

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MT. LAUREL BOARD OF FIRE COMMISSIONERS,
DISTRICT ONE,

Petitioner,

-and-

Docket No. CU-H-98-22

IAFF LOCAL 3091-O (SUPERVISORY),

Employee Representative.

MT. LAUREL BOARD OF FIRE COMMISSIONERS,
DISTRICT ONE,

Respondent,

-and-

Docket No. CO-H-98-375

IAFF LOCAL 3091-O (SUPERVISORY),

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants a petition for clarification of unit filed by the Mt. Laurel Board of Fire Commissioners District One. The Board seeks to clarify the unit represented by IAFF Local 3091-O to exclude a firefighter who holds a hybrid Department of Personnel title "Business Manager, UFD." The Board asserts that the business manager is a managerial executive and confidential employee. The Commission grants the Board's request given the employer's representation that this employee will evaluate negotiations proposals and share negotiations confidences in future negotiations.

The Commission finds that the employer violated the New Jersey Employer-Employee Relations Act when, during negotiations in 1998, its chief negotiator threatened to demote or terminate the Business Manager, UFD unless he resigned from the IAFF.

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.

P.E.R.C. NO. 2001-50

STATE OF NEW JERSEY
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Docket No. CO-H-98-375

IAFF LOCAL 3091-O (SUPERVISORY),

Charging Party.

Appearances:

For the Petitioner/Respondent, Ruderman & Glickman, P.C.,
attorneys (Steven S. Glickman, of counsel)

For the Employee Representative/Charging Party, Sagot,
Jennings & Sigmond, attorneys (Mary L. Crangle, of
counsel)

DECISION

On October 30, 1997, the Mt. Laurel Board of Fire Commissioners, District One, filed a petition seeking to have the supervisory negotiations unit represented by International Association of Fire Fighters, Local 3091-O, clarified to exclude Kenneth Scott Jones, a firefighter who holds a hybrid Department of Personnel title Business Manager/UFD (Uniformed Fire

Division). The Board alleged that the business manager is a managerial executive and confidential employee and, therefore, inappropriate for inclusion in any negotiations unit. IAFF opposed the petition.

On April 13, 1998, Local 3091-0, filed an unfair practice charge alleging that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (3) and (4),^{1/} when, during negotiations in March 1998, its chief negotiator threatened to demote or terminate Jones.

On November 23, 1998, the Director of Unfair Practices and Representation issued a Complaint and Notice of Hearing on the unfair practice charge and an order consolidating both cases. On December 4, 1998, the Board filed an Answer denying that it had threatened Jones or violated the Act.

On June 9, 1999, Hearing Examiner Elizabeth J. McGoldrick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

^{1/} These provisions 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; (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; and (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

On September 7, 2000, the Hearing Examiner issued her report. H.E. No. 2001-9, 26 NJPER 448 (¶31176 2000). She found that the Business Manager/UFD was a confidential employee and recommended that the unit be immediately clarified to exclude that title. She also recommended dismissing the Complaint because, as a confidential employee, Jones was not protected by the Act.

On October 11, 2000, after an extension of time, Local 3091-0 filed exceptions. It asserts that the information gathered by Jones and transmitted to the Board was factual, not analytical, and was available to the public and it contends that the Hearing Examiner erred in concluding that Jones was a confidential employee. Local 3091-0 also excepts to the recommended dismissal of the Complaint. It maintains that the conduct of the Board's chief negotiator at the two negotiations sessions tended to interfere with, restrain and coerce employees in the exercise of protected rights. It further asserts that a finding that the Board violated 5.4a(1) should be made even if Jones is removed from the supervisory unit as a confidential employee.

On October 24, 2000, after an extension of time, the Board filed an answering brief urging adoption of the Hearing Examiner's recommendations.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-13). We modify finding 12 to reflect that the argument between Jones and Stenton likely occurred in September rather than June of 1997 (P-8). In light of

the exceptions, we clarify finding 17 to reflect that Jones typed up contract language after negotiations had been concluded or agreement had been reached on a specific issue. We reject Local 3091-O's other factual exceptions as unnecessary or unwarranted.

Confidential Status

The Act covers all public employees except for elected officials, members of boards and commissions, managerial executives, and confidential employees. N.J.S.A. 34:13A-3(g) defines "confidential employees" as:

Employees whose functional responsibilities 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.

Mere access to labor relations information does not automatically render an employee confidential. New Jersey Turnpike Auth. v. AFSCME, Council 73, 150 N.J. 331, 358 (1997) instructs:

The test should be employee-specific, and its focus on ascertaining whether, in the totality of the circumstances, an employee's access to information, knowledge concerning its significance, or functional responsibilities in relation to the collective negotiations process make incompatible that employee's inclusion in a negotiating unit.

The Board has looked to Jones, as its business manager, to provide information concerning negotiations proposals and employee benefits. We especially note Jones' role in gathering information about alternative health insurance coverages and his dispute with a Board member over whether or not to tell the

firefighters' majority representative of cost savings he had found. We also note that Jones, as business manager, is expected to attend closed Board sessions and take the minutes of such sessions. While these sessions did not involve discussion of negotiations confidences before, the Board has represented that it intends to have its business manager evaluate negotiations proposals and share negotiations confidences in future negotiations.

Given that representation, we accept the Hearing Examiner's recommendation that Jones should be excluded from the negotiations unit. We make that order effective immediately. Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977). However, our order will be without prejudice to Local 3091-0's right to file a new unit clarification petition if the Board does not use Jones in a confidential manner in upcoming negotiations.^{2/}

The Unfair Practice Charge

Board member Stenton threatened to demote, reassign or terminate Jones unless he resigned from the IAFF. However, the

^{2/} The Hearing Examiner did not reach the question of whether Jones is a managerial executive. It does not appear that he formulates management policies and practices or directs the effectuation of such policies and practices, but in the absence of arguments by the parties, we will not formally consider this issue.

Hearing Examiner concluded that the threat did not violate N.J.S.A. 34:13A-5.4a(1) because Jones, as a confidential employee, had no rights under the Act. She further concluded that under the totality of the circumstances, his comments did not tend to interfere with the exercise of protected rights by the other unit members represented by Local 3091-O.

We find that Stenton's threat tended to discourage employees from exercising their right, protected by N.J.S.A. 34:13A-5.3, to form, join or assist an employee organization and lacked a legitimate business justification. At the time the threat was made, Jones was a member of the supervisory unit recognized by the Board; he had been deliberately excluded from any confidential negotiations activities; and he had not yet been deemed to be a confidential employee through the clarification of unit proceedings the Board had initiated. If the Board prevailed in that proceeding (as it has), then Jones would be removed from the unit by our order. But if the Board did not prevail, the position would be a non-confidential one and the Board would have had no basis for insisting that another employee besides Jones hold it. In either case, there was no legitimate reason for Stenton to have threatened Jones with demotion, menial tasks, or termination if he did not resign from the union. Accordingly, we hold that the employer violated N.J.S.A. 34:13A-5.4a(1). In the absence of exceptions, we dismiss the portions of the Complaint alleging violations of N.J.S.A. 34:13A-5.4a(2), (3), and (4).

ORDER

I. The petition for clarification of unit is granted prospectively in accordance with the terms of this decision.

II. The Mount Laurel Board of Fire Commissioners, District One, is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by threatening to lay off, demote, transfer or change the job duties of an employee the employer seeks to have deemed confidential through a clarification of unit proceeding.

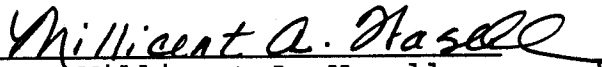
B. Take this action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other material.

2. Notify the Commission Chair within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

III. The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: February 22, 2001
Trenton, New Jersey
ISSUED: February 23, 2001



NOTICE TO EMPLOYEES
PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by threatening to lay off, demote, transfer or change the job duties of an employee we seek to have deemed confidential through a clarification of unit proceeding.

Docket Nos. CU-H-98-22 and CO-H-98-375

MT. LAUREL BOARD OF FIRE COMMISSIONERS
 (Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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

In the Matter of

MT. LAUREL BOARD OF FIRE COMMISSIONERS
DISTRICT ONE

Petitioner,

-and-

Docket No. CU-H-98-22

IAFF LOCAL 3091-O (SUPERVISORY),

Employee Representative

MT. LAUREL BOARD OF FIRE COMMISSIONERS
DISTRICT ONE

Respondent,

-and-

Docket No. CO-H-98-375

IAFF LOCAL 3091,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the business manager, UFD, employed by the Mt. Laurel Board of Fire Commissioners, Fire District One is a confidential employee within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-3(g) (Act). The Hearing Examiner found that the business manager was aware of changes in health benefits contemplated by the Board before these negotiable terms were disclosed to the union representing firefighters and officers. The Hearing Examiner also recommends that the Commission find that the Board did not violate 5.4a(1), (2), (3) and (4) of the Act when its negotiator warned that the employee who was in the business manager, UFD position could be removed from the position.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2001-9

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

In the Matter of

MT. LAUREL BOARD OF FIRE COMMISSIONERS
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Petitioner,

-and-

Docket No. CU-H-98-22

IAFF LOCAL 3091-0 (SUPERVISORY),

Employee Representative

MT. LAUREL BOARD OF FIRE COMMISSIONERS
DISTRICT ONE

Respondent,

-and-

Docket No. CO-H-98-375

IAFF LOCAL 3091,

Charging Party.

Appearances:

For the Public Employer,
Ruderman & Glickman, P.C., attorneys
(Steven S. Glickman, of counsel)

For the Public Employee Representative,
Sagot, Jennings & Sigmond, attorneys
(Mary L. Crangle, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On October 30, 1997, the Mt. Laurel Board of Fire Commissioners, District One, (Board or District) filed a Clarification of Unit petition with the Public Employment Relations Commission (Commission) seeking to have the supervisory

negotiations unit represented by the International Association of Fire Fighters, Local 3091-0, (IAFF or Local 3091-0) clarified to exclude the business manager, UFD, (uniformed fire division). The Board alleges that the business manager is a managerial executive and/or confidential employee and, therefore, inappropriate for inclusion in any negotiations unit. IAFF opposes the petition.

On April 13, 1998, IAFF Local 3091, a non-supervisory organization, filed an unfair practice charge with the Commission against the Board, alleging the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. when, during negotiations in March 1998, the Board's chief negotiator threatened to demote or terminate a member of Local 3091-0. The Board's conduct allegedly violated provisions 5.4a(1), (2), (3) and (4) of the Act.^{1/}

On November 23, 1998, the Director of Unfair Practices and Representation issued both an Order consolidating these two cases together with a Complaint and Notice of Hearing. On

^{1/} These provisions 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; (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; and (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

December 4, 1998, the Board filed an Answer denying that it threatened members of the charging party's unit or violated the Act. On June 9, 1999, a Hearing was conducted.^{2/} Post-hearing briefs were filed by August 16, 1999. Based upon the entire record, I make the following:

FINDINGS OF FACT

1. On May 20, 1997, by Resolution 1997-30, the Board voluntarily recognized IAFF Local 3091-0 as the exclusive majority representative of supervisory employees employed by Fire District One. The titles included in the resolution are deputy chief, battalion chief, fire marshal/battalion chief, captain, captain/training officer, lieutenant and business manager UFD (CP-1). A separate non-supervisory unit of firefighters and fire inspectors is represented by Local 3091.

2. The commissioners are the top level of the District's organization; the fire chief controls the daily operations of the District (P-4). Reporting to the chief are all firefighters and supervisory officers, a small administrative staff, and Kenneth Scott Jones, who has been employed by the Board since 1988 as the business manager (T141). No other employees report directly to Jones (P-4, T189).

^{2/} "T" represents the transcript, followed by the page number; "C" represents Commission exhibits; "P" represents Petitioner's exhibits; CP" represents Charging Party's exhibits.

3. Jones' duties are varied. He purchases and procures material, supplies and equipment; he processes purchase orders, obtains estimates and orders supplies (T142, T146-T147). Purchase orders are prepared monthly and presented to the treasurer for approval (T146). Once approved, the disbursements are signed by the Board members (T146). He also processes disbursements for expenses such as utilities, fuel and telephone (T142). He schedules maintenance on air conditioning, plumbing and electrical problems (T142-T143, T148). Jones has a discretionary limit of \$500 of the District's funds to use or arrange for repairs, services or supplies/equipment (T144, T148). Above this amount Jones must get the treasurer's approval (T144). The chief, fire official, captain and apparatus officer also have the ability to spend up to \$500 without prior approval (T145).

4. Jones processes the payroll for the entire district (T142). The fire chief reviews and approves all time sheets and submits them to Jones; the hours are totalled for each employee and phoned or faxed to a payroll service which prepares the disbursements, transmits the required taxes and prepares paychecks (T147). Jones personally retrieves the checks and prepares required journal entries which record payroll and deductions (T148). Jones is also a resource on employees' insurances. He has drafted a procedure on workers' compensation and first aid (T192). He advises the employees and the Board of health care changes, coverage levels and costs, brought about by status changes (marriage, pregnancy, etc.) (T165-T166).

5. Jones coordinates the preparation of the District's annual budget: he solicits and collects budget requests from the fire prevention, training, apparatus, and fire company divisions (T149). Then Jones, the fire marshall and the chief compile a rough draft of the entire budget and ascertain amounts necessary for the next year's projects (T143, T144-T145, T150-T151). Included is a projection of salary costs for the next year. Where no collective negotiations agreement is in place, the increase in salary is estimated from amounts or percentages given to Jones by the commissioners (T170-T171; T172-T173, P-6). The Board reviews the proposed budget, item by item, and modifies, approves or denies each item (T151). A final version is prepared and approved formally at the a Board meeting (T152). By statute, the budget must be approved by December each year (T152).

6. Prior to the District's negotiations with the supervisory unit, Jones was told to create a salary schedule for the titles lieutenant, captain, battalion chief, deputy chief and chief (P-6; T172-T173). To arrive at each level, he added \$2,000 to the one just below it (P-6; T173). This was prepared for the budget projections; the Board gave Jones the formula (T173). Eventually, this information was incorporated into salary item on the 1998 budget. Jones performs firefighting duties, as needed (T144).

7. Jones also attends Board meetings; his role is to provide answers to questions within his areas of expertise,

especially with questions Board members have regarding insurance or the litigation process (T143-T144, T152-T153, T156-T157). He serves on all of the Board's standing committees: insurance, buildings and grounds, etc. (T153-T154). He assists those commissioners assigned to committees in preparing correspondence, requesting proposals or other miscellaneous duties (T154). Jones prepares the minutes of the open public session of each meeting, including the regular meeting or special closed meetings for emergency purposes (T154). He prepares the minutes from a tape recording of completed regular and closed session meetings (T154). He has attended closed sessions of the Board and has participated in discussions about volunteers, accidents with fire equipment, and other litigation issues (T154-T157). Closed sessions are immediately after public Board meetings (T155). By definition, sessions are closed to discuss either personnel, legal, or labor relations matters (T155). The personnel issues often concern volunteers rather than employees (T155-T156). Since 1991, Jones has not been present at Board meetings where discipline or litigation involving employees was discussed (T156). Jones prepares correspondence for the Board (T119-T120).

8. Jones has not recommended that any other employee be disciplined; nor has he directly disciplined another employee (T156, T157, T202). Jones once screened a group of job applicants' resumes when the District was hiring a new clerical employee, but his input into hiring ended there (T189). Jones has

never been involved in any grievance proceeding (T158). He is not a member of the Board's negotiations team (T158).

9. On June 11, 1997, the Mt. Laurel Township Manager requested that the District consider administering its own health insurance in lieu of remaining under the Township's coverage (P-7; T83, T164, T166-T167). Chairman of the Board John Stenton requested that Jones investigate and evaluate the Board's assumption of health insurance policies/coverage for its employees (T81-T83). Jones was asked to obtain information from a variety of insurance carriers/agents to find policies that would meet the Board's insurance and financial requirements (T83-T84).

10. Jones contacted an insurance broker, reviewed the existing plans and options and analyzed benefit levels and costs (T168). He prepared information and turned it over to Commissioner Stenton (P-8; T167-T168). Jones knew that any new insurance programs would have to match the levels/criteria already incorporated in the collective agreement between the Board and firefighters (T84). Jones was aware that the broker had not recommended a successor contract with the Board/Township's existing provider before this fact was disclosed to any of the employee organizations (T175). Jones knew the plan details of the prospective providers, including benefit levels, costs to the Board and costs employees would likely have to pay before this information was disclosed to any union (T163, T165, T168, T175-T176, P-8).

11. Stenton met with a union shop steward and both the union and Board approved the benefits package developed by Jones and the broker (P-8, pages 2-6).

12. On or about June 11, 1997, Fire Chief William Dukes overheard an argument between Jones and Stenton outside his office (T85, T89). Dukes learned that Jones' insurance investigation had yielded cost estimates from 2-3 carriers which included cost savings to the Board, an improvement in coverage levels, but increases in employee co-payments (T86). Stenton had accused Jones of releasing this information to the union shop steward prior to its dissemination among Board members (T86). Jones' defended that Stenton had authorized the release of the information (T86-T87). Dukes mediated the heated argument which was eventually resolved (T88).

13. P-8 ^{3/} is a seven-page memo dated October 27, 1997, from Jones to Stenton containing Jones' description about the procedure followed in the implementation of the Board's takeover of health insurance for its employees (P-8; T167).

On page 3-4 of P-8, Jones wrote:

At the September Regular Meeting of the Board, as the Insurance Committee Chairman you reported that you were still evaluating the proposal and hoped that it could be resolved by the next meeting. Please keep in mind that until that night, this proposal had only been made available to the members of the Board and myself, as it was

^{3/} P-8 was prepared in response to Stenton's accusation that Jones had improperly released information to a shop steward.

still the Boards' decision whether to begin active negotiations on changing their contract from US Healthcare Patriot "X" coverage to any other coverage. At the intermission between the Open and Closed Sessions, I approached you about the urgency of expediting the proposal evaluation because price increases would take effect on 10/1/97 and I wanted to lock in these savings for 1998. You agreed that we should approach the Union with the proposal to keep this project moving forward.

We called over Firefighter Shop Steward Doug Jones, who happened to be at the meeting, and you asked him to review the proposal submitted by Corporate Dynamics as soon as possible. I specifically recalled asking you if you wanted to remove the cost savings references contained within the proposal, as I felt that this information might compromise the Boards' position in any possible negotiations. You said to me, in front of Shop Steward Jones, that you had no problem with the Union seeing the cost savings numbers as they could request to see them anyway as a matter of public record. I thought this position strange at the time and recall asking you again if you really wanted to do that, to which you replied yes. I then, in front of you, handed Shop Steward Jones a copy of the proposal and you asked him to review it with the rank and file and reply back as soon as possible. Several weeks ago, you questioned why I provided the Shop Steward with the cost savings numbers in the proposal and I reminded you of the events I have just listed. (emphasis added)

14. Negotiations between the Board and the IAFF have taken place on three occasions since 1988: for the 1992-1994 contract; the 1994-1996 contract and the 1997-1998 contract. The Board's negotiations team is usually comprised of two commissioners. In negotiations for the first contract between the Board and Local 3091-0, in 1997, the Board was represented by Commissioners Stenton and Stroup (T58). Chief William Dukes, hired in 1991, attends

negotiations sessions infrequently when an issue concerns firefighting operations (T73, T93-T95). He was present at sessions in 1991-92 for discussions about uniform changes, and hourly schedules (T74, T93-T95). Jones has not attended negotiations on behalf of the Board (T194).^{4/}

15. Although Jones was not "part" of the Board's negotiating committee, he was one of its chief resource personnel (T172). The Board relied on Jones to gather relevant information, cost out proposals and investigate issues raised in negotiations (T160-T161). For the firefighters' contracts negotiated in 1994 and 1996, he investigated health benefits and electronic payroll deposit costs for the Board (T161-T163). The unions had proposed dental benefits and Jones was asked to investigate the current coverage, the proposed coverage and evaluate the costs to the Board (T162-T163). He has collected health benefits information, "so the Board [could] look at that and say these are within [the parameters] we're willing to pay or we'll pay...80 percent and the employee will pay 20 percent" (T165).

^{4/} I credit Jones' testimony that he never attended negotiations sessions (T194). Dukes testified that Jones took notes for the Board and acted as a resource person at joint negotiations sessions in 1991, 1994 and 1996 (T97, T81, T78-T79, T74, T75-T76). But Dukes could not recall specific meeting dates or topics discussed when Jones was present (T74, T78-T79, T80-T81, T98, T92-T94). Dukes participated in negotiations infrequently and his recall was less certain and less reliable than Jones' recall (T75, T107). Jones testified credibly that he had never been on the Board's negotiations team or attended sessions where he was aware of the Board's negotiations strategy (T182-T183, T194).

16. He has calculated percentage increases to salaries to determine their budget impact and has been asked to apply half-percent increases from 2 to 7 percent to salaries for the Board during its preparation for negotiations (T169-T170, T76, T101, T169). In advance of the Board's proposals and counter proposals, Jones prepared spreadsheets showing a variety of salary alternatives for each position covered by the collective agreement (T76-T77, T172).

17. Finally, Jones prepares both draft and final contracts in connection with negotiations (T104, T109).

18. On December 23, 1997, the Board and Local 3091-0 began negotiations for a first contract (T48). On March 13, 1998, at a meeting that was to be dedicated to a review of disputed items, the subject of the unit eligibility of the business manager position was raised (T49). This one issue dominated the entire two and one-half hour meeting (T62).

19. Present at the meeting were Anthony Ambricco, President of IAFF Local 3091; Craig Collier, shop steward of IAFF Local 3091-0; Kenneth Martin, captain and assistant shop steward, and Commissioners John Stenton and William Robert Stroup (T18). The parties argued over whether Jones could be in the unit, and if not, whether he could still be a union member (T22-T24, T36-T37, T50-T51, T64). Stenton declared that Jones' position was supposed to assist the Board in its preparation and conduct of negotiations and that Jones could not be a member of the union or unit, and remain in his

title. He stated that Jones faced possible demotion, assignment of menial tasks or termination (T22-T24; T35-T37; T45, T58-T60, T63-T64). Stroup corroborated that Stenton had said that Jones would have to resign from the union in order to keep his position as business manager (T64).

20. Stenton also stated that Jones could not be "trusted" by the Board if he were also a union member; that Jones could not serve two masters; and, that if Jones did not resign from the union, the Board would replace him with a civilian business administrator (T49-T51, T53-T54). Stenton's demeanor was passionate and unyielding (T51-T52). The union representatives found Stenton's threats appalling (T41). The subject was raised again at a meeting on March 27, 1998, but neither party had changed its position (T39-T41, T44).

21. According to Commissioner Stroup, the problem facing the Board was that if Jones were a union member he could not give the commissioners the assistance they needed to carry on negotiations (T57-T59). Even the members of IAFF recognized that the problem was that Jones would be in a conflict between performing his duties as business manager and being in the IAFF (T25). Board members were inexperienced in dealing with the issue of confidential employees, and they were uncertain about options available to them if Jones remained in the union (T59-T60, T63). Stroup felt Jones would have to step down from business manager if he could not perform the Board's "confidential" duties (T59-T60). Jones' removal

as business manager and return to firefighter/inspector would be a demotion (T65-T66).

22. At the time the issue of the business manager's unit eligibility arose in 1997, the Board began to exclude Jones from attending closed sessions where labor relations issues were discussed (T91, T120, T211). The Board was concerned that Jones would be in a conflict of interest (T91).

ANALYSIS

Confidential Status

N.J.S.A. 34:13A-3(g) defines confidential employees as:

employees whose functional responsibilities 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 applying this test, the Commission has used the approach outlined in State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), recon. granted in part, P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985):

We scrutinize the facts of each case to find for whom each employee works, what he [or she] 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.

In New Jersey Turnpike Authority v. American Federation of State, County, and Municipal Employees, Council 73, 150 N.J. 331 (1997), the New Jersey Supreme Court approved the standards articulated in State of New Jersey. The Court explained:

The baseline inquiry remains whether an employee's functional responsibilities or knowledge "would make their membership in any appropriate negotiating unit incompatible with their official duties. N.J.S.A. 34:13A-3(g); see also State of New Jersey, supra, 11 [NJPER] ¶16179 (holding that final determination is "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.") Obviously, an employee's access to confidential information may be significant in determining whether that employee's functional responsibilities or knowledge make membership in a negotiating unit inappropriate. However, mere physical access to information without any accompanying insight about its significance or functional responsibility for its development or implementation may be insufficient in specific cases to warrant exclusion. The test should be employee-specific, and its focus on ascertaining whether, in the totality of the circumstances, an employee's access to information, knowledge concerning its significance, or functional responsibilities in relation to the collective negotiations process make incompatible that employee's inclusion in a negotiating unit. We entrust to PERC in the first instance the responsibility for making such determinations on a case-by-case basis. Id. at 358.

Jones testified credibly that he never attended joint negotiations sessions, but that he provided information to the Board for its conduct of negotiations. The information, which he prepared prior to negotiations, was capable of being computed by Local 3091 and 3091-O: tables displaying a range of percentage increases applied to existing salaries. He knew the parameters of the Board's thinking, but not the Board's specific intentions about initial or counter offers. In Old Bridge Tp. Bd. of Ed., D.R. No. 82-17, 7

NJPER 639 (¶12287 1981) a research assistant was deemed confidential where, inter alia, he evaluated the union's proposals, and had advance knowledge of the Board's maximum salary increase to unit members. Jones also prepared cost estimates of the union's proposals for Board members' analysis and response.

While preparing the annual budget, using percentage increases given him by the Board, Jones projected future salary rates, before they were known to the union or public, and was, therefore, very familiar with the Board's ability or inclination to pay up to those rates. There is no evidence that these budget projections were actually indicative of the Board's negotiations strategies. In Brookdale Comm. College, D.R. No. 78-10, 4 NJPER 32 (¶4018 1977), the chief accountant was deemed confidential where he prepared, revised and finalized the budget, coupled with being the principal source of information regarding wage proposals during negotiations.

Jones is a key administrator in the District: he processes the timesheets and payroll, he is aware of leave balances and advises the chief on attendance issues; he processes health insurance matters; he coordinates the preparation of the annual budget, and is aware of the amounts intended for salaries before that information is made public, or available to the IAFF. He is aware of the District's liability and health insurances, and he has been involved in and present for closed Board sessions concerning lawsuits faced by the District. He has been present for closed

session personnel discussions, mostly concerning volunteers. He is a resource on workers' compensation issues. Jones attended closed Board sessions prior to 1997 when the issue of his confidentiality was raised. But for Jones' union membership, the Board would fully include Jones in strategy discussions about labor relations issues, and have him develop information necessary to its planning and conduct of negotiations. Both District witnesses and Jones testified that the possibility of Jones' membership in the unit presented a conflict of loyalties problem. After the officers' unit was established, the Board began excluding Jones from closed sessions where labor matters were going to be discussed. Similarly, it stopped giving him assignments which would reveal its negotiations strategies. The Commission has declined to find confidential status based upon speculative duties; however, where the duties would have been assigned but for the employee's union involvement, confidential status will be found. Wayne Tp., P.E.R.C. No. 87-82, 13 NJPER 77 (¶18035 1986), rev'd 220 N.J. Super. 340 (App. Div. 1987). In Belleville Tp., D.R. No. 92-33, 18 NJPER 335 (¶23148 1992), the Director of Representation determined that the public works director's secretary was confidential where the position's duties included typing the director's recommendations for negotiations strategies and proposals. The Township in that matter would have assigned the employee specific confidential duties, but for her union involvement. See also, Sterling Bd. of Ed., P.E.R.C. No. 80, NJPER Supp. 80 (1974), where the Commission decided the unit

status of employees based upon specific duties that were to be assigned imminently. Here, the District would involve Jones in its closed sessions where negotiations issues are discussed.

Furthermore, in 1997, Jones coordinated the acquisition of health insurance for the District's takeover, some aspects of which, (ie., employee copayments and benefit levels) are clearly negotiable. The conflict of interest revealed in Jones' writings on October 27, 1997 are noteworthy:

"Please keep in mind that until that night, this proposal had only been made available to the members of the Board and myself, as it was still the Board's decision whether to begin active negotiations on changing their contract from US Healthcare Patriot "X" coverage to any other coverage.

... You agreed that we should approach the Union with the proposal to keep this project moving forward.

...We called over Firefighter Shop Steward Doug Jones, who happened to be at the meeting, and you asked him to review the proposal submitted by Corporate Dynamics as soon as possible. I specifically recalled asking you if you wanted to remove the cost savings references contained within the proposal, as I felt that this information might compromise the Board's position in any possible negotiations. (emphasis added)

Obviously, Jones was "in on" information possessed at that time only by the Board, involving a negotiable term or condition of employment. He was aware of the issues and his statements reveal a sensitivity to bargaining positions and strategy typical of a confidential employee. He was not free to reveal that information to members of Local 3091-0, and would have been in a conflict of

interest if he were to be included in its negotiations unit. Since 1997, the Board has had to exclude him from closed sessions because of the potential conflict between his job duties and his presence in a negotiations unit. Under these circumstances, if kept in the unit, the business manager's responsibilities or knowledge would compromise the employer's right to confidentiality concerning the collective negotiations process. Turnpike Authority; State of New Jersey.

Based upon all of the above, I find that the business manager is a confidential employee within the meaning of the Act and is inappropriate for inclusion in any collective negotiations unit. I recommend that the unit be clarified to exclude the business manager, effective immediately. Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977).

Having determined that the position is confidential, it is unnecessary for me to decide whether it is also a managerial executive.

The alleged violation of section 5.4a(1)

The IAFF alleges that Stenton illegally threatened Jones through Ambricco, Collier and Martin with demotion or termination unless the IAFF (and Jones) agreed to exclude the business manager position from the unit and Jones relinquished his membership in Local 3091-0. Under some circumstances these threats would violate section 5.4a(1) of the Act, which prohibits employers from:
"interfering with, restraining or coercing employees in the exercise

of the [rights guaranteed them by the Act]." Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), sets forth the principle that an employer representative may criticize union officials for the way they conduct union affairs, but may not discipline or threaten to discipline an employee for engaging in protected activity. Generally, under N.J.S.A. 34:13A-5.3, public employees: "have and [are] protected in the right, without reprisal, to form, join and assist any employee organization..provided, however...this right does not extend to...confidential employees." Confidential employees' official duties and knowledge of labor relations issues make their membership in any negotiations unit incompatible with their official duties. N.J.S.A. 34:13A-3(g). Confidential employees are one of the exceptions to those "employees" entitled to the Act's protections. N.J.S.A. 34:13A-3(d). As a confidential employee, Jones is not entitled to "form, join or assist an employee organization."

The District's threat to remove Jones from business manager position was made to discourage his union membership. However, for Jones, a confidential employee, union membership is not protected activity. Under all these circumstances, the IAFF did not prove that the District's threat to remove Jones from the business manager position impermissibly interfered with Jones' protected activity, since as a confidential employee, he is not protected in the right to "form, join or assist" an employee organization. Accord, NJ State Highway Authority (Linder), P.E.R.C. No. 92-44, 17 NJPER 493,

(¶22239 1993) (personnel director's charge dismissed for simple reason that, as a confidential employee, he did not have right to "form, join or assist" a union. His transfer to another position, even if retaliatory, did not interfere with any right under section 5.3); Parker-Robb Chevrolet, Inc., 262 NLRB 402, 110 LRRM 1289 (1982), enf'd. sub nom. Automobile Salesmen's Union v. NLRB, 711 F.2d 383, 113 LRRM 3175 (D.C. Cir. 1983) (supervisors were legally discharged because of their collective activity. Supervisors in the private sector do not have rights under the Labor Management Relations Act, 29 U.S.C. 5141 et seq., except where discipline is imposed for refusing to commit an unfair practice or testifying at NLRB or grievance hearing.)^{5/}

Assuming that the IAFF is also contending that members Martin, Collier and Ambricco were coerced in the exercise of their rights, I dismiss those allegations. Although they testified that

5/ Compare, Union Cty. Prosecutor's Office, P.E.R.C. No. 84-38, 9 NJPER 646 (¶14280 1983) (Commission found no violation of 5.4a(1) where county prosecutor disciplined police union president; evidence showed discipline was imposed for president's investigation of a grievance; manner of investigation was held conduct not protected by the Act.); State of New Jersey (Department of Corrections) (Galarza), P.E.R.C. No. 99-65, 25 NJPER 93 (¶30040 1999) (supervisor's threat to discipline unit employee for posting union news article on bulletin board unlawfully interfered with employee's protected activity.); and State of New Jersey (Department of Personnel) (Reliford) P.E.R.C. No. 98-65, 24 NJPER 6 (¶29004 1997) (dismissal of charge where employee alleged she was coerced into accepting a settlement of grievance in violation of 5.4a(1); Commission held that allegations did not rise to unfair practice; Director had dismissed charge, finding confidential employee lacked standing to assert protections under the Act.)

they were surprised that Stenton took up so much time on an issue already before the Commission, and that his demeanor was "appalling," they knew that the issue of Jones' unit eligibility was important enough for the Board to have filed its clarification of unit petition months earlier. Negotiations sessions are often adversarial; arguments become heated and both sides use tactics, which in another context might be coercive, designed to weaken the other's resolve. Under these circumstances, I am not persuaded that his remarks could reasonably be taken to be threats of reprisal to these or any other statutory employees for their exercise of protected activity. Given the context of the remarks and the fact that Jones is a confidential employee, Stenton's comments did not violate section 5.4a(1).

The Alleged Violations of sections 5.4a(2), (3) and (4)

The IAFF also alleges that the Board violated 5.4a(2) of the Act which prohibits public employers from "dominating, or interfering with the formation, existence or administration of any employee organization." The type of activity prohibited by 5.4a(2) must be pervasive employer control or manipulation of the employee organization itself. North Brunswick Twp. Bd. Ed., P.E.R.C. No. 80-122, 6 NJPER 193, 194 (¶11095 1980). However, no facts were placed into the record supporting this allegation. Accordingly, I recommend that the 5.4a(2) allegation be dismissed.

The standards for proving a violation of Section 5.4a(3) are set forth in Bridgewater Tp. V. Bridgewater Public Works Assn.,

95 N.J. 235 (1984). No violation will be found unless the charging party has proved that protected conduct was a substantial or motivating factor in the adverse action. This may be done by showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246. The IAFF did not allege or produce any evidence that Jones was engaged in protected activity or that Jones was adversely affected by the Board's conduct. Thus, two essential elements under Bridgewater have not even been alleged.

With respect to its 5.4a(4) allegation, in addition to not having shown any adverse personnel action against Jones, the IAFF did not even allege that Jones had "signed or filed an affidavit, petition or complaint or given any information or testimony under this act." Accordingly, I recommend that both of these allegations be dismissed.

CONCLUSIONS OF LAW

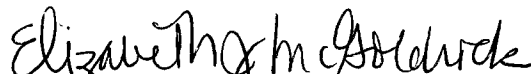
The business manager, UFD, employed by the Mt. Laurel Fire District One is a confidential employee within the meaning of the N.J.S.A. 34:13A-3(g).

The District did not violate section 5.4a(1) of the Act when, during two negotiations sessions, on March 13 and 27, 1998, its representatives made comments concerning the terms and conditions of the business manager's employment.

The District did not violate sections 5.4a(2), (3) or (4) of the Act.

RECOMMENDATIONS

Based upon all of the above, I recommend that the Commission find that the business manager, UFD, employed by Mt. Laurel Fire District One is a confidential employee within the meaning of the Act, and ORDER that the unit represented by IAFF Local 3091-0 be clarified to exclude that position. I further recommend that the Commission ORDER that the Complaint be dismissed.


Elizabeth J. McGoldrick
Hearing Examiner

Dated: September 7, 2000
Trenton, New Jersey