E.D. NO. 53

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF OCEAN CITY,
Public Employer

and

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, LOCAL 473, AFL-CIO,
Petitioner

Docket No. RO-739

and

OCEAN CITY MUNICIPAL EMPLOYEES ASSOCIATION,
Intervenor

SYNOPSIS

The Executive Director dismisses a petition filed by the International Brotherhood of Firemen and Oilers, Local 473, AFL-CIO. In the absence of exceptions, the Executive Director adopts the Hearing Officer's Report and Recommendations pro forma. The Hearing Officer found the petition to have been timely filed but he found the unit sought - basically a unit of blue-collar employees - to be inappropriate in view of the existence of a previously certified and broader negotiating unit.

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DECISION

Pursuant to a Notice of Hearing to resolve a question concerning the representation of certain employees of the City of Ocean City, a hearing was held on April 29, 1974 and on June 20, 1974, before Hearing Officer Bernard J. Manney, at which all parties were given an opportunity to examine and cross-examine witnesses, to present evidence, to argue orally and to file briefs. Thereafter, on August 15, 1974, the Hearing Officer issued his Report and Recommendations. Exceptions were not filed to the Hearing Officer's Report and Recommendations. The undersigned has considered the record and the Hearing Officer's Report and Recommendations and, on the facts in this case, finds:

1. The City of Ocean City is a Public Employer within the meaning of the Act and is subject to its provisions.
2. The International Brotherhood of Firemen and Oilers, Local 473, AFL-CIO, and the Ocean City Municipal Employees Association are employee representatives within the meaning of the Act.

3. The Public Employer having refused to recognize the petitioner herein as the exclusive representative of certain employees, a question concerning the representation of public employees exists and the matter is appropriately before the undersigned for determination.

4. The Hearing Officer found that the Petition was timely filed, but that the unit proposed by the Petitioner was not appropriate for collective negotiations. The Hearing Officer thus recommended dismissal of the Petition. In the absence of Exceptions to the Hearing Officer's Report and Recommendations, attached hereto and made a part hereof, the undersigned adopts the Hearing Officer's Report and Recommendations pro forma. The Petition is hereby dismissed.

BY ORDER OF THE EXECUTIVE DIRECTOR

Jeffrey B. Tener
Acting Executive Director

DATED: October 17, 1974
Trenton, New Jersey

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OCEAN CITY MUNICIPAL EMPLOYEES ASSOCIATION,
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HEARING OFFICER'S REPORT AND RECOMMENDATIONS

On January 7, 1974, the International Brotherhood of Firemen and Oilers, Local 473, AFL-CIO, filed a petition with the Public Employment Relations Commission for Certification of Public Employee Representative in a unit covering certain employees of the Public Employer. By Notice of Hearing issued to the parties on March 21, 1974, a hearing was conducted on April 29, 1974, before the undersigned in the City of Ocean City, New Jersey. The hearing was adjourned until Thursday, June 20, 1974, and pursuant to an Order Scheduling Hearing dated May 2, 1974, the hearing was continued before the undersigned. All parties were given the opportunity to examine and cross-examine witnesses, to present evidence, argue orally and submit briefs. Appearances were recorded as follows:

For the Public Employer:

DuBois, Maiale & DuBois, Esquires
By: E. Josiah DuBois, Jr., Esquire

For the Petitioner:

Alan R. Howe

For the Intervenor:

Michael R. Connor, Esquire

Witnesses Testifying Were:

B. Thomas Waldman, Mayor, City of Ocean City

John J. Esposito, President of Ocean City Municipal Employees Association

James Hannah, Heavy Equipment Operator
William Canizzaro, Heavy Equipment Operator

The record of the proceedings establishes that:

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

2. The International Brotherhood of Firemen and Oilers, Local 473, AFL-CIO, and the Ocean City Municipal Employees Association are employee representatives within the meaning of the Act.

3. The Petitioner on November 16, 1973, made a written request of the Public Employer for recognition as the exclusive negotiating representative for certain employees employed by the City of Ocean City. This request for recognition was denied (T-1, pp 12-13). In addition, the Public Employer and the Intervenor challenge the appropriateness of the unit requested by the Petitioner, and therefore, a question concerning representation of public employees is involved and the matter is properly before the Commission for determination.

Issues:

The issues before the undersigned pertain to the timeliness of the instant Petition vis-a-vis a claimed recognition bar, and to the appropriateness of a unit proposed by the Petitioner, to wit: "include all employees employed by the City of Ocean City, excluding policemen, firemen, professional employees, office clerical employees, administrative personnel, elected officials, and supervisors within the meaning of the Act." (T-2, p. 3).

Positions of the Parties:

The Petitioner maintains that the instant Petition is timely

filed inasmuch as no collective negotiation agreement was in effect on the date of filing; and, moreover, notwithstanding the adoption on May 9, 1973, by the City of Ocean City, of a Resolution which granted voluntary recognition to the Ocean City Municipal Employees Association as the exclusive collective negotiation agent for all employees of the public employer excluding police officers and other employees excluded by the Act (T-1, p. 40).

With respect to the issue of unit appropriateness, the Petitioner claims, that there is a sufficient community of interest among the employees in the unit he proposes, to make it appropriate for purposes of collective negotiations (T-2, pp 4-5, and Petitioner's brief pp. 3-5).

The Intervenor maintains that the instant Petition is untimely filed inasumch as the aforesaid resolution adopted by the Public Employer on May 9, 1973, constitutes a recognition bar to an election (T-1, p. 6).

As to the unit desired by the Petitioner, the Intervenor argues that it is inappropriate since it would create undue fragmentation and, too, "there's already adequate representation with the present union"(T-2, p. 4).

The Public Employer takes an ambivalent position as to the timeliness issue (T-1, p. 15, 18); and Witness Waldman testified "that we do not have any quarrel or any viewpoint as to which organization should be the representative organization ." (T-1, p. 38). On the unit issue, the Public Employer insists on a unit which includes all employees except police, and other statutory exclusions (T-1, p. 24 and Ex. E-2). Moreover, the Public Employer objects to "having splinter representation" which would adversely affect residents and taxpayers of the City of Ocean City." (T-1, p. 39).

Discussion and Findings:

After a full review of the record, including all exhibits and the brief filed on behalf of the Petitioner, the undersigned finds: (1) that the instant Petition is timely filed; and (2) that the unit proposed by the Petitioner is not appropriate for collective negotiations. Accordingly, the Hearing Officer recommends dismissal of the Petition.

The undersigned addresses himself first to the timeliness issue raised by the Intervenor, i.e., he relies on Section 19:11-1.15(b), which provides in part that "where there is a certified or recognized representative, a petition will not be considered as timely filed if during the preceding twelve (12) months...an employee organization has been granted recognition by a public employer pursuant to Section 1.14 of this Sub-chapter (T-1, p. 42).

The record shows that on May 9, 1973, the Board of Commissioners of Ocean City adopted a resolution in which the Ocean City Municipal Employees Association was granted recognition "as the exclusive bargaining agent for all employees of the City of Ocean City, excluding police officers and excluding those employees excluded by statute." (Ex. E-2). However, at that point in time, a collective negotiation agreement between the Public Employer and the Ocean City Municipal Employees Association was in effect for a period of one year commencing June 1, 1972. Accordingly, since the said contract was to terminate on either May 31, 1973, or June 1, 1973, i.e., after the date of the aforesaid recognition resolution, a question arises as to the effectiveness of said resolution, vis-a-vis a recognition bar. The undersigned finds, firstly, that the recognition granted by the Public Employer to the Ocean City Municipal Employees Association does not satisfy the criteria required by Section 19:11-1.14, of the Public Employment Relations Commission Rules which provides in part that:

> "(a) Whenever a public employer has been requested to recognize an employee organization as the exclusive representative of a majority of the employees in an

> appropriate collective negotiating unit, the public employer and the employee organization may resolve such matters without the intervention of the Commission. (Emphasis added)
>
> (b) The Commission will accord certain privileges to such recognition as set forth in Section 1.15 (Timeliness of Petitions) of this Chapter provided the following criteria have been satisfied prior to the written grant of such recognition by a public employer: (Emphasis added)
>
> (1) The Public Employer has satisfied himself in good faith, after a suitable check of the showing of interest, that the employee representative is the freely chosen representative of a majority of the employees in an appropriate collective negotiating unit..." (Emphasis added)

The record indicates clearly that the above pertinent requirements of Section 19:11-1.14 have not been satisfied. Witness Waldman declared that no request was made for recognition by the Ocean City Municipal Employees Association during the year commencing June 1, 1972. Moreover, he testified that no showing of interest was offered by any organization during the said contract period; rather, the Board of Commissioners relied on a prior Certification of Representative issued by the Public Employment Relations Commission to the said Association pursuant to an election conducted by the Commission on March 16, 1972 (T-1, pp 24-27). The undersigned notes that the witness testified, too, that he personally posted the required notice on the bulletin board on the second floor in City Hall (T-1, p. 26); however, this action serves only as partial fulfillment of the necessary criteria of Section 19:11-1.14. The undersigned observes, too, that although the actions leading to the recognition resolution do not meet the prescribed criteria of Section 19:11-1.14, it is obvious from the record that the Public Employer operated in good faith, e.g., Mr. Howe, representing the Petitioner, offered a stipulation of fact "that prior to the recognition resolution (Ex. E-2), prior to that date, Petitioner herein engaged in no organizational activity among the employees (of the) Public Employer, nor did it make

any demand for recognition on behalf of the employees (of the) Public Employer." (T-1, pp 40-41). Moreover, the record establishes that the written request for recognition made by the Petitioner was dated November 16, 1973, and received by the City on November 19, 1973 (T-1, p. 12).

In addition to non-compliance with said provisions of Section 19:11-1.15, the undersigned finds, a fortiori, that the disputed recognition is a superfluous replication of an existing valid recognition included in the aforementioned collective negotiation agreement (Ex. E-1) and, thus cannot stand as a bar to an election. To give validity to such a recognition, would, in effect, deprive public employees indefinitely from exercising their rights under Section 19:11-1.15 (C-1, 2 & 3). The said Section provides:

> "During the period of an existing written agreement containing substantive terms and conditions of employment and having a term of three years or less, a petition for certification of public employee representative or a petition for decertification of public employee representative normally will not be considered timely filed unless:
>
> 1. In a case involving employees of the State of New Jersey, any agency thereof, or any State authority, commission or board, the petition is filed not less than 240 days and not more than 270 days before the expiration or renewal date of such agreement;
>
> 2. In a case involving employees of a county or a municipality, any agency thereof, or any county or municipal authority, commission or board, the petition is filed not less than 90 days and not more than 120 days before the expiration or renewal date of such agreement.
>
> 3. In a case involving employees of a school district the petition is filed during the period between September 1 and October 15, inclusive, within the last 12 months of such agreement.

Since the critical period vis-a-vis filing of timely petitions covers the last 12 months of an existing collective negotiations agreement, public employees have two options: either to file during the prescribed

minimum and maximum days prior to the expiration date of said agreement or during a period when no contract is in effect. In the instant case, the Petitioner opted for the latter course. However, assuming arguendo that such recognitions were given legal sanction, that the Petitioner had chosen to file during the period of not less than 90 days and not more than 120 days prior to the expiration date, and too, that the Public Employer had granted the disputed recognition during the period commencing with the 360th day to the 121st day prior to the expiration date, it becomes obvious that the purpose of Section 19:11-1.15 (C-1, 2 and 3) would be defeated. Similarly, State, county and school employees could be proscribed vis-a-vis filing of timely petition in order to change their representative. In the instant case, too, the validation of said disputed recognition would have the effect of barring timely petitions from May 9, 1973, to May 8, 1974, despite the fact that the aforesaid collective negotiation contract (Ex. E-1) expired on May 31, 1973, and, as of June 20, 1974, the date of this hearing, no contract was in effect.

Given a petition timely filed, the undersigned is obliged to deal with the question of unit appropriateness. The provisions of N.J.S.A. 34:13A-6(d), require that the Commission in the event of a dispute shall "decide in each instance which unit of employees is appropriate for collective negotiations" (Emphasis added). The Petitioner's position which is predicated solely on a claim of community of interest for "blue-collar employees" ignores the long history of the bargaining relationship as a factor to be considered in determining the existence of a community of interest among public employees. The record shows that the incumbent employee representative has been in existence approximately 30 years, it admitted to membership all employees of the City, including police, and elected a representative committee of said employees to bargain with the public employer for wages and terms and conditions of employment (T-1, pp. 43-45). Since the passage of the New Jersey Employer-Employee Relations Act, Chapter 303, Laws of 1968, the Association continued to represent all employees, except police, in bargaining with the City. In 1972,

the Ocean City Municipal Employees Association was certified as the majority representative for all employees, excluding police and other employees excluded by statute. Thereafter, the O.C.M.E.A. and the City consummated a written agreement which contained substantive terms and conditions of employment. This agreement recognized a unit of "all employees of the City excluding policemen, elected officials and temporary seasonal employees, and employees excluded by law..." (Ex. E-1). Moreover, prior to the expiration of said agreement, the O.C.M.E.A. continued "to bargain with the City to seek another contract." This negotiation culminated in the unsigned contract placed in evidence by the Public Employer as Ex. E-3 (T-1, p. 50). Witness Esposito testified that the blue-collar workers were represented in all bargaining, both before and since 1968 and this testimony was not contradicted (T-1, p. 51-52).

Witness Hannah, testifying for the Petitioner, admitted to being a member of Ocean City Municipal Employees Association for about 20 years, and, too, that the president of said Association did ask "for suggestions and different things from time to time..." (T-2, p. 51). He did not recall attending a contract ratification meeting of the O.C.M.E.A. and stated that he failed to attend 20% to 25% of the meetings (T-2, pp 51-52). Witness Hannah admitted, too, that meeting notices were placed on bulletin boards "most of the time" in the Department of Public Works, "and then by word of mouth." However, he did not recall a notice advising that a collective bargaining agreement was to be ratified, although he declared that "it could have happened, obviously." (T-2, p. 52). Later, this witness testified that he had seen notices with specific references to matters to be considered such as "reading of contract" (T-2, p. 57).

Witness Canizzaro, testifying for the Petitioner, stated that he was a member of the Ocean City Municipal Employees Association for seven years and

admitted that he did not attend any of its meetings (T-2, p. 58). He testified that Association notices were posted in the Department of Public Works (T-2, p. 59). In sum, the record clearly demonstrates a long, uninterupted history of viable negotiating activity, covering wages and other terms and conditions of employment by freely-chosen representatives of the all-inclusive unit. This compels the undersigned to the conclusion that all employees employed by the City of Ocean City excluding police and supervisors within the meaning of the Act, share a community of interest and comprise the more appropriate unit for purposes of collective negotiations.

Even assuming arguendo that a community of interest exists among employees in the instant "blue-collar" unit, it should not per se, disturb an existing bargaining unit absent evidence that it "is unstable or that the incumbent organization has not provided reasonable representation. To hold otherwise would leave every unit open to re-definition simply on a showing that one sub-category of employees enjoyed a community of interest among themselves. Such a course could lead to continuous agitation and uncertainty, would run counter to the statutory objectives, and would ignore that the existing relationship may also demonstrate its own community of interest."[1/]

The record establishes that the existing bargaining unit has demonstrated stability, and too, that the incumbent organization has provided reasonable representation.

Moreover, the New Jersey Supreme Court, in a recent decision declared, "...if it were necessary for the public employer to deal with too many separate bargaining units, each frequently advancing competitive claims and demands, the whole process could well bog down on the public employer's end of the negotiating

1/ P.E.R.C. No. 61, Jefferson Township Board of Education v. Jefferson Township Education Association.

process to the negation of statutory policies such as ours (N.J.S.A. 34:13A-2) for "prompt settlement of labor disputes", prevention of "economic and public waste", and promotion of "permanent...public and private employer-employee peace", as well as to the prejudice of the general public interest.[2/]

The undersigned next addresses himself to two other issues raised by the Petitioner in his brief, to wit:

(1) Are the seven foremen, whose names appear in Ex. E-5, "supervisors" within the meaning of the Act?

(2) Is the Intervenor by virtue of its admission into membership of policemen and foremen disqualified as a representative of public employees under the Act?

In response, the undersigned relies on Chapter 34:13A-5.3, which provides in part that,

> "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 same, have the right to be represented in collective negotiation by an employee organization that admits non-supervisory personnel to membership, and the fact that any organization has such supervisory employees as members shall not deny the right of that organization to represent the appropriate unit in collective negotiations; and provided further, that except where established practice, prior agreement, or special circumstances dictate the contrary, no policemen shall have the right to join an employee organization that admits employees other than policemen to membership." (Emphasis added).

The record does not demonstrate that the instant foremen and the forelady have the power to hire, discharge, discipline or to effectively recommend the same, and therefore, are not supervisors; nor, that their job functions pose a substantial, actual or potential conflict of interest vis-a-vis the Wilton criteria[3/]. Again, the established bargaining practices of the parties demonstrated no compelling reason to remove the said foremen

2/In re State v. Prof. Assn. of N. J. Dept. of Ed., 64 N.J. 231, 252 (1974).
3/Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971).

from the negotiating unit.

As to the Peitioner's challenge of the Intervenor's status as an employee representative under the Act, the undersigned finds that the long, established practice of police membership in the O.C.M.E.A. up to the certification by P.E.R.C. exempts them from the proscriptions in Chapter 34:13A-5.3 vis-a-vis the right to join an employee organization that admits employees other than policemen to membership. Since the undersigned finds that the foremen and forelady are not supervisors within the meaning of the Act, the issue of their membership in the O.C.M.E.A. becomes moot.

RECOMMENDATIONS:

From all of the foregoing and the official record of these preceedings, the undersigned recommends dismissal of the instant Petition.

RESPECTFULLY SUBMITTED,

Bernard J. Manney

Bernard J. Manney
Hearing Officer

DATED: August 15, 1974
Trenton, New Jersey