

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PERTH AMBOY,
Public Employer

-and-

LOCAL 58, FIREMEN'S MUTUAL BENEVOLENT
ASSOCIATION,
Petitioner,

Docket No. RO-697

-and-

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
LOCAL 286,
Intervenor.

DECISION AND DIRECTION OF ELECTION

Pursuant to a Notice of Hearing to resolve a question concerning the representation of certain employees of the City of Perth Amboy, a hearing was held before Hearing Officer Kevin B. Powers at which all parties were given an opportunity to examine and cross-examine witnesses, to present evidence, to argue orally and to submit briefs. Thereafter, the Hearing Officer issued his Report and Recommendations. Exceptions were timely filed by the Intervenor. The undersigned has considered the entire record, the Hearing Officer's Report and Recommendations, and the exceptions, and, on the facts in this case finds:

1. The City of Perth Amboy is a public employer within the meaning of the Act and is subject to its provisions.
2. Local 58, Firemen's Mutual Benevolent Association, and International Association of Fire Fighters, Local 286 are employee representatives within the meaning of the Act.
3. The Employer refuses to recognize Petitioner herein as the exclusive representative of certain employees of the City of Perth Amboy. Therefore, a question concerning the representation of public employees exists and the matter is properly before the Commission for determination.
4. The parties have stipulated that the currently recognized unit consisting of all paid uniformed members of the Fire Department of the City of Perth Amboy, but excluding the chief and other superior officers, if any, managerial executives, clerical employees, craft employees, police and supervisors within the meaning of the Act, is an appropriate unit for purposes of collective negotiations, and is the unit sought by the Petitioner herein. The sole issue in dispute relates to the inclusion of "provisional" employees. The Hearing Officer recommends the inclusion of provisional employees in the unit petitioned for, and accordingly recommends their eligibility to participate in an election to be directed in the otherwise stipulated unit.

The exceptions filed by the Intervenor take issue solely with the Hearing Officer's reliance upon the Commission's decision in In re Burlington County Evergreen Park Mental Hospital, P.E.R.C. No. 14 (1969). The Intervenor argues that P.E.R.C. No. 14 dealt with "temporary" as opposed to "provisional" employees, and is accordingly inapposite. The Intervenor points to several Civil Service Rules and Regulations in support of its contention that the two terms are not identical.

The undersigned concludes that the Intervenor has misread the Hearing Officer's Report, for it is clear that the Hearing Officer was well aware of the differences between the two terms, and was simply relying upon P.E.R.C. No. 14 for guidance. The Hearing Officer's reliance upon and analysis of P.E.R.C. No. 14 is well-founded, for reasons set forth in his Report, a copy of which is attached hereto and made a part hereof. The Intervenor's exceptions are without merit, and the Hearing Officer's findings and conclusions not specifically excepted to are hereby adopted pro forma.

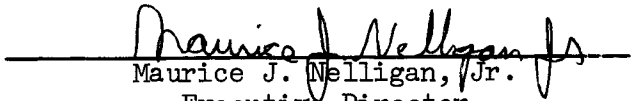
5. It is directed that an election in the unit described above, including "provisional" employees, be held within thirty (30) days of the date of this decision. Those eligible to vote shall be those who were employed in such unit during the payroll period immediately preceeding the date below, including employees who did not work during the period because they were out ill, or on vacation or temporarily laid off, including those in military service. Employees must appear at the polls in order to be eligible to vote. Ineligible to vote are those who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. The Commission requires the submission of an alphabetical list of all eligible voters along with their job titles at least seven days prior to the election. Accordingly, the public employer is hereby directed to submit such a list to the Executive Director and to the employee organizations which will appear on the ballot as set forth below.

Those eligible to vote shall vote on whether they wish to be represented for the purpose of collective negotiations by Local 58, Firemen's Mutual Benevolent Association; International Association of Fire Fighters, Local 286; or by neither organization.

The majority representative shall be determined by a majority of the valid votes cast.

The election directed herein shall be conducted in accordance with the provisions of the Commission's Rules and Regulations.

BY ORDER OF THE EXECUTIVE DIRECTOR


Maurice J. Nelligan, Jr.
Executive Director

DATED: Trenton, New Jersey
May 3, 1974

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PERTH AMBOY
Public Employer

and

LOCAL 58, FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION
Petitioner

and

Docket No. RO-697

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
LOCAL 286
Intervenor

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

Pursuant to a Notice of Hearing to resolve a question concerning the representation of certain employees of the City of Perth Amboy, a hearing was held on January 3, 1974 before Hearing Officer Kevin B. Powers at which all parties were given an opportunity to examine and cross examine witnesses, present evidence, submit briefs, and argue orally. Based on the entire Record in this proceeding, the Hearing Officer finds:

1. The City of Perth Amboy is a Public Employer within the meaning of the Act and is subject to its provisions.
2. Local 58, Firemen's Mutual Benevolent Association and the International Association of Fire Fighters, Local 286, AFL-CIO are employee representatives within the meaning of the Act.
3. The Employer refused to recognize Petitioner herein as the exclusive representative of certain employees of the City of Perth Amboy. Therefore, a question concerning the representation of certain public employees exists and the matter is properly before the Commission.

ISSUE

The parties have stipulated that the currently recognized unit consisting of all paid uniformed members of the Fire Department of the City

of Perth Amboy, New Jersey, but excluding the chief and other superior officers, if any, managerial executives, clerical employees, craft employees, police and supervisors within the meaning of the Act, is an appropriate unit within the meaning of the Act and is the unit sought by the petitioner in this matter. ^{1/}

The issue before the Hearing Officer is whether provisional employees should be considered eligible voters in any election which the Commission may direct in this matter. This is the only issue which stands in the way of an agreement by the parties to enter into an Agreement for Consent Election.

Positions of the Parties

It is the position of the Public Employer and petitioner in this matter that the group of provisional firefighters involved herein share a community of interest with other members of the unit and, therefore, are eligible to vote in any representation election directed by the Commission. ^{2/} Intervenor excepts to that position and contends that since those employees are appointed temporarily and serve only at the pleasure of the employer with no recourse under Civil Service procedures to their dismissal, they do not share a sufficient community of interest with other employees of the Fire Department to warrant their inclusion in the unit. Intervenor further contends that allowing provisional employees to vote in any election directed in this matter would provide the employer an unfair advantage in that he would be free to hire whatever number of provisional employees were necessary in order to influence the results of that election. ^{3/}

^{1/} Tr. p. 10. The Public Employment Relations Commission on January 7, 1972 issued a certification of representative certifying that pursuant to a consent election held in accordance with the Act and Chapter 11 of the Commission's Rules and Regulations, Local 286, International Association of Fire Fighters, AFL-CIO had been selected as representative for the purpose of collective negotiations of employees in a unit of "All paid uniformed members of the Fire Department of the City of Perth Amboy, N. J., but excluding chief and other superior officers, if any, managerial executives, clerical employees, craft employees, police and supervisors within the meaning of the Act."

^{2/} Tr. pp. 11, 25

^{3/} Tr. p. 17

Background and Discussion

Previous decisions of the Public Employment Relations Commission are not precedential in nature. Frequently, however, it is useful to examine previous Commission action when similar factors are present. In PERC No. 14 the Commission discussed the question of eligibility of temporary employees as voters in representation elections directed by the Commission.^{4/} In PERC 30 the Commission placed its imprimatur on a unit which contained permanent and "probationary" employees.^{5/} The relevant sections of those Commission decisions are cited below and discussed as they relate to this matter.

In PERC 14 the Commission found that:

The Act does not expressly exclude a "temporary" employee from the protection in the exercise of, the right, freely and without fear of penalty or reprisal, to form and assist any employee organization or to refrain from such activity.

Section 3 provides in pertinent part: "(d) the term 'employee' shall include any employee...This term, however, shall not include any individual taking the place of any employee whose work has ceased as aforesaid, nor shall it include any individual employed by his parent or spouse, or in the domestic service of any person in the home of the employer or employed by any company owning or operating a railroad... This term shall include public employee, i.e., any person holding a position, by appointment or contract, or employment in the service of a public employer, except elected officials, heads and deputy heads of departments and agencies..."

Accordingly, the Legislature has made exquisitely clear the categories of employment excepted from the broad coverage and protection afforded by the Act. To infer an additional exception in the instant case would fly in the face of the express legislative purpose to provide an all inclusive definition of "public employee" within the meaning of the Act.^{6/}

-
- ^{4/} PERC 14. Burlington County, Evergreen Park Mental Hospital, September 19, 1969.
- ^{5/} PERC 30. Cherry Hill Township Department of Public Works, January 9, 1970.
- ^{6/} PERC 14, p. 4.

The Commission also noted that "the reasonable expectation... of the attainment of permanent status in accordance with the prescribed Civil Service procedure, as well as a similarity of interest in the terms and conditions of employment with permanent employees, warrants a finding of a "public employee" within the meaning of the Act."^{7/}

In a subsequent court action in that matter the Court held that notwithstanding the right of public employers to terminate provisional or temporary employees at their discretion pursuant to the Revised Civil Service Rule, N.J.A.C. 4:1-16.8b,^{8/} the right granted to employees by Art. I, par. 19 of the 1947 Constitution and by the implementing statute, N.J.S.A. 34:13A-5.3 "to form, join and assist a union of fellow employees in an appropriate unit is an integral part of employment irrespective of its temporary or probationary character."^{9/}

In PERC 30 the Commission indicated that units containing permanent and probationary employees were not inappropriate as such.^{10/} Absent a statutory prohibition or prior Commission policy bar to the inclusion of temporary or probationary employees with those of permanent status in appropriate units, consideration must be given to whether there exists a sufficient community of interest among the employees concerned herein to warrant such inclusion.

Section 4:1-2.1 of the New Jersey Administrative Code describes several types of positions and appointments employees may hold.

^{7/} PERC 14, pp. 4-5.

^{8/} Revised Civil Service Rule N.J.A.C. 4:1-16.8b states: "b. A provisional or temporary employee may be terminated at any time at the discretion of the appointing authority. A provisional or temporary employee who has been terminated shall have no right of appeal to the Civil Service Commission."

^{9/} Supreme Court of New Jersey, Burlington County Evergreen Park Mental Hospital v. Cooper 56 of N. J. at p. 583.

^{10/} PERC 30, p. 5.

"'Position' means an office or employment in the classified service, the prescribed duties and responsibilities of which require the full or part-time employment of a person. A position is either permanent or temporary, as follows:

(a) Permanent...Local Service - if it is required without interruption for a period of more than four months or for recurrent periods aggregating more than four months in any 12-month period; or

(b) Temporary...Local Service - if it is required for a period of not more than four months in any 12-month period."^{11/}

A permanent employee is defined as "an employee who has acquired Civil Service permanent status in his position after the satisfactory completion of a working test period."^{12/} Prior to attaining status as a permanent employee, one may receive a provisional appointment which is described as "the appointment to a permanent position pending the regular appointment of an eligible person from a special reemployment, regular reemployment or employment list."^{13/}

The working test period referred to in the definition of permanent employee is defined as follows: "'Working Test Period' or Probationary Period means a part of the testing process which consists of a trial working period after regular appointment, during which time the work performance and conduct of the appointee is evaluated to determine if he shall merit permanent status."^{14/}

Thus, the term "probationary employee" as used in PERC 30 refers to a "permanent employee" as defined above who has not completed the "working test period."

As noted in the foregoing discussion, the Commission and the Supreme Court of the State of New Jersey have determined that temporary employees are public employees within the meaning of the Act and that units of "probationary" and permanent employees are not inappropriate as such. It remains, however, to be found whether "provisional" employees are entitled to the same rights under

^{11/} NJAC 4:1-2.1 p. 12

^{12/} NJAC 4:1-2.1 p. 12

^{13/} NJAC 4:1-2.1 p. 13

^{14/} NJAC 4:1-3.1 p. 16

the Act as their temporary and permanent counterparts.

FINDINGS AND RECOMMENDATIONS

Applying the standards cited in PERC 14, the Hearing Officer finds that provisional employees do entertain a reasonable expectation of attaining permanent status in accordance with normal Civil Service procedure.^{15/} No party in this matter has presented testimony or evidence which would in any reasonable interpretation lead to a finding that provisional employees were not intended to be covered in the definition of public employee contained in the Act as previously cited.

The holding of the Supreme Court of the State of New Jersey in Burlington County Evergreen Park v. Cooper, in the opinion of the undersigned, reinforces such a finding. In that case the Court cited Revised Civil Service rule NJAC 4:1-16.8b which states: "A provisional or temporary employee may be terminated at any time at the discretion of the appointing authority. A provisional or temporary employee who has been terminated shall have no right of appeal to the Civil Service Commission."^{16/} The Court went on to state that the rights granted employees by Art. I, par. 19 of the 1947 Constitution and by the implementing statute, N.J.S.A. 34:13A-5.3 are "an integral part of... employment...irrespective of its temporary or probationary character."^{17/} In the opinion of the Hearing Officer there is a clear implication in the Court's finding that, NJAC 4:1-16.8b notwithstanding, the rights granted temporary employees apply to provisionals equally.

The Hearing Officer has discovered no statutory or policy bar to units of permanent and provisional employees and no party to this matter has presented testimony or evidence that such a bar in fact exists. Absent such a bar, the elements of community of interest must be examined in order to determine if the provisional employees involved herein enjoy a sufficient community to warrant their inclusion in the unit petitioned for.

^{15/} Tr. pp. 12, 34.

^{16/} Civil Service Rules, Title 4, N.J.A.C. at 4:1-16.8b.

^{17/} 56 N.J. Burlington County Evergreen Park Mental Hospital v. Cooper, p. 583.

There are approximately six employees in the Perth Amboy Fire Department who are on provisional status. They were hired in accordance with established Civil Service procedure and await the opportunity to take a Civil Service examination to gain regular appointments. ^{18/}

The skills of provisional employees involved herein correspond with the skills called for in the Civil Service specifications. Several of the employees in question have taken Civil Service examinations in other municipalities in order to prepare themselves better for any examination which will be conducted for the City of Perth Amboy. In at least one instance an employee has been offered a position as a fireman in another jurisdiction on the basis of his performance on such an examination. ^{19/}

The lines of supervision and responsibility for provisional employees are the same as those of permanent employees. Provisional employees work the same hours and enjoy the same holidays, sick days, and vacation benefits as permanent employees. Although their wages are lower than those of permanent employees, their rate is tied to that of the permanent employees in that the rate is approximately 90% of the permanent rate. Further, provisional employees are eligible for overtime, as their permanent counterparts are. ^{20/}

The degree of interchangeability and interdependence of function within the Fire Department is so great that there is no discernible distinction between provisional and permanent employees. Provisional employees are transferred among the various facilities maintained by the Department in order to familiarize them with the different apparatus and procedures of the Department. From time to time both provisional and permanent employees may be transferred within the Department as manpower needs dictate or to fill in for men who are out sick or on vacation. ^{21/}

^{18/} Tr. pp. 11, 12, 28

^{19/} Tr. pp. 12, 34

^{20/} Tr. pp. 31, 33, 34, 35

^{21/} Tr. pp. 14, 23, 31, 32, 34, 35, 37

Provisional employees attend and participate in Department meetings, enjoy day to day contact of a highly integrated nature with other Department employees, have access to and use the same facilities as other employees, wear the same uniform as their permanent counterparts and spend their working day performing the same tasks as permanent employees of the Fire Department. ^{22/}

The single benefit provisional employees do not receive is membership in the pension fund. This condition is true of all nonpermanent city employees. ^{23/} Therefore, in the judgement of the undersigned, this single exception should not be seen as a controlling factor for the purposes of this proceeding.

Thus, with the exception of permanent Civil Service status and membership in the pension fund, provisional employees are indistinguishable from permanent employees of the Fire Department.

Neither intervenor nor any other party has submitted any evidence or testimony in this matter which would lend credence to its contention that the public employer would, in effect, be in a position to influence the outcome of an election by hiring a sufficient number of temporary employees. The Hearing Officer recommends that, if any party discovers such evidence, the proper forum for such a development would be the filing of timely objections to conduct alleged to have affected any election in accordance with Section 19:11-19 of the Commission's Rules and Regulations.

Based upon the evidence and the uncontroverted testimony submitted in the present matter, the Hearing Officer finds that provisional employees of the Fire Department of the City of Perth Amboy do enjoy a sufficient community of interest with the permanent employees of that Department to warrant their inclusion in the unit petitioned for.

^{22/} Tr. pp. 33, 36, 37

^{23/} Tr. p. 31

It is recommended that an election be directed pursuant to the Public Employment Relations Commission's Rules and Regulations in the appropriate unit to include all paid permanent and provisional uniformed members of the Fire Department of the City of Perth Amboy, New Jersey but excluding the chief and other superior officers, if any, managerial executives, clerical employees, craft employees, police, confidentials and supervisors within the meaning of the Act, to determine which, if any, employee organization involved herein they desire as their representative under the Act.

RESPECTFULLY SUBMITTED

A handwritten signature in cursive script that reads "Kevin B. Powers". The signature is written in dark ink and is positioned above a horizontal line.

Kevin B. Powers
Hearing Officer

DATED: February 11, 1974

Trenton, New Jersey