

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Respondent,

-and-

Docket No. CO-78-40-64

LOCAL 2306, AFSCME, AFL-CIO,

Charging Party.

SYNOPSIS

In an unfair practice proceeding the Commission finds, in agreement with the Hearing Examiner, that Local 2306 failed to meet its burden of proof by a preponderance of the evidence that the County by subterfuge and sham had eradicated and diverted the negotiations unit represented by Local 2306. The Hearing Examiner found, and the Commission affirmed, that the record evidence failed to establish that the County, in placing CETA employees in the Department of Law rather than the Welfare Division, did so out of any motivation to adversely affect the Local's negotiations unit. The Commission, in the absence of exceptions filed by the Local also adopted the Hearing Examiner's recommendation that the Complaint regarding the County's alleged failure to deduct dues be dismissed. The Commission, however, noted concerning the dues issue that failure to deduct dues in accordance with N.J.S.A. 52:14-5.9(e) may constitute a violation of the Act in certain circumstances.

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Charging Party.

Appearances:

For the County of Hudson
Murray, Granello & Kenney
(Malachi J. Kenney, Esq., and
John Paul Dizzia, Esq. on the Brief)

For Local 2306, AFSCME, AFL-CIO
Rothbard, Harris & Oxfeld, Esqs.
(Sanford R. Oxfeld, Esq.)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on August 29, 1977, by Local 2306, AFSCME, AFL-CIO (the "Local") alleging that the County of Hudson (the "County") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"), in that the County had in the first week of July 1977 begun to hire employees with monies provided by CETA, which employees had subsequently signed dues checkoff authorization cards for the Local but the County had refused to make dues deductions pursuant to the said authorization cards. On March 20, 1978, the charge was amended to allege additionally that the County had by subterfuge and sham transferred the CETA employees out of the bargaining unit represented by the Local and in so doing

eradicated and diverted the bargaining unit. It is alleged that this conduct by the County is in violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) of the Act. ^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on February 28, 1978. Hearings were held before Alan Howe, Hearing Examiner of the Commission, on April 10, 1978, and June 20, 1978, ^{2/} in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The parties filed post-hearing briefs on September 6, 1978. ^{3/}

On September 13, 1978, the Hearing Examiner issued his Recommended Report and Decision, which report included findings of fact, conclusions of law and a recommended decision. The original of the report was filed with the Commission and copies were served upon all parties. A copy is attached hereto and made a part hereof. ^{4/} No exceptions have been filed.

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- ^{1/} These subsections prohibit 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.
 - (2) Dominating or interfering with the formation, existence or administration of any employee organization.
 - (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."
- ^{2/} The delay in the holding of the second hearing was due to the illness on one occasion of the Hearing Examiner and the illness on a second occasion of counsel for the County.
- ^{3/} Briefs were originally due on August 1, 1978, but due to vacation schedules and other conflicts the briefing was deferred first to August 22 and finally to September 6, 1978.
- ^{4/} H.E. No. 79-15, 4 NJPER ____ (¶ , 1978).

The Hearing Examiner identified the issue as follows: "Did the County violate the Act when it placed CETA employees, who were hired as Welfare Investigator Aides, in the Department of Law of the County rather than in the Welfare Division?" (Report, p. 4)

The Hearing Examiner found that the Local failed to meet its burden of proof by a preponderance of the evidence that the County by subterfuge and sham had "eradicated and diverted the bargaining unit." The Hearing Examiner found that evidence failed to establish that the County, in placing the CETA employees in the Department of Law rather than the Welfare Division, did so out of any motivation to eradicate and divert the bargaining unit.

After careful consideration of the entire record, the Commission adopts the Hearing Examiner's findings of fact, conclusions of law and recommended order regarding this issue for substantially the reasons cited by him.

N.J.A.C. 19:14-6.8 states that "the charging party...shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." The Hearing Examiner found that testimony offered by the County to be credible to explain the reasons for placing the CETA employees in the Law Department, rather than the Welfare Division. The decision to establish an investigative unit staffed by CETA employees within the Department of Law was not motivated by any union considerations. The only nexus between the CETA employees and the Welfare Division was a two-week training program. But, due to the potential conflicts of interest, the County chose to place the investigative unit outside the Welfare Division. ^{5/}

We also adopt the Hearing Examiner's recommendation that the complaint regarding the County's alleged failure to deduct dues be dismissed. Although it

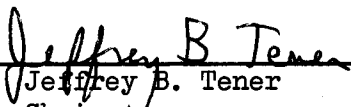
^{5/} The Commission, in agreement with the Hearing Examiner, notes that the underlying issue might be one of representation rather than a matter of an unfair practice under the Act. At this time, the Commission does not address this issue as there is no formal representation proceeding pending.

is arguable that a failure to deduct dues in accordance with N.J.S.A. 52:14-5.9e constitutes a violation of the Act in some circumstances, the Local's failure to pursue this issue by filing exceptions to the Hearing Examiner's Report constitutes a waiver of its right to a remedy. N.J.A.C. 19:14-7.3(b) provides that any exceptions not urged shall be deemed to have been waived.

ORDER

Accordingly, for the reasons set forth above, it is hereby ORDERED that the Complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Schwartz and Parcels voted for this decision. Commissioners Hartnett and Graves abstained. None opposed.

DATED: Trenton, New Jersey
October 23, 1978

ISSUED: October 25, 1978

STATE OF NEW JERSEY
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RELATIONS COMMISSION

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COUNTY OF HUDSON,

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- and -

Docket No. CO-78-40-64

LOCAL 2306, AFSCME, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices filed by the Local alleging that the County by subterfuge and sham sought to eradicate and divert the bargaining unit represented by the Local at the County's Welfare Division when it placed certain CETA employees hired as Welfare Investigator Aides in the Law Department rather than in the Welfare Division. The Hearing Examiner concluded that the Local failed to meet its burden of proving its charge by a preponderance of the evidence in that it failed to show any union considerations in the decision of the County to place the CETA employees in the Law Department rather than in the Welfare Division. The only nexus that the CETA employees had had with the Welfare Division was a two-week training period in the Welfare Division in early July 1977. The final decision to place the CETA employees in the Law Department was made by resolution by the Board of Chosen Freeholders on September 22, 1977.

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.

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John Paul Dizzia, Esq. on the Brief)

For Local 2306, AFSCME, AFL-CIO
Rothbard, Harris & Oxfeld, Esqs.
(Sanford R. Oxfeld, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on August 29, 1977 by Local 2306, AFSCME, AFL-CIO (hereinafter the "Local" or the "Charging Party") alleging that the County of Hudson (hereinafter the "County" or the "Respondent") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the County had in the first week of July, 1977 begun to hire employees with monies provided by CETA, which employees had subsequently signed dues checkoff authorization cards for the Local but the County had refused to make dues deductions pursuant to the said authorization cards, all of which was alleged to be a violation of N.J.S.A.

34:13A-5.4(a)(1), (2), (3) and (5) of the Act. ^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on February 28, 1978. Pursuant to the Complaint and Notice of Hearing, hearings were held on April 10, 1978 and June 20, 1978 ^{2/} in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The parties filed post-hearing briefs on September 6, 1978. ^{3/}

Unfair Practice Charges, as amended, having been filed with the Commission, a question concerning alleged violation of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The County of Hudson is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

1/ These Subsections prohibit 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.

"(2) Dominating or interfering with the formation, existence or administration of any employee organization.

"(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."

Under date of March 20, 1978 the charge was amended to allege additionally that the County had by subterfuge and sham transferred the CEFA employees out of the bargaining unit represented by the Local and in so doing eradicated and diverted the bargaining unit.

2/ The delay in the holding of the second hearing was due to the illness on one occasion of the Hearing Examiner and the illness on a second occasion of counsel for the County.

3/ Briefs were originally due on August 1, 1978 but due to vacation schedules and other conflicts the briefing was deferred first to August 22 and finally to September 6, 1978.

2. Local 2306, AFSCME, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The County and the Local have for many years had a collective negotiations relationship, and the most recent collective negotiations agreement was effective during the term January 1, 1977 through December 31, 1977 (J-1).

4. Under the provisions of Article II of the agreement, Recognition, the Local is recognized as the exclusive negotiations agent for employees of the Hudson County Welfare Division of the Hudson County Department of Health and Social Services (hereinafter the "Welfare Division"), who work in the following classifications: Case Workers, Welfare Aides, Clerk Transcribers, Clerk Typists, Account Clerks, Clerk Stenographers, Clerks, Telephone Operators, Senior Clerk Transcribers, Senior Clerks, Senior Account Clerks, Senior Clerk Typists, Senior Clerk Stenographers, Senior Office Appliance Operators, Messengers, Office Appliance Operators, Investigators and Social Service Aides. The Recognition provisions extend to both permanent and temporary employees in the foregoing classifications.

5. Under date of July 8, 1977 Mr. Milton Filker, President of the Local, wrote to Mr. Ed Lombardi at the CETA Hudson Consortium, which letter indicated that the Local had recently become aware of the fact that CETA employees would be employed in a special project at the Welfare Division. Mr. Filker stated in the same letter that the Local should have been apprised of this project and should have been involved in consultation on the impact on the Welfare Division, the employees of which the Local represents in collective negotiations. A request was made for the exact job title under which the CETA employees would work, the qualifications of the job and the job specifications. (CP-5).

6. Under date of July 12, 1977 Mr. Lombardi replied to Mr. Filker by letter, which indicated that the job title is Welfare Investigator Aide and thereafter listed the job specification for the title, the qualifications for employment and the criteria for salary (CP-6).

7. The CETA employees, who were hired as Welfare Investigator Aides, initially commenced employment in the Welfare Division in July 1977. There they received two weeks of in-service training and orientation.

8. The Local solicited the signing of dues checkoff authorization cards among the CETA employees when they commenced work in the Welfare Division in July 1977. On August 2 and August 11, 1977 authorization cards for dues checkoff to the Local were submitted by the Local to Mr. Henry Orlowski at the offices of the CETA Hudson County Consortium.

9. Under date of August 15, 1977 Mr. Michael Lanni, the Executive Director of Council 52 of AFSCME, with which the Local is affiliated, wrote a letter to Mr. Ed Farrelly, the Director of the Hudson County Consortium, stating that the authorization cards referred to above had been sent to Mr. Orłowski and that he, Mr. Lanni, had been advised that the Consortium refused to checkoff dues for the CETA employees. Mr. Lanni stated that there was no discretion under law in the matter of checkoff of union dues to the Local. He enclosed a copy of the applicable law on checkoff of dues and a copy of the earlier letters sent listing the names of the CETA employees who had signed dues checkoff authorization cards. (CP-2).

10. Upon the receipt of Mr. Lanni's letter of August 15, 1977, Mr. Farrelly turned the letter over to the Law Department of the County, which advised him that the CETA employees were not employees of the Welfare Division and that the letter would be held in abeyance. No formal reply was made by Mr. Farrelly to Mr. Lanni's letter of August 15, 1977.

11. Under date of September 22, 1977, The Board of Chosen Freeholders of Hudson County adopted a Resolution establishing a Welfare Fraud Investigative Unit or Integrity Unit, staffed by CETA employees, which unit was assigned to the Office of the County Adjuster within the Department of Law of the County, the purpose of which was to avoid possible conflicts of interest with employees and personnel within the Welfare Division (R-2). ^{4/}

12. Council 52 asked for and received assurances that the CETA employees were not going to be used as "ferrets and informers against fellow workers". This assurance came in the form of a letter dated September 1, 1977 from Mr. William J. Jones, Director of the Department of Health and Social Services

THE ISSUE

Did the County violate the Act when it placed the CETA employees, who were hired as Welfare Investigator Aides, in the Department of Law of the County rather than in the Welfare Division?

^{4/} The County offered ample testimony as to why the employees of the Integrity Unit should be separate and apart from the employees of the Welfare Division with respect to actual or possible conflicts of interest. In this regard the Hearing Examiner accepts as accurate the testimony of Vincent J. Fusilli and William J. Jones (1Tr. 15, 16; 2Tr. 5, 6, 9-19). Further, the Hearing Examiner accepts as true the testimony of Mr. Fusilli and Mr. Jones that considerations of union affiliation of the CETA employees did not enter into the decision to assign the CETA employees to the Law Department (1Tr. 23; 2Tr. 12, 13).

DISCUSSION AND ANALYSIS

The County Did Not Violate the Act When it Placed the CETA Employees in the Department of Law Rather Than in The Welfare Division

The Charge as initially filed alleged that the County violated the Act when it refused to make dues deductions for CETA employees who had signed dues checkoff authorization cards in favor of the Local. While the Local may have a remedy for the failure of a public employer to deduct and remit union dues upon receipt of the dues authorization cards, the remedy is to be found elsewhere than before the Commission. It would appear that the Local's recourse under such circumstances is to file for arbitration under the collective negotiations agreement seeking an award of an arbitrator or, possibly, in the alternative, to bring a law suit for failure to comply with N.J.S.A. 52:14-15.9e, which is the statute providing for dues checkoff. It is the view of the Hearing Examiner that the failure of the County to checkoff union dues in favor of the Local upon receipt of the dues checkoff authorization card is not an unfair practice.

However, the Local on March 20, 1978 amended its charge to allege additionally that the County had by subterfuge and sham transferred the CETA employees out of the bargaining unit represented by the Local and in so doing eradicated and diverted the bargaining unit. This amended charge, if proved, suggests a possible Subsection (a)(5) violation with a derivative violation of Subsection (a)(1).

The Local's problem is that it has failed to meet its burden of proof by a preponderance of the evidence that the County by subterfuge and sham has "eradicated and diverted the bargaining unit." The requisite burden of proof, that is by a preponderance of the evidence, is set forth in N.J.A.C. 19:14-6.8. The evidence adduced at the hearings in this case plainly fails to establish by any quantum of evidence that the County, in placing the CETA employees in the Department of Law rather than in the Welfare Division, did so out of any motivation to eradicate and divert the bargaining unit. Further, the County acted without "subterfuge" or "sham".

There was adequate testimony offered by the County to explain the reasons for the actions which it took in placing the CETA employees in the Law Department. Mr. Jones testified at length about his experience with the State Medicaid program and the Integrity Unit which was developed there. The concept of the Integrity Unit was merely transferred to the Hudson County situation. Adequate reasons were provided as to why the Integrity Unit was to be placed in some department

of the County government other than the Welfare Division, primarily, because of potential conflicts of interests if an investigation involved a co-worker in the Welfare Division.

The Hearing Examiner finds and concludes that the decision of the Board of Chosen Freeholders of the County to adopt a resolution on September 22, 1977 establishing a Welfare Fraud Investigative Unit staffed by CETA employees as part of the Department of Law was not motivated by any union considerations whatsoever. The only prior nexus that the CETA employees had had with the Welfare Division was a two-week training program early in July. It was logical that the County train the employees in the Welfare Division. There was a similar category of employee in the Welfare Division to whom the CETA employees would relate in their training, namely the Income Maintenance Technician, whose duties are similar to that of the CETA Welfare Investigator Aides. However, the mere fact that the CETA employees were trained in the Welfare Division does not give the Local an unqualified claim to represent these employees in the face of the County's determination that the CETA employees were to be placed in the Department of Law. The fact that the resolution to place the CETA employees in the Department of Law was not adopted until September 22, 1977 does not change the opinion of the Hearing Examiner that the County was not motivated by union considerations when it made its decision in September rather than at some earlier date.

The Hearing Examiner takes note of the fact that no one from the County government or the Hudson County Consortium responded to Mr. Lanni's letter of August 15, 1977 with respect to the failure to deduct dues from the CETA employees. Someone should have replied to Mr. Lanni and his letter inquiry should not have been left in limbo. However, the Hearing Examiner is unwilling to draw any adverse inference with respect to the failure of the County or the Consortium to have replied to Mr. Lanni's letter.

It is the view of the Hearing Examiner that the Local's problem is basically one of representation rather than a matter of unfair practices under the Act. The basic fact is that the CETA employees are working in the Law Department and, if they are to be represented by the Local, the Local will have to initiate the appropriate representation procedures under the Act. It may well be that the Local will be confronted with the question of the appropriateness of the unit if there are other Law Department employees who should appropriately be included within any negotiations unit. This, however, is the Local's organizational problem.

Having found and concluded that the County has not engaged in any unfair practices within the meaning of the Act, the Hearing Examiner has no alternative but to recommend dismissal of the Complaint in its entirety.

* * * *

Upon the foregoing and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The County Did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) when it placed the CETA employees, hired as Welfare Investigator Aides, in the Law Department rather than in the Welfare Division of the County.

RECOMMENDED ORDER

The County not having violated the Act, supra, it is **HEREBY ORDERED** that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: September 13, 1978
Trenton, New Jersey