that vacancy in the

position of Police Chief would only be open to a Deputy Police Chief.

The council wanted a Captain Jeremiah O'Sullivan to be named to the vacant police chief position, so, by resolution, council first created an additional Deputy Chief position and appointed O'Sullivan to it. Three months later the council appointed O'Sullivan Police Chief. The two apparently pre-existing Deputy Chiefs, John Reuter and Bernard Hart, filed suit challenging O'Sullivan's appointment to Police Chief. They alleged that O'Sullivan's appointment as Deputy Chief was invalid because he was appointed by resolution only to a third Deputy Chief position that was never created by ordinance. Since only the Deputy Chiefs were eligible for the Chief position, they argued that O'Sullivan's appointment as Chief was equally invalid. The Appellate Division agreed, and affirmed the trial court decision returning O'Sullivan to the position of Captain. The New Jersey Supreme Court agreed entirely with the reasoning of the Appellate Division and the trial court, but nonetheless decided that O'Sullivan's appointments to Deputy Chief and then Chief would nonetheless not be invalidated on this basis. Rather, as noted above, the New Jersey Supreme Court noted the decision was contrary to a "long term interpretation of the law," and held the new interpretation effective "from today [3/29/01] forward..."

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The basic reasoning of the Appellate Division, adopted also by the New Jersey Supreme Court, is based upon recognition of the different procedural requirements and safeguards when municipal action is required by ordinance vs. by resolution. Particularly, the Appellate Division noted that public notice and participation are the two important interests embodied in the requirements that ordinances go through two readings, publication and a hearing before passage. Resolutions, by contrast, may be introduced and passed at the same meeting, and may be passed in minutes without the knowledge of anyone except those present. Turning to an examination of the state statute at issue, it requires that municipalities “shall provide for a line of authority relating to the police function” by ordinance.¹ The court explicitly interpreted the term “line of authority” to mean “an organizational chart.” The court also suggested that the organizational chart required to be in an ordinance must not only include whether a department will have the ranks of patrolman, sergeant, lieutenant, captain, inspector, deputy chief, chief of police and possibly others), but the number of each rank to comprise the police force.

Some interesting questions were left unresolved by the Reuter decision. For one thing,

¹ The statute also provides that the municipality “may . . . provide for the appointment of . . . such members, officers and personnel as shall be deemed necessary. . . [and] fix[] their compensation and prescri[be] their powers, functions and duties” by ordinance. The use of the word “may” in this sentence, contrasted with the use of the word “shall” noted above is certainly interesting to consider. It at least suggests that perhaps inclusion of the terms of office and the powers, functions and duties of the officers at the various ranks provided for in the ordinance is discretionary, not mandatory. It would thus seem that these issues could be addressed either by ordinance or by less strictly-circumscribed means such as resolution or perhaps even policies or rules and regulations promulgated by the appropriate authority.

the two pre-existing Deputy Chief’s positions held by Reuter and Hart had also never been established by ordinance as would now be required as of March 29, 2001. Rather, the initial two Deputy Chief positions were contained in “the then Fort Lee Police Department Organizational Chart.” The decisions do not reflect whether that Organizational Chart came from a resolution, policy of the appropriate authority, Rules and Regulations promulgated by the appropriate authority, or perhaps the Chart had been merely created and updated from time to time by the previous Police Chiefs. Clearly, however, the two pre-existing Deputy Chief positions were similarly not created by ordinance, and if the situation were analyzed under post-March 29, 2001 applicable law, their tenure in those positions would seem to be equally invalid. The court explicitly noted it was not addressing that issue. Similarly left unaddressed is the question of how detailed the Organizational Chart of the Police Department in the ordinance must be, see fn1 herein. What was addressed and made perfectly clear, however, is that an organizational chart for the police force must be contained in an ordinance, and it must definitely specify the positions and ranks comprising the police force, and the number of people at each rank. It is also clear then that changes can only be effectuated by ordinance.

Municipal and police administrations must not make the mistake of assuming their police ordinance meets these requirements, or that somehow it will not matter. If the police ordinance has not been reviewed and amended since March 29, 2001, it is likely to not be in conformity with Reuter. Reuter represented a significant change from what was commonly believed to be necessary for a valid police ordinance. More often than not, before March 29, 2001, police ordinances were enacted giving municipal and/or police administration the flexibility to change the structure and organization of the police force without the formal, technical prerequisites and procedures that come with changing an ordinance.

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History has taught us that this is indeed a sweeping change, and the courts will invalidate promotions and appointments in a municipal police force whose ordinance does not conform to Reuter. The last change this significant was when the statute itself was amended in 1981, requiring municipalities to create and establish their police forces by ordinance. The ordinances were then required to designate an “appropriate authority” and the statute required that the rules and regulations governing a police force be adopted only by that “appropriate authority.” Many municipalities failed to keep up with the changes to the 1981 statute, and lost disciplinary actions against police officers as a result. The Borough of Glassboro in 1985, the Township of Westampton in 1987, and the Township of Hamilton in 1994 all had disciplinary charges against police officers thrown out, merely because they did not properly implement the changes to the police statute, by ordinance, following the 1981 statutory amendments. Even as recently as 1999, the Appellate Division not only threw out disciplinary charges against an Atlantic City Police Sergeant (who was represented by my office) on that basis, but in fact held that the Atlantic City Police Department had not been properly created and established since 1981.

The effects on police administrations that have failed to re-evaluate their police ordinances and comply with Reuter since March 29, 2001 can be just as serious as these effects on municipalities that failed to enact proper ordinances after the 1981 statutory amendments. **The New Jersey Supreme Court was clear in Reuter that**

appointments and promotions to positions that do not exist by an ordinance with a sufficiently detailed, set table of organization will be invalidated. When openings arise in a police force by way of retirement, dismissals or otherwise, officers and/or their unions can bring suit to make sure these positions are filled, as the positions can only be abolished by ordinance, and not by being left vacant intentionally.

Simply put, every municipality with a police force should review its ordinance for compliance with Reuter. **Every municipality with a police force should also review its ordinance for comparison with the actual, existing structure and table of organization periodically, and, if differences exist, either change the ordinance (by ordinance) to match the structure of the department, or change the structure of the department to match the ordinance.**

The Reuter decision is a potentially powerful tool for police and fire unions seeking to preserve the structure of their organizations by filling all vacancies. It thus also presents an important pitfall for police and fire administrations to be wary of and protect against when seeking to change the structure of the organization.

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