D.R. NO. 99-11

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

TOWNSHIP OF WINSLOW,

Public Employer,

-and-

LIU, LOCAL 172,

Docket No. RO-99-46

Petitioner,

-and-

CAMDEN COUNCIL #10,

Intervenor.

SYNOPSIS

The Director of Representation dismisses a Petition for Certificiation of Public Employee Representative filed by LIU, Local 172 seeking to represent a unit of full-time employees employed by the Township of Winslow in the departments of public works, parks and recreation, and utilities. The employees are represented by Camden Council No. 10, NJCSA in a broad-based collective neogtiations unit including part-time blue collar employees as well as white collar employees in various other Township departments.

The Director finds that Local 172 has not met the standards for severance of the existing unit as set forth in Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61, NJPER Supp. 248, 249 (¶61 1971). In particular, Council 10's processing of grievances or administration of the collective negotiations agreement was not so unreasonable that the existing collective negotiations relationship should be changed by severance.

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Appearances:

For the Public Employer
Zeller & Bryant attorneys
(James W. Burns, of counsel)

For the Petitioner
Zazzali, Zazzali, Fagella & Nowak
(Paul L. Kleinbaum, of counsel

For the Intervenor
Tomar, Simonoff, Adourian, O'Brien,
Kaplan, Jacoby & Graziano, attorneys
(Mary L. Crangle, of counsel

DECISION

On September 29, 1998, Laborer's Local #172, LIUNA, AFL-CIO filed a timely Petition for Certification of Public Employee Representative seeking to represent a unit of approximately 40 full-time employees of Winslow Township in its public works, parks and recreation, and utilities departments. These employees are

currently represented by Camden Council No. 10, NJCSA in a broad-based collective negotiations unit which also includes part-time blue-collar workers as well as white-collar employees in various other Township departments.

Local 172 alleges that the petitioned-for employees should be severed from the existing unit because Council 10 has unfairly and inappropriately represented their interests within the larger unit.

Council 10 intervened in this matter based on its then current collective negotiations agreement covering the petitioned-for employees for the period January 1, 1995 to December 31, 1998. N.J.A.C. 19:11-2.7. Council 10 seeks dismissal of the petition. It argues that it has provided consistent and fair representation to all unit employees, and that Local 172's allegations are unsupported.

The Township maintains that the existing broad-based unit should not be fragmented by severance of the petitioned-for group.

We have conducted an investigation of the facts and allegations concerning the petition. N.J.A.C. 19:11-2.2 and 2.6. The parties were afforded an opportunity to present their positions on the issues at an investigatory conference on October 15, 1998. Local 172 and Council 10 also submitted extensive position statements, numerous certifications and other documents, all of which have been considered. On February 22, 1999, I sent the parties a letter summarizing their positions and setting forth the

apparent facts in this matter. I advised the parties that absent additional facts, I intended to dismiss Local 172's petition. No additional submissions were made. I find the following facts.

In 1987, Council 10 was certified as the exclusive representative for all of the Township's blue-collar and white-collar employees. Council 10 has since negotiated a series of collective agreements covering all unit employees, including those now sought by Local 172. In addition to coverage under the grievance procedure, Council 10's contract generally covers the petitioned-for employees with regard to all terms and conditions of employment. Additionally, Article V, Work Schedule, and Article XVIII, Fringe Benefits, G.2. Uniforms, make specific reference to benefits relevant to the positions at issue in the petition.

Winslow Township is a civil service community. In September 1992, it implemented a layoff and resulting demotions of certain unit employees. Local 172 asserts that Council 10 did nothing to assist employees who were affected by the layoff. Local 172 offers supporting employee statements expressing their dissatisfaction with the 1992 layoffs. The employees state that when questioned about a former supervisor being bumped into the rank and file unit as a result of the layoffs, the Council 10 president responded that the employees should keep quiet so they would not get hurt. These employees acknowledge that they understood the Council president's remarks to mean that the Township might totally disband departments and they would lose their jobs. Additionally, certain

employees assert that, despite discussing their concerns about the layoffs with Council 10, they were never advised that they could file their own grievances or appeals; nor were they informed of the procedure for filing grievances or appeals.

Local 172 also relies on a November 1995 letter to Council 10 addressed "To Whom It May Concern" and signed by five employees, to support its argument that Council 10 has not provided appropriate and fair representation over time. The letter, which Council 10 received on November 8, 1995, referred to the senders' dissatisfaction with the results of the 1992 layoff resolution. It also asserted that unfair hiring practices occurred, and "a conspiracy" to intimidate, coerce and violate the rights of certain union members existed among "certain individuals." The letter called for an investigation of the matter or the signers would file federal court actions. On November 14, 1995, Council 10's attorney responded in writing to each of the signers of the "To Whom It May Concern" correspondence, reaffirming that the employees were entitled to the protections afforded in their collective negotiations agreement and by virtue of their civil service status. Council 10 requested specific information concerning the alleged rights violations in order to allow it to conduct the requested investigation. It asserts that it received no response. Four of the five employees who sent the letter subsequently filed suit in federal court against the Township and Council 10.

In addition to the terms of the negotiations agreement, the Township, as a civil service community, is also subject to the policies and procedures of the Civil Service Statute, N.J.S.A. 11A:1 et seq. (1986) and its pertinent regulations. While members of the petitioned-for unit have alleged Council 10's failure to represent them concerning the September 1992 layoff, Council 10 has provided documents including a decision by Administrative Law Judge Paul J. Sollami which show that Council 10 processed claims concerning the layoffs for 11 employees including several employees who have submitted statements in support of the instant petition. Those claimants were represented by Council 10 from the initial administrative filings through the hearing before Judge Sollami. In 1994, the ALJ issued his decision upholding the Township's layoff decision. Shortly after the issuance of the decision, Council 10 informed each of the affected employees that it would take no further appeals since it believed an appeal would not be successful.

Provisions of Contractual Grievance Procedure

There is no assertion that members of the bargaining unit represented by Council 10 did not receive a copy of the parties' collective negotiations agreement.

Article XXVII of the current collective agreement sets forth the grievance procedure. That procedure provides that the "Union", "any individual employee" or "group of employees" may initiate a grievance. A "grievance" is defined as an appeal from

the "Township's interpretation, application or violation of policies, agreements and administrative decisions." The grievance procedure specifically excludes matters which are controlled by statute or administrative regulations from being processed beyond step one of the negotiated grievance procedure. This article further provides that only those disputes which involve interpretation, application or alleged violations of the terms and conditions of employment set forth in the collective negotiations agreement are grievable beyond step one of the formal procedure. The procedure provides that "either party" may invoke binding arbitration to resolve these types of grievances.

In response to Local 172's allegations that petitioned-for employees were never told they could file their own grievances and were not made aware of the procedure for doing so or for filing appeals, Council 10 presented copies of grievances filed on behalf of the petitioned-for employees, and grievances filed by individual employees, including those who assert that they were not informed that they could file their own grievances. These grievances were filed as early as June 1990, and as late as July 1997.

Additionally, it appears that one of the employees was represented in 1997 by a Council 10 Trustee in a dispute over his date of hire. The employee also believed there was a discrepancy in the amount of back pay he was owed. The employee was accompanied to the Township offices by the Council 10 trustee and the dispute was resolved informally. Council 10 Trustee Joseph Tragno, in a

certification submitted in response to Local 172's allegations, states that the employee was at the top of his level, therefore his longevity and rate of pay would not have been affected. The employee asserts that he was advised not to pursue the issue, and he took no further action.

Other Assertions in Support of Severance

In further support of its position that the petitioned-for unit should be severed from the existing unit because of Council 10's alleged inappropriate and unfair representation, Local 172 relies on a certification from an employee who allegedly complained to Council 10 that white employees with less seniority hold a higher title than he does. The employee states that he was told that he is receiving the same pay without the title.

Another employee certification states that in 1997 he asked Council 10 to appoint a shop steward for department of public works employees. The employee asserts that the Council 10 trustee told him to "just stop all the bull----." In his certification, Trustee Tragno states he responded to the request by posting a notice of a public works shop steward opening, but no one applied for the position. Tragno also points out that there is a shop steward in the utilities department. Finally, Tragno disputes that he told the employee to "stop all the bull----."

Council 10 also asserts that on numerous occasions in response to employees' concerns described above, it asked those

employees if they wanted to file grievances and the employees declined to do so.

Civil Suit Filing

Local 172 has provided documents which show that several members of the petitioned-for unit have filed a civil suit in federal district court. The documents reveal that in April 1997, four employees filed separate pro se complaints in U.S. District Court against the Township and Council 10. The suits were consolidated by the court on April 15, 1997. The allegations comprising the consolidated complaints appear to be based in large part on the 1992 layoff and the resulting demotions discussed previously, which adversely affected the four employees who filed the complaints. The complaints specifically allege collusion, discrimination, failure to represent, and fraud. Finally, in an undated letter to the district court signed by 16 employees, the employees appear to be requesting a "procedural withdrawal from Council 10" for lack of representation; in general the letter repeats the assertions presented in the federal complaints. Council 10 has filed a motion to dismiss the pending federal complaint.

As a final example of the lack of appropriate and fair representation by Council 10, Local 172 offers one incident in which an employee in the petitioned-for unit allegedly requested information about what he believed were employees with "the same or more seniority" than he had and who were allegedly making more

money. The assertion does not specify when such a request was made and Council 10 does not recall receiving such a request.

ANALYSIS

After reviewing the arguments and submissions presented by the parties as set forth above, I find that the petitioned-for unit is inappropriate.

N.J.S.A. 34:13A-6(d) provides that the Commission shall determine the appropriate unit for collective negotiations. In making unit determinations, we must consider the general statutory intent of promoting stable and harmonious employer-employee relations. Where there is a dispute, the Commission is charged with the responsibility of determining the most appropriate unit. State v. Prof. Assn. of N.J. Dept. of Ed., 64 N.J. 231 (1974).

The Commission has long held that severance from broad-based units may only occur under very limited circumstances. In Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61, NJPER Supp. 248, 249 (¶61 1971) the Commission stated:

> The underlying question is a policy one: Assuming without deciding that a community of interest exists for the unit sought, should that consideration prevail and be permitted to disturb the existing relationship in the absence of a showing that such relationship is unstable or that the incumbent organization has not provided responsible representation. We think not. To hold otherwise would leave every unit open to redefinition simply on a showing that one sub-category of employees enjoyed a community of interest among themselves. Such course would predictably lead to continuous agitation and uncertainty, would run counter to the statutory

> objective and would, for that matter, ignore that the existing relationship may also demonstrate its own community of interest.

In other words, there exist strong policy concerns and statutory objectives for establishing predictable, stable labor relationships between public employers and public employee representatives. The benefit of this stability runs not only to the two parties to the relationship and their constituencies, but also to the public at large. A petitioner seeking to redefine the negotiations relationship has a heavy burden. In this regard, the petitioner must show that what is assumed to be a stable relationship between the recognized parties is in fact unstable, and thus does not support the statutory objectives; or that the incumbent employee negotiations representative has failed to provide its constituency with reasonable representation, which could also lead to instability and unpredictability in the existing negotiations relationship. Thus, a petitioner's claims of instability or irresponsible representation, which could lead to a dramatic change in the negotiation relationship between the employer and employees will be carefully scrutinized in the context of the entire existing relationship rather than isolated occurrences. Passaic Cty Tech. & Voc. H.S. Bd. of Ed., P.E.R.C. No. 87-73, 13 NJPER 63 (¶18026 1986).

Here, Local 172 raises no issue concerning unit stability. Rather, it alleges Council 10 has not responsibly represented the petitioned-for employees.

The assertions made by Local 172 appear to focus on Council 10's performance in administering its collective negotiations agreement and processing grievances. Accordingly, Council 10's processing of grievances and administration of the negotiations agreement are the two areas to be addressed in this determination.

Section 5.3 of the Act empowers a union to negotiate on behalf of all unit employees and to represent all unit employees in administering the contract. Section 5.3 specifically links that power to negotiate and administer with the duty to represent all unit employees "without discrimination and without regard to employee organization membership." The standards in the private sector for measuring a union's compliance with the duty of fair representation were articulated in Vaca v. Sipes, 386 U.S. 171 (1967); Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976). The duty of fair representation as described in Vaca is reviewed differently depending on the nature of the parties' filings before the Commission. There is a difference between the review required in determining whether a statutory violation has occurred in the unfair practice context and the review triggered by the representation question raised in a petition to sever employees from an existing bargaining unit. In the first instance we examine isolated incidents; in the latter context we look to the entirety of the parties' relationship. Moreover, even a finding that the employee representative has breached its duty of fair representation on one

occasion, and perhaps more, does not necessarily mean that employees must be severed from the existing unit. If this were the case, units would be constantly subject to redefinition and labor instability would inevitably result. Passaic Cty; Middletown Bd. of Ed., D.R. No. 99-5, 25 NJPER 1 (¶30000 1998).

In this matter, Local 172 asserts that petitioned-for unit members were not told they could file individual grievances nor were they told of the procedure to grieve. Council 10's contract provides that "any individual employee", or "group of employees" may initiate a grievance. There is no evidence that the petitioned-for employees did not have a copy, or access to a copy of the agreement. Additionally, there is no evidence that information on filing grievances was discriminatorily or deliberately withheld from employees. Further, several employees who asserted that they were not informed of the grievance procedure in fact filed grievances as individuals and with Council 10's assistance. The undisputed evidence reveals that Council 10 filed grievances for the employee groups at issue and/or assisted them in filing grievances.[1/] Moreover, Council 10 assisted one employee in settling a dispute concerning his date of hire, answered questions concerning pay rates and titles for another employee (albeit the answers were not to the satisfaction of the employee), and attempted to explain the reason that a former supervisor was bumped back into the negotiations unit.

1/ I note that failing to inform an employee that the employee could initiate a grievance on his or her own would not breach the union's duty of fair representation. Carteret Ed. Assn., P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997).

Local 172 also alleges that Council 10 failed to provide responsible representation to petitioned-for employees concerning the 1992 layoffs. A majority representative is not obligated to file every grievance which a unit member asks it to submit. Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶10285 1987); Trenton Bd. of Ed., P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986). In N.J. Turnpike Employees Union, Local No. 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979), the Commission said that, when faced with a claimed contract violation, the union must,

> ...exercise reasonable care and diligence in investigating, processing and presenting grievances, it must make a good faith judgment in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit.... [Id. at 413.]

Here, the Township, Council 10, and the employees are bound by the Civil Service Act. The parties' contract restricts matters appropriate for civil service from being processed beyond step one of the grievance procedure. Thus, while Council 10 determined not to file grievances over the 1992 layoffs and demotions, Council 10 did investigate the employees' complaints and represented all affected employees through the civil service process, including the hearing before and administrative law judge. Insofar as the Civil Service Act provides for processing these types of employment complaints, Council 10's compliance with those procedures, as opposed to filing grievances, does not support a finding that it irresponsibly administered the collective negotiations agreement,

which, in a layoff situation provided no protection. Moreover, just as a union is not required to process a grievance to arbitration under Vaca as long as its decision to refrain to do so is not arbitrary, discriminatory or in bad faith, a union cannot be required to take an appeal of an ALJ's decision if, after investigating the matter, in its judgment, to do so would prove fruitless. Such was the objective determination made by Council 10 in the instant matter. Additionally, Council 10's decision not to appeal was explained in writing to all of the petitioned-for unit members.

Based upon the foregoing, I find that with regard to processing of grievances or informing the petitioned-for employees of their right to file grievances; or other instances of Council 10's administration of the contract, none of the incidents cited by Local 172, when taken together, demonstrate that Council 10 has failed to provide responsible representation to the employees in the petitioned-for unit.

1995 "To Whom It May Concern" Letter, 1998 Federal Court Suit

In both the letter offered by Local 172 and the general complaint allegations, there appear at best to be inferences that Council 10 in some unexplained manner engaged in discriminatory

actions toward some members of the petitioned-for unit.2/ However, no evidence was presented of specific acts in any specific time frame. Moreover, when Council 10 requested more information in response to the 1995 letter, no further information was forthcoming.

In light of these vague and unsupported inferences, Local 172 has not established any discriminatory conduct on the part of Council 10, either standing alone or as a pattern, which would constitute irresponsible representation requiring severance of the petitioned-for unit.

Based upon the totality of the circumstances reviewed herein, Local 172 has not met the standards necessary to justify severance of the petitioned-for employees from the existing unit.

ORDER

The Petition for Certification is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Stuart Reichman, Director

DATED: March 12, 1999
Trenton, New Jersey

2/ While there is an allegation in the federal complaint that white employees received better job assignments than one of the minority employees, there is no link to or evidence of action by Council 10 which appears to have created or supported that alleged discrimination.