

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

In the Matter of

CITY OF PLAINFIELD,

Public Employer,

-and-

DOCKET NO. CU-81-37

FIREMEN'S MUTUAL BENEVOLENT  
ASSOCIATION, LOCAL NO. 7,

Petitioner.

SYNOPSIS

The Director of Representation, adopting the recommendations of a Hearing Officer, determines that an FMBA firefighters' negotiations unit does not include Fire Signal Division employees. The Director agrees with the Hearing Officer that, when as here, the parties, at the inception of the negotiations relationship did not intend to include existing fire signal division classifications and where the petitioning party has "slept on its rights" concerning unrepresented titles, the negotiations unit may not be found to include these classifications.

The record revealed that the parties did not include the Signal Division employees in the firefighter's unit after the unit was formed. After a City reorganization, the FMBA, in 1972 and 1975, attempted to negotiate for Signal Division employees. The City resisted these attempts and the FMBA subsequently abandoned its efforts. This abandonment, coupled with the failure of the FMBA to seek a determination from the Commission of the employees' unit status through the filing of a clarification of unit petition in a timely fashion, leads to the conclusion that the FMBA's actions constituted a waiver of any future claim that these employees should be clarified into their negotiations unit.

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Petitioner.

Appearances:

For the Public Employer  
Sachar, Bernstein, Rothbert,  
Silora & Mangello, attorneys  
(David H. Rothberg of counsel)

For the Petitioner  
Osterweil, Wind & Loccke, attorneys  
(Manuel A. Correia of counsel)

DECISION AND ORDER

Pursuant to a Petition for Clarification of Unit filed on December 4, 1980, with the Public Employment Relations Commission (the "Commission") by the Firemen's Benevolent Association, Local No. 7 (the "FMBA"), hearings were conducted before Commission Hearing Officer Arnold H. Zudick on the claim raised by the FMBA that employees of the Fire Signal Division of the City of Plainfield (the "City") should be included in the collective negotiations unit represented by the FMBA.

Hearings were held on May 11 and 12, 1981, in Newark, New Jersey, at which time all parties were given an opportunity

to examine witnesses, to present evidence and to argue orally. Briefs were submitted by the parties, the last of which was received by July 28, 1981. The Hearing Officer issued his Report and Recommendations on August 28, 1981, a copy of which is attached hereto and made a part hereof. No exceptions to his Report and Recommendations were filed by either party.

The undersigned has carefully considered the entire record herein, including the Hearing Officer's Report and Recommendations, the transcript, and the exhibits, and finds and determines as follows:

1. The City of Plainfield is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), is the employer of the employees who are the subject of this Petition and is subject to the provisions of the Act.

2. Firemen's Mutual Benevolent Association, Local No. 7 is an employee representative within the meaning of the Act and is subject to its provisions.

3. The FMBA seeks a clarification of the collective negotiations unit which it represents. The parties have been unable to agree upon the placement of the titles in question in the FMBA's unit and, therefore, a question concerning the composition of a collective negotiations unit exists, and the matter is appropriately before the undersigned for determination.

4. The Hearing Officer found and recommended the following: (a) Signal Division employees are not firefighters

within the meaning of the Police and Fire Compulsory Interest Arbitration Act because these employees predominantly perform electrical work and their job descriptions, unlike firefighters, do not include any firefighting duties or training requirements; (b) since the Signal Division employees are not firefighters they are not entitled to compulsory interest arbitration; (c) Notwithstanding the aforementioned, the Petition for Clarification of Unit should be dismissed in its entirety since the instant dispute involved a question of representation which requires that a representation petition be filed rather than the Petition for Clarification of Unit filed by the FMBA herein.

The undersigned agrees with the Hearing Officer that questions raised concerning the asserted firefighting status of Signal Division employees need not be resolved in the context of the instant proceeding, since even if this issue were resolved in favor of the FMBA's position, for the reasons cited below, the employees could not be found to be included in the FMBA's negotiations unit. The undersigned, therefore, finds it unnecessary to discuss the issues raised concerning the alleged firefighting status of the disputed employees.

Where a record reveals that the parties, at the inception of their negotiations relationship, did not intend to include certain employee classifications which were then in existence in the negotiations unit or where the petitioning party has for a considerable period of time "slept on its rights" concerning unrepresented titles, the negotiations unit may not be found to include these

classifications. See In re Wayne Bd. of Ed., D.R. No. 80-6, 5 NJPER 422 (¶ 10221 1979), aff'd in relevant part, P.E.R.C. No. 80-94, 6 NJPER 54 (¶ 11028 1980). The FMBA's Petition to have the Signal Division employees deemed included in its unit falls under both of the above standards.

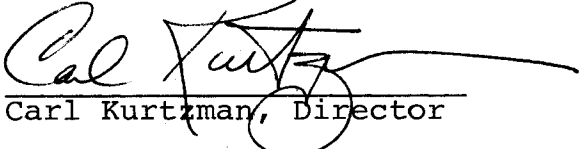
The testimony provided by Larry Zampella, a firefighter who was instrumental in the formation of the negotiations unit and knowledgeable in the negotiations between the FMBA and the City, reveals that the FMBA did not seek to include the Signal Division employees in the negotiations unit when it was recognized in 1969 or 1970. During this period of "transition" due to a City charter change, the Signal Division was removed from control of the fire chief, and constituted a separate division within the Department of Public Law and Safety along with the Police Division and the Fire Division.

Zampella's testimony further reveals that the FMBA sought to negotiate on behalf of signal division employees during the parties' 1972 and 1975 negotiations, but that each time the City refused to negotiate, advising the FMBA that it did not consider these employees to be within the negotiations unit. At no time after these refusals did the FMBA seek to have the matter placed before the Commission for a determination. See In re Bergen Pines Hospital, D.R. No. 80-20, 6 NJPER 61 (¶ 11034 1980) (failure to identify potential unit employees within an initial contractual period and to seek their inclusion in the negotiations unit through Commission processes constitutes waiver of any future claim to have employees clarified as within negotiations unit.)

There is ample evidence in the record to support the Hearing Officer's determination that the Signal Division employee classifications existed at the time of the creation of the FMBA bargaining unit. The record further supports the Hearing Officer's finding that, pursuant to the Wayne test, at the time the FMBA unit was formed, there was no mutual intent to include the instant disputed titles. Even assuming arguendo that there was, in fact, a mutual intent to include Signal Division employees in the FMBA bargaining unit at the time of its formation, or alternatively that a subsequent City reorganization created a change in circumstances, the record indicates that the FMBA, in 1972 and 1975, attempted to negotiate for Signal Division employees. The resistance to such negotiations by the City and the subsequent abandonment by the FMBA of its attempts to negotiate for the disputed titles coupled with the failure of the FMBA to file a clarification of unit petition in a timely fashion leads to the conclusion that the FMBA's actions constitute a waiver of any future claim that these employees should be clarified into their negotiations unit.

Accordingly, for the above reasons, the undersigned hereby clarifies the firefighters' negotiations unit as not including the Signal Division employees. 1/

BY ORDER OF THE DIRECTOR  
OF REPRESENTATION

  
Carl Kurtzman, Director

DATED: February 8, 1982  
Trenton, New Jersey

1/ As the Hearing Officer noted, the issue as to the includability of the Signal Division employees in the firefighters unit may be raised by the filing of a certification petition by the FMBA seeking an election to include nonrepresented employees in the firefighters' unit. The instant record may provide a sufficient basis to resolve this question without the need for additional investigation or hearing.

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ASSOCIATION, LOCAL NO. 7,

Petitioner.

SYNOPSIS

A Hearing Officer of the New Jersey Public Employment Relations Commission finds that the following Signal Division titles, the Police and Fire Signal System Repairer and Electrician, Radio Repairman, and the Senior Electronics Repairer, are not employees engaged in "firefighting" within the meaning of the Police and Fire Compulsory Interest Arbitration Act. Accordingly, he recommended that said titles cannot be included in a unit with firefighters, and they are not entitled to interest arbitration.

The Hearing Officer further recommended that the instant Petition be dismissed based upon procedural grounds. Relying upon In re Wayne Bd. of Ed., D.R. No. 80-6, 5 NJPER 422 (¶ 10221 1979), aff'd P.E.R.C. No. 80-94, 6 NJPER (¶ 11028 1980), the Hearing Officer found that a question concerning representation existed which could not be resolved through a clarification of unit proceeding.

The Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The Report is submitted to the Director of Representation who reviews the Report, any exceptions thereto filed by the parties and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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Sachar, Bernstein, Rothberg, Sikora & Mangello, Esqs.  
(David H. Rothberg of counsel)

For the Petitioner  
Osterweil, Wind & Loccke, Esqs.  
(Manuel A. Correia of counsel)

HEARING OFFICER'S  
REPORT AND RECOMMENDATIONS

A Petition for Clarification of Unit was filed with the Public Employment Relations Commission (the "Commission") on December 4, 1980, by the Firemen's Mutual Benevolent Association, Local No. 7 (the "FMBA") seeking a clarification of a negotiations unit which it represents, the employees of which are employed by the City of Plainfield (the "City"). The FMBA seeks to have certain titles in the City's Fire Signal Division, i.e., the Police and Fire Signal System Repairer and Electrician, Radio Repairman, and the Senior Electronics Repairer, who are currently



unrepresented, included in its unit because they allegedly perform firefighting duties and have a community of interest with firemen, and are, therefore, entitled to interest arbitration. The City argues that the disputed titles are not firemen and have no community of interest with firemen and are, therefore, ineligible for inclusion in the FMBA's unit and are not entitled to interest arbitration.

Pursuant to a Notice of Hearing dated March 19, 1981, hearings were held in this matter before the undersigned Hearing Officer on May 11 and 12, 1981, in Newark, New Jersey, at which all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Subsequent to the close of hearing the parties filed briefs in this matter, the last of which was received by July 28, 1981.

Based upon the entire record in these proceedings, the Hearing Officer finds:

1. The City of Plainfield is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), is the employer of the employees who are the subject of this Petition and is subject to the provisions of the Act.

2. The Firemen's Mutual Benevolent Association, Local No. 7, is an employee representative within the meaning of the Act and is subject to its provisions.

3. The FMBA seeks a clarification of the collective negotiations unit of City employees which it represents. The parties have been unable to agree upon the placement of the

titles in question in the FMBA's unit and, therefore, a question concerning the composition of a collective negotiations unit exists, and the matter is appropriately before the undersigned for Report and Recommendations.

4. The parties agree that the issues in this matter are as follows:

Do the members of the Signal Division of the City of Plainfield have such a community of interest with the members of the Plainfield Fire Department that would entitle them to be part of the FMBA's unit, and if so, are they entitled to interest arbitration pursuant to the Interest Arbitration Law? T-1, pp. 5-6.

#### FINDINGS OF FACT

1. The FMBA was recognized by the City as the majority representative for all uniformed fire privates in 1969 which led to the first collective agreement effective 1970-71. <sup>1/</sup> However, the FMBA did not seek to represent Signal Division employees when it reached its first collective agreement, and although it attempted to negotiate on behalf of those employees in 1972 and 1975, subsequent agreements did not include those titles because the City did not believe they were appropriate for the unit. <sup>2/</sup> Prior to the instant Petition, the FMBA never petitioned the Commission to represent Signal Division employees.

2. In 1969, the City underwent a charter revision, one result of which was the creation of the Department of Public Law & Safety. That Department was divided into various divisions

<sup>1/</sup> Transcript ("T") 1 p. 76; T-2, p. 24 Exhibit J-5

<sup>2/</sup> T-2, pp. 25-27

including the Police Division, the Fire Division commanded by the Fire Chief, and the Signal Division which was thereafter removed from control of the Fire Chief and instead commanded by the Superintendent of the Signal Division whose authority equals that of the Fire Chief. <sup>3/</sup>

3. The Signal Division consists of the Superintendent, as well as the three titles in dispute. The Signal Division is located in a separate building which stands behind the firehouse, it has a budget separate from the Fire Division, and it uses its own vehicles to perform division functions. Signal Division employees, however, utilize certain facilities in the firehouse and occasionally drive fire vehicles, and they wear the same blue work clothes as firemen, but Signal employees are not authorized to wear the fire shoulder patch, nor are they issued the same badge as firemen. <sup>4/</sup>

4. The basic duties of the instant titles as set forth in their respective job descriptions are as follows:

a. Police and Fire Signal System Repairer and Electrician

Installs and maintains police and fire signal system; performs all general electrical work; emergency repairs; maintains police and fire radio systems; installs power feeders and cables. Exhibit J-1.

b. Radio Repairman

Maintenance and repair of radios; testing radio equipment. Exhibit R-1.

c. Senior Electronics Repairer

Maintenance and repair of radios, fire alarm systems and electronic devices; testing electronic equipment. Exhibit R-3B

<sup>3/</sup> T-1, pp. 7, 15

<sup>4/</sup> T-1, pp. 30, 34-35, 48, 50-55

5. The basic duties of a firefighter currently represented by the FMBA as set forth in its job description are as follows:

a. Firefighter

Answers fire alarms; assists in extinguishing fires; cleans and maintains fire equipment and apparatus; participates in fire drills and other training courses; inspects fire hydrants; performs rescue work; responds to bomb threats. Exhibit J-7.

6. The facts show that both Signal and Fire Division employees receive the same health plan, sick leave and vacation plans, and are paid by City checks. <sup>5/</sup> Employees of both divisions order supplies from, and report their vacation leave to the same City official, and they both report sick leave to the same person, a deputy chief of the Fire Division. <sup>6/</sup> However, Signal and Fire Division employees have different working hours and schedules, their overtime policies are different, and they have different pension systems because Signal Division employees are in the Public Employees Retirement System, whereas, the Fire Division employees are in the Police and Fire Pension System. <sup>7/</sup>

7. The record further reveals that other than motorboat operation training, and training involving electrical matters, the Signal Division employees, unlike firemen, do not receive any training involving firefighting, nor do they receive fire gear such as helmets

<sup>5/</sup> T-1, pp. 36-38; T-2, p. 51

<sup>6/</sup> T-1, pp. 28, 82-83

<sup>7/</sup> T-1, pp. 32, 37, 103; T-2, pp. 51-52. The record does show that although employees holding the instant titles are not in the Police and Fire Pension System, the Superintendent of the Signal Division is in that system because his employment in the City predated a change in the law regarding membership in that system. T-2, pp. 42, 49.

and coats. <sup>8/</sup> The record, however, does show that both Signal employees as well as firemen check the fire alarm repeater panel which is located in the firehouse. <sup>9/</sup>

8. Pursuant to departmental policy and orders, Signal Division employees are required to attend second alarm or multiple alarm fires, (see Exhibit J-4) but not to fight fires, rather to be available to perform duties within their own expertise, and there is approximately one such fire a year. <sup>10/</sup> However, Signal employees are not required to attend the more common "working" or class "B" fire, nevertheless, said employees frequently attend such fires based upon their own volition. <sup>11/</sup>

9. Signal Division employees have attended at least five major fires the last of which was in 1978, (see Exhibit J-3) and have attended class "B" fires as recently as 1980. <sup>12/</sup> Although it is not standard operating procedure to use signal employees to help fight fires, and although firemen have not been instructed to use said employees to fight fires, <sup>13/</sup> the record reveals that Signal Division employees have assisted firemen at fires in several ways. Signal employees have changed air packs for firemen, and they have advanced fire hose and raised fire ladders. <sup>14/</sup>

<sup>8/</sup> T-1, pp. 18, 34, 83, 119-126; T-2, pp. 50, 59

<sup>9/</sup> T-1, pp. 45, 57-58

<sup>10/</sup> T-1, pp. 19, 25-26, 30

<sup>11/</sup> T-1, pp. 58-59, 105-106

<sup>12/</sup> T-1, pp. 71, 92-93; T-2, p. 39

<sup>13/</sup> T-1, pp. 67, 73-74

<sup>14/</sup> T-1, pp. 66, 69, 88-89, 93-96, T-2, pp. 6, 60

The facts also support a finding that at least one Signal Division employee was directed on two separate occasions to use a hose to water down a fire, and he was also ordered to go inside a burning building on one occasion to cover certain machinery. <sup>15/</sup>

10. A review of the rules and regulations of the Signal Division show that the Signal Division and its employees are subject to the rules and regulations of the Fire Division to the extent that they are applicable. <sup>16/</sup> Although the Superintendent of the Signal Division is in charge of that Division, he is subject to the administrative supervision of the Fire Chief and is required to obtain permission with respect to certain matters from the Fire Chief. <sup>17/</sup> Moreover, the record shows that the Fire Chief has the authority to order Signal Division employees to perform a variety of duties in emergency situations. <sup>18/</sup> Finally, the facts show that when Signal Division employees report to fires they are subject to the authority of the officer in charge, and must perform the duties assigned by that officer. <sup>19/</sup>

#### ANALYSIS AND CONCLUSIONS OF LAW

In stipulating the issue(s) herein, the parties raised two questions, the first concerning community of interest and the second concerning interest arbitration. The issue(s), as framed by the parties, seem to suggest that the two questions can be answered independently of one another. Such a finding, however,

<sup>15/</sup> T-1, pp. 89, 91

<sup>16/</sup> T-2, pp. 46-47, 49; Exhibits J-2 & R-2

<sup>17/</sup> Exhibits J-2 & R-2

<sup>18/</sup> T-1, p. 24; Exhibits J-2 & R-2

<sup>19/</sup> T-2, p. 46

would not be possible. The amendment to the Act that provided for interest arbitration in police and fire departments, (The Police and Fire Compulsory Interest Arbitration Act) N.J.S.A. 34:13A-14 et seq., defines fire departments as:

... any department of a municipality, county, fire district or the State or any agency thereof having employees engaged in firefighting provided that such firefighting employees are included in a negotiating unit exclusively comprised of firefighting employees. N.J.S.A. 34:13A-15.

Based upon that definition, only firefighters are appropriate for inclusion in the existing FMBA unit because to permit nonfirefighters in the unit would require the removal of interest arbitration from individuals who are firefighters which is contrary to the purposes of the Act. Consequently, the threshold issue herein is whether the instant titles are firefighters, and not whether they otherwise share a community of interest with the firefighters in the FMBA unit. If Signal Division employees are firefighters they would be appropriate for inclusion in the FMBA unit and automatically entitled to interest arbitration. If they are not firefighters they would not be appropriate for inclusion in the unit and would not be entitled to interest arbitration.

#### Findings on Firefighting

The Act does not provide a specific definition for a firefighter, but several decisions serve as guidelines for reaching such a definition. A firefighter is someone engaged in the fighting of fires which includes the use and operation of firefighting equipment and apparatus, and as evidenced by specific training in

firefighting tactics and use of firefighting equipment. <sup>20/</sup>

In support of its contention that Signal Division employees are firefighters, the FMBA relies upon its argument that said employees share a community of interest with firemen, i.e., they have a similar employer, similar health, sick and vacation plans, and use similar equipment -- and that they fight fires as evidenced by the fact that they have pulled fire hose, raised ladders, and occasionally sprayed water on fires.

In addition, the FMBA relies upon the Commission decision in In re City of Newark, D.R. No. 81-18, 7 NJPER 3 (¶ 12002 1980), in support of its argument that Signal Division employees perform services that are integral to the functioning of the Fire Division. In City of Newark, the Director of Representation held that the arbitration statute was not limited to the definition of "policemen", but was intended to apply to public employees in police departments who are engaged in providing those vital services which are an integral element of the total process of detecting, apprehending and arresting criminals. In applying the above statement, the Director found that police identification officers who were involved in criminal identification performed duties which were integral to the police responsibilities of detecting, apprehending and arresting criminals. However, the Director also found that communication officers, linemen, and the supervising police property clerk were not performing duties integral to the police responsibilities.

<sup>20/</sup> See In re Camden County, H.O. No. 82-3, 7 NJPER \_\_\_\_\_ (¶ 1981); In re City of Pembroke Pines, 4 FPER 329 (¶ 4174 1978), Cf. In re City of Newark, D.R. No. 81-18, 7 NJPER 3 (¶ 12002 1980).



The FMBA suggests that City of Newark also stands for the proposition that individuals who perform functions vital to firefighting are firefighters, and must, therefore, be included in a firemens' unit. The FMBA argues that the instant titles perform such vital functions and must, therefore, be included in its unit.

The undersigned agrees with the FMBA that City of Newark applies to fire as well as police cases, and also agrees that Signal Division employees perform a service vital to the City. Nevertheless, the undersigned cannot conclude that these employees are firefighters merely because they have, on occasion, assisted firemen at fires.

It is particularly relevant to note that in City of Newark the Director held that the "linemen" position was not performing a police service. The linemen in that case performed duties similar to the instant titles, such as repair and maintenance of electrical lines and the communications system, stringing wires and testing equipment. The Director specifically found that these functions were not a "police service" and for the same reasons the undersigned concludes that what the instant titles do is not firefighting. In a more recent decision, In re Camden County, supra, n.20, another Hearing Officer of the Commission interpreted the Police and Fire Compulsory Interest Arbitration Act with respect to firefighting, and found that fire and ambulance dispatchers were not employees engaged in firefighting. In reaching his decision the Hearing Officer reviewed the legislative history of the Interest Arbitration Act and found in pertinent

part that an earlier reference in the proposed bill for the inclusion of linemen as a firefighter was subsequently dropped, leaving one to conclude that the Interest Arbitration Act was limited to employees actually engaged in firefighting as opposed to linemen who perform related but different functions.

In analyzing the evidence herein, it appears that Signal Division employees perform electrical work on a regular basis nearly all of their time. They are only required to attend multiple alarm fires and technically, they are only required to be available to provide emergency electrical work at those fires. There have only been five such fires between 1975 and 1981, the last of which occurred in 1978. The fact that some firemen have directed Signal Division employees to assist firemen at fires does not make these employees part of the Fire Division, and pulling fire hose, moving ladders and changing air packs in only five fires in the past six years does not make these employees firefighters. Even if the instant titles performed such functions on a more regular basis those duties are frequently performed by other individuals at the fire scene and do not establish that the individual is "fighting fires."

Although the record also established that one Signal Division employee also sprayed water on a fire and went inside a burning building, these isolated instances of firefighting are de minimis in scope and do not support a finding that the instant titles are firefighters, nor are they representative of their normal duties. In fact, the record established that the instant titles predominantly perform electrical work and their job

descriptions, unlike firemen, do not include any firefighting duties or training requirements.

It is equally important to note that despite being required to attend only multiple alarm fires, the Signal Division employees frequently attend working fires on a "voluntary" basis. Such voluntary attendance is encouraged by the Superintendent, but is not an indication that Signal employees are considered firefighters.

The record also shows that certain rules of the Fire Division apply to Signal employees, that the Fire Chief has authority over Signal employees at certain times, and that Signal employees who report to fires must take direction from the fire officer in charge of the fire. None of these elements, however, establishes that the instant titles are firefighters. First, only fire rules that are applicable to the Signal Division apply to the Signal employees, second, the Fire Chief only has authority over Signal Division employees with respect to utilizing electrical knowledge at fires and other related fire emergencies, and third, in order to prevent confusion at a fire scene it is common practice for one person to be in command. Since the Signal Division employees report to fires to provide electrical or other assistance, it makes sense to require them to report to the officer in charge.

Finally, in contrast to the City of Newark, supra, where the police identification officers were part of the police structure and took direction on a regular basis from police officers, the instant titles are in a structure and hierarchy separate from the Fire Division. They have separate supervision on a regular basis, except perhaps at the scene of a fire, and

they normally are far removed from the operations of the Fire Division, fire training, and firefighting.

### Procedural Findings

Although the City did not make a formal motion to dismiss based on procedural grounds, it is the Commission's responsibility in a representation hearing such as this to gather all of the facts that bear upon the petition, and this includes procedural facts, as well as facts on the merits of the case. Where it becomes apparent to the Commission that based upon the facts the wrong petition was filed, the Commission must dismiss that petition in order to maintain the integrity of its representation proceedings. Such is the situation herein. <sup>21/</sup>

The Commission policy with respect to the filing of clarification of unit petitions has been enunciated in two leading decisions. In In re Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977), the Commission defined the difference between clarification of unit (CU) and representation (RO) petitions, set forth the various uses of a clarification of unit petition and when they may be filed, and indicated when clarification of unit determinations would be effective. In In re Wayne Bd. of Ed., D.R. No. 80-6, 5 NJPER 422 (¶ 10221 1979), aff'd P.E.R.C. No. 80-94, 6 NJPER 54 (¶ 11028 1980), the Commission set forth a test to be applied to determine whether a clarification of unit petition

<sup>21/</sup> The Hearing Officer recognizes that the Director may dismiss this matter based on procedural grounds and reserve any judgment with respect to the merits of the case. However, if the appropriate petition is subsequently filed, the Director would then need to consider the decision on the merits. The Hearing Officer made a decision on the merits herein despite the procedural error in an attempt to avoid a relitigation of this issue if the corrected petition were filed.

is appropriate in a given set of circumstances.

In Clearview, supra, the Commission indicated that there are two categories of proceedings to resolve disputes concerning representational status. First, those proceedings which resolve questions concerning representation through election, and second, those proceedings which resolve questions concerning the composition of bargaining units by interpreting the existing language that defines the unit. The Commission stated that representation petitions are filed in instances where unrepresented employees seek to form a unit; where unrepresented employees seek to be added to a unit already in existence; where represented employees seek to become part of another unit; and other situations. It also stated that clarification of unit petitions are filed to determine whether a particular title is contemplated within the scope of the unit. Other examples of when clarification of unit petitions are filed are where there are changes in the job functions of a particular title; when a new title is created entailing job functions similar to those already covered by the unit; and when either party to a collective agreement seeks the exclusion of a given title(s) because of its managerial, confidential or supervisory status.

In Wayne, supra, the Commission actually clarified the distinction between clarification of unit and representation petitions. The Commission held that it was inappropriate to use clarification of unit petitions to include a title(s) which was in existence at the time the unit was formed, or where a union had, for a considerable period of time, "slept on its rights"

concerning the unrepresented title. The Commission stated that under these circumstances a question concerning representation exists and the clarification of unit petition should be dismissed. In Wayne the Commission further indicated that when a disputed title existed at the time the unit was formed, as did the instant titles, a determination must be made as to whether there was a mutual intent by the parties to include that title within the unit recognition clause. In the absence of a mutual intent to include the title, a question concerning representation exists and a clarification of unit petition should be dismissed.

The Commission established the following criteria to utilize in a clarification of unit proceeding to determine whether a question concerning representation exists:

1. Whether there was a mutual intent to include the disputed title,
2. Where an intent to include was initially present, it must then be determined whether the subsequent conduct of the parties demonstrated a mutual agreement to exclude the title, and,
3. Whether the subsequent conduct of the majority representative constituted an abandonment or waiver of the claim that the title was represented in the unit.

The Commission further stated:

In those cases where it is found that there has been an agreement to exclude or evidence of a waiver on the part of the majority representative it will result in the conclusion that this Petition raises a question concerning representation. If it is found with

regard to any classification that a question concerning representation exists, that portion of the Clarification Petition relating to such classification will be dismissed. Wayne, supra at slip. op. p.6.

It is clear from the evidence gathered herein that Signal employees existed prior to the formation of the FMBA unit. However, the facts show that the FMBA did not seek to include Signal employees in its unit at the time of its recognition as majority representative or when it reached its first collective agreement. Although the FMBA did initially attempt to negotiate for Signal employees in 1972 and 1975, it subsequently ended its attempts to negotiate for those titles, and the collective agreements for those years did not include the instant titles. Finally, the facts show that the FMBA did not file any actions before the Commission seeking to represent these titles prior to the filing of this Petition.

Having reviewed all of the facts herein, the undersigned must conclude, that in application of the Wayne test, there was, at the time the unit was formed, no mutual intent to include the instant titles and they never have been included; that, in fact, there was a mutual intent to exclude the titles; and, that by subsequently agreeing to not negotiate for these titles the FMBA waived any claim it may have had that the titles were included in its unit.

Since the facts show that there has never been a mutual intent to include the Signal Division employees in the FMBA unit, a question concerning representation exists with regard to those titles that cannot be resolved in a clarification of unit proceeding.

The Petition must, therefore, be dismissed.

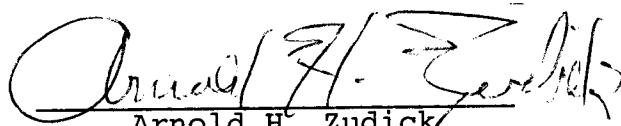
RECOMMENDATIONS

Based upon the foregoing discussion the undersigned Hearing Officer recommends the following:

1. The instant Signal Division titles are not firefighters within the meaning of the Police and Fire Compulsory Interest Arbitration Act and are, therefore, inappropriate for inclusion in the FMBA's firefighter unit, and are not entitled to interest

2. That whether or not the instant titles are appropriate, for inclusion in the FMBA's unit, a question concerning representation exists with respect to their placement in that unit, and the clarification of unit petition must, therefore, be dismissed in its entirety.

Respectfully submitted

  
Arnold H. Zudick  
Hearing Officer

DATED: Trenton, New Jersey  
August 26, 1981