P.E.R.C. NO. 95-100

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-H-93-346

NEWARK COUNCIL NO. 21,
NJCSA, IFPTE, AFL-CIO,

Charging Party.

CITY OF NEWARK,

Petitioner,

-and- Docket No. CU-H-93-45

NEWARK COUNCIL NO. 21,
NJCSA, IFPTE, AFL-CIO,

Employee Representative.

SYNOPSIS

The Public Employment Relations Commission remands a clarification of unit petition to the Hearing Examiner in a case consolidated with an unfair practice charge to obtain further evidence about the duties of all aides to City Counsel members. The City contains that the aides are confidential employees within the meaning of N.J.S.A. 34:13A-3(g), but the evidence in the record does not address the duties of all aides.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Employee Representative.

Appearances:

For the Respondent, Michelle Hollar-Gregory, Corporation Counsel (Joanne Y. Watson, First Assistant Corporation Counsel)

For the Petitioner, Genova, Burns, Trimboli & Vernoia, attorneys (Nathaniel L. Ellison, at hearing; Stephen E. Trimboli, on the exceptions)

For the Charging Party-Employee Representative, Fox and Fox, attorneys (John D. Onnembo, Jr., at hearing; Dennis J. Alessi, on the brief and on the exceptions)

DECISION AND ORDER

On April 2, 1993, Newark Council No. 21, NJCSA, IFPTE, AFL-CIO filed an unfair practice charge (CO-93-346) against the City of Newark. The charge alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,

specifically subsections 5.4(a)(1), (3) and (5),[1/] by reducing the work hours of City Council Aide Talmadge Mercer and then terminating him in retaliation for his having exercised his protected right to pursue grievances and challenge unilateral employer action.

On April 12, 1993, the City petitioned to have Council 21's negotiations unit clarified to exclude all aides to City Council members. The City contends that the aides are confidential employees within the meaning of N.J.S.A. 34:13A-3(g), removable at the pleasure of the Council members pursuant to N.J.S.A. 40:69A-60.5, and were included in Council 21's unit inadvertently.

On September 14, 1993, a Complaint issued on the unfair practice charge and the Complaint and the clarification of unit petition were consolidated for hearing. On October 25, the City filed its Answer to the Complaint. The City denied that Mercer's termination was in retaliation for his requesting overtime or that it violated the collective negotiations agreement. It further

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

contended that pursuant to N.J.S.A. 40:69A-60.5, Council Aides are "removable at the pleasure of the Council Member."[2/]

On January 11, 1994, Hearing Examiner Arnold H. Zudick conducted a hearing on the Complaint. On April 29, he conducted a hearing on the petition. Separate briefing schedules were set.

On August 31, 1994, the Hearing Examiner recommended dismissing the Complaint and granting the petition to clarify the unit to exclude the title of Aide to Councilman. He concluded that the aides were confidential employees within the meaning of the Act and thus excluded from the protections of the Act. H.E. No. 95-8, 20 NJPER 361 (¶25185 1994).

On October 14, 1994, Council 21 filed exceptions. The City filed a response on the petition only.

We have reviewed the record in both cases. The evidence in the unfair practice case does not establish that Mercer was a confidential employee within the meaning of the Act. The evidence in the clarification of unit case is based on the testimony of one Council member and one aide, and does not specifically address Mercer. The only evidence concerning other aides -- a job description -- does not indicate that all aides are confidential employees within the meaning of the Act.

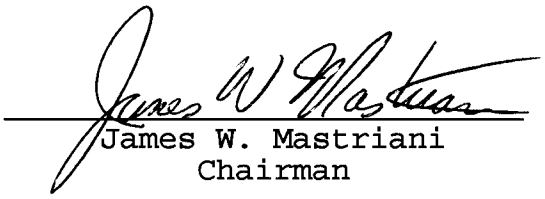
2/ The City's Answer did not assert that Mercer was a confidential employee outside the Act. N.J.A.C. 19:14-3.1 requires that an Answer shall "normally include a specific detailed statement of any affirmative defenses." We will consider the filing of the clarification of unit petition as meeting the pleading requirements.

The Hearing Examiner inferred that all other aides, including Mercer, are similarly situated. That inference may ultimately be supportable, but at this juncture, given the limited scope of this record, we are unwilling to deem all aides to be outside the protection of the Act. Representation matters are non-adversarial and are to be decided based on a full factual record. N.J.A.C. 19:11-6.3. The facts in this representation case do not address all aides. Accordingly, we remand this matter to the Hearing Examiner to obtain further evidence as to the duties of the other aides.[3/]

ORDER

This matter is remanded to the Hearing Examiner for further proceedings consistent with this opinion.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Boose, Finn, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Buchanan abstained from consideration. Commissioner Klagholz was not present.

DATED: May 23, 1995
Trenton, New Jersey
ISSUED: May 24, 1995

3/ This will not necessarily require additional witnesses. The parties might stipulate that all aides are similarly situated, or a single witness might testify on the relationship of the evidence already taken to the remaining aides.

H.E. NO. 95-8

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the City of Newark did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. when it terminated aide Talmadge Mercer. The Hearing Examiner found that Mercer was terminated due to a poor attendance/tardiness record, and not because of the exercise of protected activity.

The Hearing Examiner further recommends that the title Aide to Councilman be found to be confidential within the meaning of the Act and removed from Council 21's unit.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 95-8

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Appearances:

For the Respondent, City of Newark
Michelle Hollar-Gregory, Corporation Counsel
(Joanne Y. Watson, First Asst. Corp. Counsel)

For Petitioner, City of Newark
Genova, Burns, Trimboli & Vernoia, attorneys
(Nathaniel L. Ellison, of counsel)

For Charging Party-Employee Representative, Council No. 21
Fox and Fox, attorneys
(John D. Onnembo, Jr., of counsel)
(Dennis J. Alessi, on the brief)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On April 2, 1993, Newark Council No. 21, NJCSA, IFPTE, AFL-CIO ("Council 21") filed an unfair practice charge (CO-93-346)

with the New Jersey Public Employment Relations Commission alleging that the City of Newark violated subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] Council 21 alleged that the City reduced the work hours of - and then terminated - employee Talmadge Mercer in retaliation for his filing a grievance regarding overtime, and further alleged that the City also unilaterally reduced the work hours of employees Mercer and Kenneth Watkins in violation of the parties' collective agreement. Council 21 seeks an order reinstating Mercer to his former position with backpay, lost benefits and his overtime, and an order reinstating Mercer's and Watkins' work hours in accordance with the parties' collective agreement.

On April 12, 1993, the City filed a clarification of unit petition (CU-93-45) with the Commission seeking the removal of the title "Aide to Councilman" from the negotiations unit represented by Council 21. The City alleged that the Aides were confidential employees within the meaning of the Act. Council 21 opposes the petition.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act.(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

On September 14, 1993, the Director of Unfair Practices and Representation issued an Order Consolidating Cases and a Consolidated Complaint and Notice of Hearing merging these matters for hearing. The City filed an Answer to the Complaint on October 25, 1993. It denied it terminated Mercer in retaliation for his overtime request, or that it violated the parties' collective agreement. The City asserted as an affirmative defense that aides are removable at the pleasure of City Council Members pursuant to N.J.S.A. 40:69A-60.5.

Hearings were held in these matters on January 11, 1994 for the unfair practice case, and April 26, 1994 for the petition.[2/] Briefs were received regarding the charge on April 29, 1994, and for the petition on August 12, 1994.[3/]

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The City and Council 21 are parties to a collective agreement (J-1) effective from January 1, 1992 through December 31, 1994. The recognition clause of that agreement recognizes Council 21 as the majority representative of all regular and part-time white collar workers and professional employees employed by the City.

2/ The transcript from January 11 will be referred to as 1T, the transcript from April 26 will be referred to as 2T.

3/ On August 25, 1994, I received another brief on behalf of Council 21 regarding the clarification of unit petition. Council 21 called it a supplemental brief. Council 21 had not requested the opportunity to file a supplemental brief, I had not previously provided for it, and there was no indication that Council 21 informed the City of its intent to file such a brief.

Article 19, the Employee Performance clause, defines an acceptable level of performance in Section D as follows:

> D. An acceptable level of employee performance shall be attained only if performance is adequate and acceptable in all major aspects of the job requirements. Consideration shall be given to all aspects of performance including requisite attitudes and conduct as well as production and efficiency of work. Consistently poor judgment, lack of diligence, undependability, inaccurate work, improper use of leave, and personal relationships which hamper individual or group effectiveness are representative of conduct and attitudes which may be the basis for disapproval of salary increment or adjustment.

Article 7, the Overtime clause, provides that overtime may be compensated for in cash or compensatory time at the City's discretion, but only for overtime that was properly directed and authorized in advance. The pertinent language of that clause provides:

> A. DEFINITION OF OVERTIME
>
> Authorized work performed in excess of the assigned normal daily or weekly working hours for each class of positions shall be considered overtime. Employees may be required to work a reasonable amount of overtime. Seniority shall be a factor in the assignment of overtime which shall be distributed as equitably as possible. All provisions of this Article shall apply to overtime which has been properly directed and authorized in advance by the appropriate department head or his/her designee(s).
>
> B. COMPENSATORY TIME OFF OR CASE PAYMENT FOR OVERTIME
>
> 1. Employees who are required to work in excess of their normal work day or work week shall be compensated in cash or compensatory time off at the discretion of the City in accordance with the schedule noted below:

> c. Work beyond eight (8) hours in any one day or forty (40) hours in any calendar week shall be compensated for at one and one-half (1 1/2) times.

2. Facts Regarding CO-93-346.

a. Talmadge Mercer was employed as an aide to City Councilman George Branch from August 1989 until his termination effective March 16, 1993 (1T55). His job included reviewing constituent problems, trying to solve them and making reports concerning them, attending meetings and reporting to the Councilman (1T25). His work hours were scheduled as 9:00 a.m. to 5:00 p.m., five days per week (1T26).

Mercer had attendance problems throughout calendar year 1990. By December 31, 1990, he had used all of his sick and vacation time and actually owed the City 2 1/2 vacation days. That trend continued. By the end of January 1991, Mercer had used all of his sick time and most of his vacation time for 1991 (R-5). By the end of 1991, Mercer had used six of his fifteen sick days allotted for 1992, thus he began 1992 with only nine sick days (R-7).

Mercer's attendance problems grew worse in 1992 and continued in that direction in 1993 until his termination. In 1992, Mercer was tardy on 192 days, which was nearly every day he reported for work. He used thirty-five sick days and three vacation days

that year, thus he completed the year owing the City 26 sick days, but with a balance of 9 vacation days (R-7).[4/]

In 1993 Mercer was tardy on thirty of the days he worked leading up to his termination on March 16, 1993. He was sick on one day and on unpaid leave on seven of the work days during that period. For 1993 he earned 2.5 sick days and 2 vacation days. The 2.5 sick days were deducted from his carryover balance of minus twenty-six days which, when the one sick day he used was added to the balance, resulted in him owing the City 24.5 sick days at the time of his termination. He was not paid for the 11 vacation days he had accumulated due to the larger number of sick days he owed the City (R-6, T88). The City had originally allowed Mercer to borrow sick time from the following year's allotment, but eventually had to dock him for the time because he had borrowed too much (1T106).[5/]

b. Thomas Parks has been the Executive Assistant to Councilman Branch for twelve years (1T93). At the time each aide was employed Parks advised them, including Mercer, of the overtime policy affecting their work (1T99).

4/ Exhibit R-7 was Mercer's 1992 attendance record. It listed the number of sick days he used per month that year which, if added properly was 35. The Exhibit, however, incorrectly listed the total number of sick days used for that year as 33.

5/ At hearing I explained to the parties (1T91-1T92) that this case does not concern Mercer's right to sick time or vacation time, or whether he owes sick days or should be docked vacation days. That was not the subject of the charge, thus, I will make no finding on liability, or recommendation on remedy regarding those matters.

Councilman Branch's office is allocated $4,000 a year for overtime for aides. Once that money is spent, overtime is compensated for by giving compensatory time (1T96-1T97). Aides are entitled to overtime if they have been assigned such work, completed the work, and have submitted a written report indicating who made the assignment, what it was for, how long it took, and a written request for either money or compensatory time (1T96, 1T98). Overtime has not been denied to any aide who was entitled to it and made a proper request (1T100).

Mercer claimed that Parks instructed him to attend a meeting on an overtime basis at least once a week (1T26). Mercer did not receive overtime compensation for such work (1T27).[6/] In late 1992, another employee told Mercer about the availability of overtime funds (1T27, 1T65-1T66). Mercer had been unaware of his right to overtime compensation. Shortly thereafter, Mercer questioned Parks about the availability of overtime compensation (1T28, 1T66). Parks had been unaware that Mercer did not know that he might be entitled to overtime (1T97). He explained to Mercer the process to qualify for overtime (1T97-1T98). He also responded to Mercer that since he (Mercer) never asked for it, he (Parks) didn't

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6/ At hearing I also explained that this charge was not about whether Mercer was entitled to overtime (1T89). The charge raised a question over the City's motive for terminating Mercer, but not over whether Mercer should have been compensated for overtime. Mercer could have sought resolution of the overtime issue through the parties grievance procedure, but there was no evidence that he filed such a grievance.

give it to him (1T28, 1T98). Parks suggested to Mercer that he put in writing the time for which he thought he was entitled to overtime compensation, and Parks provided the records to extract that information (1T68).

On November 4, 1992, Branch sent a memorandum (CP-2) to the staff outlining the method by which overtime compensation is granted (1T29, 1T67, 1T99). The memorandum explained that overtime had to be documented in writing to Parks and a request made for either cash or compensatory time. A copy of Article 7, the overtime clause in J-1, was attached to CP-2.

c. On December 22, 1992, Parks sent Mercer a memorandum (R-4) entitled "Suspension Without Pay Days" regarding his inappropriate behavior on December 17, 18 and 21, 1992. R-4 provides:

> On Thursday, December 17, 1992 when you reported to the office at 9:35 am extremely disleveled (sic) and apparantly under the influence of some substance and, after having come to the office the previous day at 11:30 am disleveled (sic) and apparantly under the influence of some substance and unable to fill out your time sheet coherently, I dismissed you for the day without pay feeling that your condition would not allow you to deal effectively with our constitiuents (sic). You commented, in front of Councilman Branch, "Fuck you Tommy, I am going to the Labor Board".
>
> Further, since you did not come to work on Friday, December 18, 1992 and did not call the office as required, you were assigned by me as Off With-Out Pay.
>
> On Monday, December 21, 1992, you did report to work on time perspiring profusely but completed the day.

> If you wish to discuss any aspect of this memo with me or with Councilman Branch with or without me, please feel free to make the arrangements.

Mercer acknowledged that Parks had spoken to him on several occasions about being tardy (1T52), and had spoken to him about improving his attendance (1T51). Mercer told Parks he would get to work as often as he could, but that Parks did not tell him he might loose his job due to his attendance problem (1T51). Mercer explained that when he came in late he stayed later to make up the time (1T53). He also claimed that Parks did not complain about his attendance problem until after he made known his demand for overtime (1T51-1T52).

I do not credit Mercer's testimony that Parks did not complain about his attendance problem until after he (Mercer) raised the overtime issue. Tardiness is an important component of attendance. Mercer testified that Parks spoke to him about being late for work on several occasions, and that those discussions were justified (1T52). Given Mercer's poor tardy record which extended throughout 1992 (R-7), I find that most of those discussions occurred prior to Mercer's discussion with Parks over overtime.

d. On December 31, 1992, Mercer provided a handwritten document (CP-3) to Parks regarding his overtime request. On the cover page of that document Mercer said:

> After a care full (sic) review of my time sheets for the year 1992, I find that I am due at least 90 hrs. These hrs. were accrued <u>only</u> from the weeks I worked in excess of 40 hrs.

> Please be mindfull (sic) that for the years 1991, 1990, and a quarter of 1989, I worked overtime, and was never compensated in any way.
>
> I respectfully request that I be allowed to take vacation for the week of 1/4/93 (Although I'll be in the hospital) and be paid for any remaining time.
>
> Please share this request with the Councilman.

Attached to the cover page was a list of dates and times for which Mercer felt he was entitled to overtime. But Mercer did not explain who assigned that work to him, nor did he indicate whether he wanted money or compensatory time. Mercer did not receive a response from Parks regarding his overtime request (1T33).

On January 15, 1993, Councilman Branch's office sent the City Clerk a memorandum (R-3) noting that Mercer was off without pay on January 4-8, 1993.

Some time after December 1992, but prior to February 22, 1993, Mercer spoke with City Personnel Director, John K. D'Auria about his (Mercer's) request for overtime. On February 22, 1993, D'Auria sent a memorandum to Mercer (attachment to CP-5), briefly explaining Mercer's right to overtime. Mercer thought Council 21 had filed a grievance on his behalf regarding his overtime request, but further questioning revealed that no such grievance was filed (1T76-1T77).[7/]

7/ The record shows that what Mercer thought was a grievance conference was really an exploratory conference held in this

Footnote Continued on Next Page

On February 26, 1993, Parks told Mercer and aide Kenneth Watkins that another employee was being added because they were not fulfilling his (Parks') request for written reports, and informing them that they were being assigned to a four-day work week effective March 1, 1993 (1T33-1T35). Later that day Parks gave Mercer and Watkins a memorandum (CP-4) stating in writing what he told them earlier (1T34).[8/]

7/ Footnote Continued From Previous Page

matter prior to the issuance of a complaint (1T77). On cross-examination, Mercer said that he did file a grievance over an overtime matter when he was employed by the tax department, but that was several years prior to 1992 (1T78-1T79).

8/ CP-4 provides:

> As I discussed in our staff meeting this date, I am attempting to bring on staff someone who can comply with the Councilman's directive that written reports be made of each contact we have with our constituents. This report will serve as a vehicle to certify what we are accomplishing as well as to develop a list of names, addresses and assistance rendered for future use.
>
> In order that we may afford, within our payroll amount, the additional cost and/or in order to gain compliance from you with office directive, I am assigning each of you to a four day week beginning the week of March 1, 1993.
>
> Therefore, Tuesday, March 2, 1993 Tal Mercer will be off with Kenneth Watkins off Wednesday, March 3, 1993.
>
> As always in the best interests of this office and with the Councilman's concurrence, I shall be adjusting the time off as needed.

After receiving CP-4, Mercer explained the situation to D'Auria and showed him the memorandum. D'Auria told Mercer that Parks could not reduce his hours and that he would so inform Parks (1T35-1T36). By memorandum of March 2, 1993 (CP-5), D'Auria notified Parks that reducing Mercer's and Watkins' hours might be in violation of Council 21's labor agreement, and he also attached a copy of his February 22, 1993 memo to Mercer regarding overtime. Parks' memo, CP-4, was never implemented (1T102).

e. After speaking with D'Auria about CP-4, Mercer informed his union representative, Evelyn Laccitello, about Parks' intent to reduce his work hours. Laccitello spoke to Council 21's attorney about the matter, and by letter of March 11, 1993 (CP-6), the Council's attorney explained to Councilman Branch that he could not unilaterally reduce Mercer's hours, and he asked that CP-4 be rescinded (1T44-1T46).[9/]

9/ CP-6 provides:

> Please be advised that this office represents Newark Council No. 21, NJCSA, IFPTE, AFL-CIO which is the collective bargaining representative for a broad-based unit of blue and white collar employees in the City of Newark including those employed in the title of Councilmatic Aide. The provisions of the collective bargaining agreement between Council No. 21 and the City set forth both the work week, five (5) work days, seven (7) hours a day and total hours worked per week, thirty-five (35) hours. The collective bargaining agreement also sets forth a yearly salary. This collective bargaining agreement covers the employees in the title of Councilmatic Aide and it is a binding agreement between the City and the Union.

Footnote Continued on Next Page

Mercer testified that after receiving CP-6, Parks told him "I'm not going to deal with you and your lawyer too, you're fired." (1T47). Mercer claims that Parks told him he was fired because he went to a lawyer and the personnel director (1T47-1T48). Parks denied making that statement (1T104). Mercer further testified that he spoke to Branch about Parks an hour later and that Branch said, "he runs my office" (1T48).

On March 16, 1993, Mercer received a termination letter from Branch (R-2) which said:

> As you know and have known, I have charged Tom Parks with the responsibility of running the office. He has indicated to me that he is unable to be responsible for your productivity, your attendance or your attitude when dealing with constituents over the phone or during meetings, that in spite of his many efforts to get you to improve your performance, you have not responded adequately.
>
> Therefore, I regret that I have to let you go from my staff immediately.

9/ Footnote Continued From Previous Page

> With all due respect, even as a Councilman you cannot unilaterally reduce the work week and reduce the salary of these employees. Such action violates the collective bargaining agreement. Accordingly, in order to avoid any legal proceedings in this regard, I would hope that you will quickly rescind the memo of February 26, 1993 issued by your administrative assistant, Thomas L. Parks, and restore the complete work week and full salary to Councilmatic Aides Watkins and Mercer.
>
> I am forwarding a copy of this letter to the City's Personnel Director, John D'Auria. I am sure that Mr. D'Auria will further confirm for you that you cannot unilaterally reduce the work week or salaries of these employees.
>
> Thank you for your anticipated cooperation in this regard.

> If I can be of assistance to you in some other regard, please do not hesitate to call me.

Parks denied that CP-6 and Mercer's request for overtime had anything to do with Mercer's termination (1T104, 1T107). He testified that the decision to terminate Mercer had been made prior to CP-6, and that Mercer was terminated because he was a poor employee, his performance had deteriorated, and that he had a poor absent and tardy record (1T103-1T105). I credit Parks' testimony on the pertinent facts. While I cannot be entirely certain of the events of March 11 and 16, I found Parks to be a more reliable witness than Mercer, and I specifically credit his explanation that Mercer was terminated because of his poor work record which is supported by R-6, R-7, R-5 and R-4.

f. Mercer, and the other aides, were responsible for preparing Inquiry Forms and Overtime Reports (1T101). The Inquiry Forms were used to record conversations the aides had with constituents regarding a problem they were having. The form had sections to record the problem or request, and the action taken. Mercer filled out many Inquiry Forms between February 2, 1993 and March 15, 1993 (CP-1).[10/]

10/ CP-1 is a compilation of numerous Inquiry Forms Mercer prepared from February 2, 1993 through March 15, 1993. Those forms were admitted into evidence to prove that they exist, but were not admitted to prove that Mercer complied with Branch's/Parks' directive that written reports be made of each contact with a constituent (1T43-1T44).

g. Mercer did not experience constituents complaining directly to him about the quality or content of his reports, but he admitted that some constituents complained that he did not do enough or that the problem was not resolved (1T40). Sometime after Mercer had requested overtime, Parks spoke to him about his attitude in dealing with constituents over the telephone (1T51). Mercer admitted that Branch received complaints from constituents about him, and that Parks spoke to him about how he handled particular constituents (1T85).

Mercer claimed that prior to working for the City he had never been disciplined for unauthorized absences (1T60). But on cross-examination he admitted that while working for the City in 1985 he was disciplined for an unauthorized absence (1T64-1T65).

3. Facts Regaring CU-93-45.

a. The job description of the "Aide to Councilman" position (J-2), includes the following relevant information:

> Definition: Under direction, acts as a personal aide and liaison between an elected official and public and/or various governmental agencies and assists him by performing varied highly responsible administrative duties, some of which may be of a confidential nature; does related work as required.
>
> Examples of Work: Assists an elected official in the decision making process pertaining to municipal government by collecting and analyzing data from public records and other sources.
>
> Assists in the review of municipal policies and procedures by researching data and conducting field interviews.
>
> May act as liaison between the elected official and the public by meeting with local groups and representatives of governmental agencies and provides them with information.

May represent the elected official at conferences or engagements or may accompany the official at these conferences.

Assembles statistical and other materials required for reports, memoranda and speeches.

When so directed, takes appropriate action(s) to resolve any problems brought to the attention of the elected official.

May conduct special investigations for the elected official.

Maintains confidential, personal correspondence and other records and files.

Investigates activities to assure compliance with municipal and other laws, and gathers supporting facts and data.

May assist in conducting studies or surveys of agency/department/program operations.

Assists with the preparation of progress reports, reports of expenditures and research findings.

Assists in reviewing and analyzing proposals before governing body to determine if benefits derived justify application.

b. Ronald Rice has been a Newark City Councilman since 1982. He testified regarding his duties, his aides' duties, and his interaction with his aides. Each Councilperson can appoint up to four aides (2T15).

Rice (and presumably other City Councilpersons) does not negotiate contracts or formulate proposals on behalf of the City (2T27, 2T33, 2T67), but he is involved in the legislative process which can affect employees, and he often has advance knowledge of proposed layoffs before they are made public (2T19-2T20). Rice attends executive session meetings with the Mayor and other Councilmembers wherein the Mayor often discusses the positions the

City intends to take in negotiation sessions with the various unions representing City employees. The negotiations information discussed at those sessions has not been made public, and Rice and other Councilpersons express their opinions and positions on those proposals at that time (2T32-2T34). Rice openly shares the negotiations information with his aides (2T34-2T35).

Although Rice is not part of, nor does he participate in, the formal grievance procedure, many employees come to him, informally, seeking his assistance in resolving grievances (2T29-2T31, 2T48, 2T64).

c. Rice does not use a chief of staff (2T-41). He relies on his aides to assist him in performing all aspects of his elected position, and generally, his aides have knowledge of everything he does (2T26-2T27, 2T39). For example, he has informally discussed with his aides his position on proposed collective agreements (2T46); he has told his aides "in confidence" the results of executive session discussions regarding labor matters and the positions and strategies the Mayor might take on certain negotiations proposals (2T32-2T35), how the Council might vote (2T56-2T57); he has asked his aides to review copies of proposed negotiated contracts prior to Council ratification (2T70); and, his aides are made aware of planned layoffs or planned hiring in proposed budgets before they are made public (2T20-2T24, 2T75-2T78).

It would be difficult for Rice to function as a Councilperson if the information he discusses with his aides was

made public. It could lead to litigation, it could adversely affect employee morale, it could cause unions to demonstrate in response to something that may ultimately not occur, and it could raise taxation issues that were not yet ripe for public debate (2T25-2T26). At one point Rice confidentially discussed with his aides the need for employee drug-testing. The substance of that discussion apparently was leaked, and put Rice in a difficult position (2T28).

d. Rice has two offices with aides at both locations. His aides open, read, sort, and often take some action in response to his mail (2T36-2T38). Some of Rice's mail deals with confidential labor relations matters which his aides open and read (2T35-2T36). That mail includes correspondence from the City's labor counsel which contains confidential labor matters (P-2A, P-2B). Rice believes he could not operate his office efficiently, or effectively deal with the problems brought to his office if he could only designate two aides to deal with confidential information (2T51-2T54).

e. Rice and his aides are often involved in helping employees and union leaders in resolving grievances and other matters affecting the unions (2T69-2T31; 2T48-2T50; 2T70). Union leaders have contacted his aides, as well as urged employees to talk to his aides, asking them to try to persuade Rice on how to vote on certain matters (2T70). There is frequent contact between Rice's aides and union leaders who are seeking Rice's support for resolving various matters affecting the unions (2T50-2T51). Finally, Rice's

aides must often contact department heads and administration officials to help resolve grievances or problems that may become the subject of a grievance (2T29-2T32).

f. Thomas Matthews has been an aide to Councilman Anthony Carrino for twenty years. He is regularly made aware of labor information affecting employees and/or the unions before the information is made public (2T75-2T79; 2T86-2T87; 2T97-2T98). Councilman Carrino informs Matthews of what occurs in Council sessions. Matthews has learned of the Mayor's negotiations proposals and strategies and of the Administration's intent to rotate the opening and closing of firehouses before it was made public (2T83-2T87), and learned about the intent to privatize certain City services before that was made public (2T96-2T97), all of which affected organized employees.

After one Council meeting Councilman Carrino told Matthews that the Administration had proposed to Council to reduce the hours of recreation aides. Although that information had not yet been made public, it had leaked to the leadership of Council 21. The President of Council 21 called him and asked him to verify what she had heard, but Matthews indicated that the information was confidential (2T78-2T81).

g. Matthews is often asked to review the City's proposed budget and its impact on employees and programs while it is still considered to be confidential information (2T74-2T76; 2T82-2T83). He has reviewed the impact of cutting positions that

the union represents before any cuts are announced (2T75-2T78). He has also received information on the Administration's negotiations position on different matters prior to the City entering negotiations with Council 21 (2T87-2T88), and has been asked to review the proposed contract before the Council conducts a ratification vote (2T88-2T89).

h. Matthews, on behalf of Councilman Carrino, is often asked to assist employees by investigating the circumstances of their grievances on disciplinary actions, determine how the Administration handled the matter, and attempt to assist the employee in resolving the matter (2T90-2T93).

When asked why he did not think it was appropriate for him to be represented by a union, Matthews responded:

> I just don't understand how you're asking the City Council member to have aides who might be inclined to agree with the union's position. I mean, that's not the aides' job. The aides' job is to give his objective opinion, not subjective opinion (2T99).

ANALYSIS

The Clarification of Unit Petition

The Act at N.J.S.A. 34:13A-3(g) defines confidential employees as employees of public employers

> "whose functional responsibility or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties."

In State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), the Commission explained how it determines whether an employee is confidential. It held:

> We scrutinize the facts of each case to find for whom each employee works, what he does, and what he knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit. [Id. at 510].

The Commission further explained that it begins its examination by determining the functions of the department within which the affected employee(s) work, and the functions, and actual responsibilities, of the alleged confidential employees. The Commission said:

> If we find that an employee works in a department that deals with issues related to the collective negotiations process, we direct our attention to the employee's functional responsibilities or knowledge of the issues. If the employee's function or knowledge of the issues would create a conflict, then the employee is excluded as a confidential employee. [Id. at 514].

The Commission recognized that some of the questions relevant to a determination of confidential status included:

> What is the nature of the alleged confidential's work relationship with the person for whom the work is done? Does the [employee(s)], in the course of performing his/her functions, have access to and knowledge of confidential labor relations materials? Do they have advanced knowledge of certain labor relations material, strategies or policies...which eventually will be made public? Are they expected to continue performing that part of their duties which exposes them to the confidential materials? ...[H]as the exposure [to such materials] been of such a degree as to render the alleged confidentials membership in any negotiations unit inappropriate? [Id. at 515].

Where the evidence shows that the answer to most of those questions is yes, the affected employee(s) would be considered confidential within the meaning of the Act.

By following the evidence here through these series of questions it is apparent why the aides to the City Councilpersons are confidential employees. The primary function of the aides is to assume and perform a myriad of responsibilities that will enable City Councilpersons to perform their job of representing the best interests of their constituents. Aides and Councilpeople have a very close working relationship, and the Councilperson must feel free to discuss and share his/her thoughts with aides on a wide range of topics, including matters that would affect employees' jobs and terms and conditions of employment. The aides have virtually the same access to labor relations materials as does their Councilperson, and the aides are aware of both their Councilperson's and the Administration's positions and strategies regarding layoffs, hiring, contract proposals, and budget matters affecting employees before that information becomes public. The aides are also regularly contacted by union leaders who seek their assistance in getting their Councilperson to support their positions on issues affecting them.

The aides are expected to continue to perform these specific functions for their Councilperson. There is no likelihood that their duties will change. In addition, the aides regularly open, read and determine how to process the Councilperson's mail

which often contains material related to labor relations. That fact alone establishes their confidential status. Sayreville Bd. of Ed., P.E.R.C. No. 88-109, 14 NJPER 341 (¶19129 1988), aff'd App. Div. Dkt. No. A-4297-87T1 (4/21/89); Mt. Olive Tp., P.E.R.C. No. 85-113, 11 NJPER 311 (¶16112 1985).

In evaluating the evidence here it is apparent that in the performance of their normal functions aides are regularly exposed to confidential labor relations information making their membership in any negotiations unit incompatible with their job responsibilities. That finding is for the protection of both the Councilperson and the aides. Councilpeople cannot be placed in a position that would inhibit their job performance because they were unable to share confidential information with their aides. Similarly, aides cannot be placed into a position of conflicting loyalties, to their union or to their Councilperson. If they remained in a negotiations unit they could be placed under increasing pressure to share confidential information with their own union leaders or risk being ostracized by the union and other employees, while at the same time placing them in the position where they may evade their obligation to their Councilperson to keep certain information confidential until it is time for it to become public.

In its post-hearing brief regarding the petition, Council 21 argued that the aides were not confidential employees because the Council/Councilpeople did not perform "day-to-day" labor relations functions; and because the Commission prefers to minimize the number

of people found to be confidential. Council 21 focused on the fact that Councilman Rice and his aides did not actually negotiate contracts or decide grievances, and that even though aides may become aware of budget information affecting labor relations prior to it becoming public, it is not necessary to find all aides confidential.

While it is true that Councilpeople and their aides are not directly responsible for contract negotiations or grievance processing, Council 21 avoids focusing on the information these aides actually receive as a normal function of their jobs. As cited above, the Commission in State of New Jersey, Id. at 510, held that it scrutinizes the facts of each case to determine what employees do and what they know about collective negotiations issues. More recently in Tp. of East Brunswick, D.R. No. 92-23, 18 NJPER 162, 164 (¶23077 1992), the Commission's Director of Representation similarly held that:

> A finding of confidential status requires a case-by-case examination of each alleged confidential employee's knowledge of information which could compromise the employer's position in the collective negotiations process.

The facts of this case show that these aides are regularly made aware of contract strategies and proposals, probable layoffs and hirings, and other labor relations information before it is made public, and which, if it was prematurely released by these aides could compromise the City's position in the negotiations process.

In its post-hearing brief, Council 21 had, in fact, relied on certain language in East Brunswick to supports its claim. It cited:

> The key to confidential status is an employee's access to and knowledge of materials used in labor relations processes including contract negotiations, contract administration, grievance handling and assisting management in preparing for these functions. Id. at 164.

But when the facts here are applied to that language it supports a finding that these aides are confidential employees. The information these aides regularly have access to from the meetings between the Mayor and Council members regarding negotiations proposals and strategies is precisely the information that is used in preparing the City for the negotiations process.[11/]

With respect to how many of the aides are confidential employees, Council 21 properly indicates that the Commission narrowly construes the term "confidential employee." See State of New Jersey; Ringwood Bd. of Ed., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd App. Div. Dkt. No. A-4740-86T7 (2/18/88); Cliffside Park Bd. of Ed., P.E.R.C. No. 88-108, 14 NJPER 339 (¶19128 1988). But, once again, Council 21 has avoided focusing on what this record contains, it supports a finding that the title, Aide to Councilman, be removed from the unit, meaning all of the aides will be affected.

11/ The result is the same regarding language that Council 21 relied upon in City of Orange Tp., D.R. No. 85-23, 11 NJPER 317, 321 (¶16115 1985).

Here, the City called Rice and Matthews as witnesses, a representative of the Council members and a representative of the aides, both of whom established that aides have regular access to confidential information. Council 21 called no witnesses. In fact, Council 21, at hearing, did not argue or allege that it had, nor did it produce, any evidence to contradict the evidence already presented, and it did not argue in its post-hearing brief that any such evidence exists.

It is both normal and preferred in Commission hearings to avoid duplicitious testimony and to call witnesses to testify not only on their own behalf, but also as representative of other individuals, i.e., employees, similarly situated. It is also normal and appropriate for the trier of fact to draw inferences from such testimony that the other individuals would be affected the same way as the individual who testified. Since Council 21 never suggested there was evidence to contradict Rice or Matthews, or that their testimony was not representative of the information available to all aides, and it waived the right to call witnesses, I was satisfied that all aides have the same access to confidential information. Council 21's argument in its post-hearing brief, therefore, was unpersuasive.[12/]

Given the weight of the evidence, I recommend the Commission find that the title Aide to Councilman is confidential

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12/ Council 21 may seek to review this issue at a later time based upon changed circumstances.

within the meaning of the Act, and should be immediately removed from Council 21's negotiations unit.

The Unfair Practice Charge

Mercer's Termination

Having found that Mercer held a title that was confidential within the meaning of the Act, the charge could be dismissed as moot because confidential employees have no rights under the Act. But having already gathered the evidence, the parties are entitled to a decision on the merits.

In Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984), the New Jersey Supreme Court created a test to be applied in analyzing whether a charging party in a 5.4(a)(3) case has met its burden of proof. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence, that conduct protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct or circumstantial evidence showing that the employee engaged in activity protected by the Act, that the employer knew of this activity, and that the employer was hostile toward the exercise of the protected activity. Id. at 246.

If a charging party satisfies those tests, then the burden shifts to the employer to prove that the adverse action would have occurred for lawful reasons even absent the protected conduct. Id. at 242. The burden will not shift to the employer, however, unless the charging party proves that anti-union animus was a motivating or substantial reason for the employer's actions.

Although Council 21 did not prove that Mercer filed a grievance over his overtime problem, it, nevertheless, satisfied the first two elements of the Bridgewater test. Regardless of whether Mercer was actually entitled to overtime, he was exercising his protected rights by raising the overtime issue, and Parks was obviously aware that he made the overtime request.

As in most (a)(3) cases, however, the most difficult element of the Bridgewater test to prove here is the hostility requirement. But even if hostility is proved, the City's action will still be protected if it can prove that Mercer would have been terminated for lawful reasons.

The focus of this case is not on whether Mercer was entitled to overtime, it is on what was the reason for his termination. If he was terminated entirely because he sought compensation for overtime, his termination would be reversed. But if he was at least in part terminated because of his poor absence/tardy and performance record, his termination will be upheld.

For argument sake I will assume that Parks, on March 11, 1993, made the remark attributed to him by Mercer. From that remark I could infer that Mercer was terminated--at least in part--because he sought overtime compensation. That would be enough evidence to shift the burden to the City to prove that Mercer's termination would have occurred for lawful reasons even absent the protected conduct. The overwhelming weight of the evidence then shows, however, that Mercer was an unreliable employee and would have been discharged due to his excessive absences and tardiness.

Mercer admitted that he had a tardiness problem and that Parks had spoken to him on several occasions about being tardy, about improving his attendance and about constituent complaints. Given Mercer's excessive tardiness and absences throughout 1992 I found that Parks had spoken to Mercer about improving his record well before Mercer submitted his overtime request on December 31, 1992. But Mercer never improved. He was tardy 192 days and absent 35 days in 1992. On December 22, 1992, Mercer was given R-4 which reviewed his inappropriate behavior on December 17, 18 and 21 of that year for which he was docked pay. That behavior alone may have been sufficient to justify his termination at that time. Mercer never denied that his behavior on those days was inappropriate, and there is no evidence that he grieved the suspension of pay.

Mercer began 1993 being on leave without pay for the first five work days that year, and he was tardy nearly every day he worked that year leading up to his termination. In all, he had a miserable tardy/attendance record, one which justified his termination, and supports Parks' testimony that the decision to terminate Mercer was made before Councilman Branch received CP-6, and was based on Mercer's poor record.

Work Hours Issue

The allegation that the City unilaterally reduced Mercer's and Watkin's work hours was simply wrong, and lacks merit. While Parks clearly intended to reduce their hours because they were not adequately performing their respective jobs, he did not implement

the change after D'Auria notified him of the potential labor problem it might create. The record does not support a finding that Parks wanted to reduce their hours because of their exercise of protected activity. Since D'Auria acted prudently to prevent any hours change there is insufficient basis to find that the City violated the Act. Compare, State of New Jersey, P.E.R.C. No. 78-55, 4 NJPER 153 (¶4072 1978).

Statutory Intent. N.J.S.A. 40:69A-60.5

In its post hearing brief the City argued that 40:69A-60.5 made Mercer, and all other council aides, at will employees who could be terminated with or without cause, but not because of their exercise of protected rights.

N.J.S.A. 40:69A-60.5 provides in relevant part:

> The municipal council of any municipality having a population of more than 270,000 which, prior to January 9, 1982 had adopted the form of government designated as "Mayor-Council Plan C" provided for in article 5 of P.L.1950, c. 210 (C. 40:69A-55 et seq.), may appoint an executive secretary and not more than four aides for each council member, who shall serve, and be removable at the pleasure of the council member, and who shall serve in the unclassified service of the civil service of the city and shall receive such salary as shall be fixed by ordinance, but said salary shall not exceed the salaries of persons holding the positions of executive secretary or aide on April 26, 1985. Persons appointed pursuant to this section may have their salaries increased on a periodic basis in accordance with the recommendation in an annual merit evaluation for each aide, to be filed with the municipal

> clerk by the council members, but not in excess of the average percentage increase granted to other municipal employees in the same period.

The tests used to determine whether certain State statutes or regulations preempt negotiations on what would otherwise be negotiable terms and conditions of employment have been well established in this state. State of N.J. v State Supervisory Employees Assoc., 78 N.J. 54, 80-82 (1978); Local 195, IFPTE v. State, 88 N.J. 393, 411-12 (1982); Bethlehem Tp. Ed. Ass'n v Bethlehem Tp. Bd. Ed., 91 N.J. 38, 44 (1982).

In State Supervisory the Court held:

> [W]e affirm PERC's determination that specific statutes and regulations which expressly set particular terms and conditions of employment, as defined in Dunellen, for public employees may not be contravened by negotiated agreement. For that reason, negotiations over matters so set by statutes or regulations is not permissible. We use the word "set" to refer to statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer. 78 N.J. at 80.

> It must be emphasized...that the adoption of any specific statute or regulation setting or controlling a particular term or condition of employment will preempt any inconsistent provision of a negotiated agreement governing that previously unregulated matter. 78 N.J. at 81.

The Court also explained that where a statute or regulation permits an employer to exercise some discretion regarding a particular term and condition of employment, that regulation does not "speak in the imperative," and has only a limited preemptive effect on collective negotiations. 78 N.J. at 81.

In Local 195 the Supreme Court established a three-part test for determining whether a subject was mandatorily negotiable. The second part of that test was whether the subject was preempted by statute or regulation. 88 N.J. at 404-405.

In Bethlehem The Supreme Court more fully set forth the rules for determining when a statute or regulation preempts negotiations. The Court held:

> As a general rule, an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation. However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations. Negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively." 91 N.J. at 44.

Where, however, the language of particular rules and regulations does not expressly, specifically and comprehensively cover and/or prohibit the subject or actions the employer asserts are preempted, the regulations will not preempt negotiations, or at most will only partially preempt negotiations.

The issue here is whether there is any language in 40:69A-60.5 which operates as a defense to Mercer's termination. I find there is not.

The language the City relies upon in the statute concerns the appointment of aides "...who shall serve, and be removable at the pleasure of the council member...." That language does not expressly, specifically and comprehensively say that a Councilperson may remove an aide for any reason. In fact, I agree with the City's

argument that the language means that absent a retaliatory motive, an aide can be removed "at will". But since the issue here is whether Branch or Parks retaliated against Mercer for pursuing an overtime claim, the City cannot rely on the "at will" language as a defense to his discharge because a determination had to be made about the motive for the termination. Having found, under the Bridgewater test, that the motive for the termination was substantially based upon Mercer's poor work record, however, it is unnecessary to rely on the "at will" language to defend the termination.

There is language in 40:69A-60.5, however, that is relevant to the issue raised in the clarification of unit petition. The statute provides that salaries for aides may be increased:

> in accordance with the recommendation in an annual merit evaluation for each aide...but not in excess of the average percentage increase granted to other municipal employees in the same period.

That language expressly, specifically and comprehensively limits the amount of increase an aide can receive, and makes any increase contingent upon an annual merit evaluation recommendation. That language acts to preempt Council 21's ability to negotiate an increase for aides which is greater than an average increase, and preempts any contractual increase from being implemented unless it is preceeded by a merit recommendation. Thus, to the extent any increase for aides in J-1 is greater than the average, or if the contract calls for an increase without acknowledging the need for a merit recommendation it is unenforceable.

While the salary increase language in the statute is not dispositive of the confidential issue, when it is combined with all the confidential facts it is consistent with a finding that the aides are not subject to the Acts protections.

Accordingly, based upon the above facts and analysis I make the following:

Recommendations

1. The Complaint should be dismissed.

2. The title Aide to Councilman should be found to be confidential within the meaning of the Act and removed from Council 21's negotiations unit immediately upon the issuance of a Commission decision.

Arnold H. Zudick
Hearing Examiner

DATED: August 31, 1994
Trenton, New Jersey