I.R. NO. 82-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1036, AFL-CIO and OCEAN
COUNCIL #12, CSA,

Respondents,

-and-

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION,

Docket No. CO-82-50

Charging Party,

-and-

OCEAN COUNTY BOARD OF CHOSEN FREEHOLDERS,

Interested Party.

SYNOPSIS

In an interim relief proceeding a Hearing Examiner, acting on behalf of the Public Employment Relations Commission, restrained the Ocean County Board of Chosen Freeholders from negotiating, recognizing or granting recognition to any collective negotiations representative of the white collar employees covered by the collective negotiations agreement with Ocean Council #12, CSA except with Ocean Council #12 itself until further order of the full Commission. It was found that Council 12 was a party to a valid agreement with the County and that two competing unions, the Communications Workers of America, Local 1036, AFL-CIO and the Office and Professional Employees International Union, each claimed it was the successor to Council 12 and was entitled to exclusive representation of its white collar employees. At the hearing, however, the evidence adduced showed there was a substantial likelihood of success that at a full plenary hearing it would be found that Council 12, CSA is a separate, viable and independent representative of said employees and the contract between the County and Council 12 would serve as a contract bar to any other union seeking recognition of these employees.

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Appearances:

For the Respondents, Kapelsohn, Lerner, Reitman & Maisel, Esqs. (Jesse H. Strauss, Esq.)

For the Charging Party, Schneider, Cohen, Solomon and DiMarzio, Esqs. (J. Sheldon Cohen, Esq.)

INTERLOCUTORY DECISION

On August 17, 1981, Ocean Council #12, CSA and Ocean Council #12, CSA Local 1036, CWA, AFL-CIO, filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the Ocean County Board of Chosen Freeholders (County) was violating the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. More specifically, the charge makes the following allegations: Ocean Council #12 CSA was certified as the

exclusive representative of all white collar employees employed by the County. Currently Council #12 and the County are parties to a collective negotiations agreement which was effective April 1, 1980, and by its term is to continue until March 31, 1983.

On or about April 9, 1981, Council #12 notified the County that it had affiliated with the CWA and requested that the County recognize CWA as the majority representative for the employees in the white collar unit.

On June 10, 1981, the County objected to CWA's claim of representation and recommended the filing of a petition before the Commission to resolve the question of representation. Accordingly, on June 18, 1981, Council #12 CSA filed an Amendment of Certification petition with the Commission seeking to amend Council #12 certification to indicate the affiliation of Ocean Council #12, CSA with the CWA.

The charge goes on to allege that despite conflicting claims to representation, the County approved recognition of the Office and Professional Employees International Union as the exclusive representative for the unit of white collar employees. It was alleged that the Respondent was about to adopt a formal resolution affirming such recognition at a Board of Freeholders meeting on August 19, 1981. The charge also made allegations that the County permitted the OPEIU the use of interoffice mail facilities and allowed the OPEIU the use of County premises in which to conduct business.

The Charging Party also submitted an Order to Show Cause

with their unfair practice charge wherein an interlocutory order temporarily restraining the County from recognizing the OPEIU as the negotiations agent for the employees in the Charging Party's white collar unit was requested. In addition, it sought to restrain the County from permitting the OPEIU from using its facilities.

On August 17th the Charging Party appeared before the undersigned. In addition, the OPEIU, which was served by the Charging Party as an interested party, was also represented by counsel. No one made an appeareance on behalf of the County.

At the hearing the OPEIU maintained that it was the exclusive majority representative of the white collar employees of the County. It alleged that the white collar employees constituted a separate unit and there was an affiliation election in the white collar unit of Council 12. The OPEIU won the election and the white collar unit of Council 12 disbanded.

The OPEIU went on to state that it had negotiated a reopener provision of the collective negotiations contact and the County was scheduled to ratify the contract for the white collar employees at the August 19th meeting.

At the conclusion of the hearing the undersigned signed the Charging Party's Order to Show Cause and temporarily restrained the County from recognizing, granting any recognition or engaging in negotiations with or ratifying any contract negotiated with any collective negotiating representative of the white collar employees covered by the collective agreement with Ocean Council #12 CSA

except with Ocean Council #12 CSA itself. The temporary restraint also barred the OPEIU from using the office mail facilities of the County or County premises to conduct meetings with white collar employees of the County.

A return date on the show cause order was set down for September 9, 1981. Pursuant to the request of counsel for OPEIU, the return date of the show cause order was adjourned to September 21. All parties submitted briefs and supporting affidavits and all parties, including the County, argued orally at the show cause hearing. 1/

At the conclusion of the hearing, the parties were advised that pursuant to N.J.A.C. 19:14-9.5(a), and upon review of the entire record of this proceeding, a written decision on the instant dispute would issue but the temporary restraints would continue pending the issuance of the written decision.

The standards that have been developed by the Commission for evaluating the appropriateness of interim relief are similar to those applied by the courts when confronted with similar applications. The test if twofold: the substantial likelihood of success on the legal and factual allegations in the final Commission decision, and the irreparable nature of the harm that will occur if the requested relief is not granted. 2/ These standards must be satisfied before the requested relief will be granted.

1/ The hearing took place at the P.E.R.C. Offices in Newark.

2/ See In re Twp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975); In re State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); and In re Twp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975).

The position of the County is that they believed the OPEIU represented the white collar employees and therefore the memorandum of agreement, signed with the OPEIU, was proper. However, they complied with the temporary restraints and entered into a separate memorandum of agreement with Council #12 for the white collar employees and were prepared to execute the new agreement.

The Charging Party points out that in Middlesex County (Roosevelt Hospital), 7 NJPER 226 (¶ 1981), the Commission adopted the NLRB's Midwest Piping [3/] doctrine and held that an employer may not recognize one of two or more competing unions unless and until the question concerning representation has been settled by the Commission. Therefore it is argued under this doctrine the employer cannot recognize either the OPEIU or the CWA in the presence of conflicting claims. Here there are competing interests between two outside labor organizations who are not parties to the contract currently in effect between the County and Ocean Council #12.

The Charging Party points out that the contract between Ocean Council 12 and the County runs from April 1, 1980 through March 31, 1982. It is therefore argued that traditional contract bar rules would prohibit any other labor organization from raising a question concerning representation at this time. "This circumstance is an even more compelling reason for prohibiting the County from recognizing or negotiating with any outside unions instead of Ocean Council #12 which is both the certified representative and

3/ 63 NLRB 1060, 17 LRRM 40.

the party to the contract which is still in mid-term." The NLRB has held that any employer violates § 8(a)(1) and (2) of the National Labor Relations Act when it recognizes a new union at a time when no question concerning representation could be raised because of a valid, existing bargaining agreement. Burgreen Contracting Co., 195 NLRB 1067, 79 LRRM 1700 (1972); Shea Chemical Corp., 121 NLRB 1027, 42 LRRM 1486 (1958).

The Charging Party argues that the County violated § 5.4 (a)(1), (2) and (5) by recognizing and negotiating with OPEIU. The result would be the same whether there was no contract bar and a question concerning representation did exist in which event the Midwest Piping doctrine would apply - or if there was a contract bar in favor of Ocean Council 12, in which event Burgreen would apply. Even if a question concerning representation arguably were to exist at the present time, the County would have to continue to deal with Ocean Council 12 and only Ocean Council 12 in the administration of the current contract and the processing of grievances.

Accordingly, it is argued that there is a substantial likelihood that it will be found that the County is prohibited from recognizing OPEIU as the successor and replacement of Ocean Council #12.

The Respondent made four basic issues in response to the argument of the Charging Party:

1) There is no contract bar since there is a reopener provision in the contract. The contract provides:

Article XXIX

Reopener

> There shall be contract reopener on salaries and benefits for the contract years 1981 and 1982.
>
> Both parties shall have the right to propose reopener on four (4) Articles or Agreements other than those which concern salaries and benefits in each of the contract years.

It is argued that the agreement can operate at best as a bar for one year only and it maintains that a contract reopens pursuant to a reopener clause prevents its renewal for contract bar purposes and cite American Zeotrue Production, 84 LRRM 1491 (1973); Delux Metal Furniture Co., 42 LRRM 1470 (1958).

2) Assuming that the unit of County employees was part of a union which also represents units of other employees, there was a schism. Thus OPEIU's affiliation vote was proper and valid The OPEIU cites Hershey Chocolate Corp., 121 NLRB 901, 42 LRRM 1460 (1958) in support of this argument.

3) The OPEIU argued that all employee organizations should be restrained and the Commission conduct an expedited representation election. The OPEIU filed an RO petition with the Commission. This would guarantee an accurate representation of the employee views.

4) Finally it is argued that there is no irreparable harm if the County enters into an agreement with the OPEIU.

This argument goes to the conflicting affiliation votes that were conducted by both the CWA and the OPEIU. It is argued that in order to have a proper affiliation vote a three-pronged

test must be satisfied: 1) The certified union did not oppose the affiliation; 2) the unit remains the same and 3) the employees are given an opportunity to consider and vote on the question of affiliation through a democratic process and in accordance with the union's constitution or by-laws. It is claimed that the CWA's affiliation votes have failed the test but the OPEIU's certification satisfied said requirements and to refuse to allow the OPEIU to maintain its representation capacity and to order the County to negotiate with a defunct organization will irreparably harm the OPEIU.

Finding

In addition to the conflicting affidavits submitted by the parties, David Mitchell, president of Council #6, was called to testify by CSA Council #12 and CWA. He testified that Council #12 is the exclusive majority representative of white collar employees of the County. He acknowledged that the white collar employees have separate officers and negotiations teams but other groups represented by Council #12 also have such decentralized structures. All structures including those of the white collar employees were created by Council #12 to better service its varied members. It is noted that the white collar contract was signed by Mrs. Anselmi who is an officer of Council #12 but not a white collar employee.

He testified that Council #12 is not defunct, that it did for a time merge with CWA Local 1036 and the officers of Council #12 were officers of CWA Local 1036, but that merger has ceased and the two organizations are now separate.

On the basis of this testimony, for the purposes of the instant motion I am satisfied that the white collar employees do not constitute an independent separate organization and further that Council #12 is not defunct.

Further, the contract between Council #12 and the County acts as a bar to recognizing or negotiating with any union other than Council #12. The Respondent's argument that a reopener provision alters the insulated period is in this case incorrect. The cases cited by him are not on point. See Western Electric Co. and CWA, 94 NLRB No. 9, 28 LRRM 1002 (1951).

Nor does the current dispute between the OPEIU and CWA constitute a schism. In Hershey Chocolate, supra, there was a dispute within a local when a group of employees sought to disaffiliate from the international union and sought to assume control of the local. At the same time the international union sent a trustee to take over the same local. The employer brought the action to the NLRB in order to determine who was the proper employee representative. In the instant case the facts do not demonstrate that there was a legitimate dispute as to the existence of Council 12 nor is there a legitimate dispute as to who represents Council 12. The dispute is limited to whether or not there is a legitimate successor.

Council 12 has demonstrated a substantial likelihood of success at a full plenary hearing on the law and the facts that it will be found that they are and continue to be the exclusive majority representative of white collar employees employed by Ocean County.

For all the reasons set forth above, the undersigned is satisfied and convinced that to allow either the CWA or the OPEIU to assume the representation of the white collar employees would be so unsettling as to irreparably harm the relationships between the employer, Council 12 and the white collar employees.

Order

For the reasons set forth above it is hereby ORDERED that the County of Ocean be restrained from recognizing, granting recognition or engaging in negotiations with or ratifying any contracts negotiated with any collective negotiations representative of the white collar employees covered by the collective agreement with Ocean Council #12 CSA, except with Ocean Council #12 CSA itself until further order of this Commission made in the course of this proceeding.

IT IS FURTHER ORDERED, that in the absence of demonstration of any compelling need, all other restraints limiting the use of interoffice mail facilities of Ocean County or the use of buildings of Ocean County by any other labor organizations be dissolved.

Edmund G. Gerber
Hearing Examiner

DATED: October 20, 1981
Trenton, New Jersey