

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH

Respondent

and

ELIZABETH FIRE OFFICERS ASSOCIATION

Docket No. CE-9

Complainant

DECISION AND ORDER

Pursuant to a Notice of Hearing to resolve a question concerning a charge alleging violations of the Act, a hearing was held before Hearing Officer Theodore A. Winard on December 8, 1969. The Hearing Officer's Report and Recommendation was served on the parties February 6, 1970.

The Employer has filed exceptions to the Report and Recommendation. The Commission has considered the record, the Hearing Officer's Report and Recommendation, and the Exceptions and, on the facts in this case, finds:

1. The City of Elizabeth is a public employer within the meaning of the Act and is subject to the provisions of the Act.
2. The Elizabeth Fire Officers Association is an employee representative within the meaning of the Act.
3. A Charge has been filed with the Commission alleging violations of the Act by the public employer; a question concerning alleged violations of Section 7 of the Act exists and this matter is appropriately before the Commission for determination and order.
4. The Hearing Officer found that the Employer had refused to negotiate with the certified representative for a unit of fire officers including

the Chief, Deputy Chiefs and Battalion Chiefs. The Employer does not dispute its refusal but contends it was justified because the unit includes the Chief, Deputy Chiefs and Battalion Chiefs, who, it claims, are managerial executives within the meaning of the Act and thus excluded from the Act's coverage. The Hearing Officer concluded that the composition of the unit was determined in a prior proceeding, P.E.R.C. No. 4, to which the Employer was a party, that no compelling reason exists, such as newly discovered or previously unavailable evidence or special circumstances, which requires reconsideration of that determination, and that the Commission's decision and subsequent certification are therefore conclusive. Although the Hearing Officer permitted evidence on the question of the managerial status of the three(3) classifications in question, he declined to make a recommendation on that issue.

The Employer excepts to this disposition essentially on the following grounds: 1) it did not participate in the prior proceeding because it mistakenly understood that the only issue to be resolved was which of several competing organizations would represent its rank and file firemen; it was not aware that the proceeding would involve an officer's unit; 2) its failure to participate should not prejudice its right to question the unit's composition now; 3) the disputed job titles alone indicate managerial executives and the evidence supports the inference. The Hearing Officer observed with respect to the prior proceeding that the Employer was served with notice that a hearing was scheduled to resolve the question concerning representation of Fire Department personnel, that such notice indicated the complainant here was a party, and that the Employer's attorney appeared but only long enough to indicate that the Employer took no position and would abide by the Commission's

decision. Thereafter Hearing Officer Kleeb issued his Report and Recommendations. In his preliminary remarks the Hearing Officer stated "...if [the parties] do not agree with the facts and recommendations set forth herein they may file exceptions with the Commission..." Thereupon the Hearing Officer recited certain facts agreed upon by the three (3) participating employee organizations, including the following:

"...that "Fire Officers (Chiefs, Deputy Chiefs, Battalion Chiefs and Captains) are supervisory employees but may be appropriately grouped with the Uniformed Firemen..."

"Elizabeth Fire Officers Association was formed on July 11, 1968...EFOA is interested only in representing "line" officers which includes the classifications Chief, Deputy Chief, Battalion Chiefs and Captains. Since its inception, EFOA has represented Fire Officers before the Mayor and City Council in discussing wages, hours and working conditions and has also handled grievances for Fire Officers..."

Hearing Officer Kleeb found, inter alia, that a unit limited to Fire Officers and Probationary Fire Officers was appropriate and recommended that an election be conducted giving such officers the option of separate representation by Elizabeth Fire Officers' Association. The Employer did not file exceptions to the Hearing Officer's Report and Recommendation. The Commission adopted the Report and Recommendation with certain modifications not pertinent here. The Employer did not challenge the Commission's Decision and Direction of Election. In the election which followed each of the disputed employees voted; the Employer did not challenge any of these ballots.

In spite of the fact the Employer previously dealt with the complainant for those in question and was notified that complainant was a party to the representation case, it may be that, initially, the Employer misunderstood the scope and significance of that earlier proceeding.

But it is difficult to perceive how such misunderstanding could continue after the Hearing Officer's Report issued. At the very least the Commission, as well as other interested parties, are entitled to expect that an aggrieved party will exercise due diligence in protecting its interest and will assert its claim at the appropriate time. Lack of due diligence is not sufficient cause to re-examine the earlier determination. We therefore affirm the Hearing Officer's conclusion in the instant case that the prior certification is conclusive and that the unit may not be challenged in this proceeding.^{1/}

As part of the remedy for the violation found, the Hearing Officer recommended that the Employer post a notice for the benefit of its employees. The Commission affirms the finding of a violation but, because of the nature of that violation, concludes that notice posting is not appropriate. Otherwise, the Commission adopts the Hearing Officer's recommended remedy.

ORDER

Pursuant to the Act, the Commission hereby orders that the respondent, City of Elizabeth, its officers and agents shall:

1. Cease and desist from:
 - (a) Refusing to negotiate collectively with the Elizabeth Fire Officers Association as the exclusive collective negotiating representative of the employees in the following unit:

^{1/} In its exceptions, the Employer refers to another case involving the representation of officers in its Police Department and cites the Hearing Officer's recommended finding that the Chief and Deputy Chiefs of Police are managerial executives. Subsequently, however, the Commission issued its decision in that case, City of Elizabeth, P.E.R.C. No. 36, and found, contrary to the Hearing Officer, that the Chief and his deputies were not managerial executives and were properly included in a unit of officers. Thus, while the Commission does not reach the substantive merits of the Employer's unit contention in this case, the ultimate result is not inconsistent with its decision involving a sister department of this same Employer.

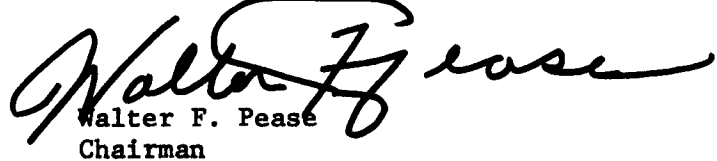
All fire officers and probationary Fire officers excluding uniformed firemen, probationary firemen, linemen, the supervisor in the Bureau of Communications, mechanics, the supervisor in the Bureau of Repair and all clerical employees.

(b) Interfering with the efforts of said employee organization to negotiate for or represent employees as such exclusive collective negotiating representative.

2. Take the following affirmative action, which will effectuate the policies of the Act:

Upon request negotiate collectively with the Elizabeth Fire Officers' Association as the exclusive representative of all employees in the unit with respect to grievances and terms and conditions of employment.

BY ORDER OF THE COMMISSION


Walter F. Pease
Chairman

DATED: April 2, 1970
Trenton, New Jersey

In the Matter of
ELIZABETH, CITY OF

Respondent

and

Docket No. CE-9

ELIZABETH FIRE OFFICERS ASSOCIATION

Complainant

HEARING OFFICER'S REPORT AND RECOMMENDATION

Pursuant to a Notice of Hearing issued by the Public Employment Relations Commission, a hearing was held on December 8, 1969, before the undersigned Hearing Officer of the Commission to resolve questions concerning a charge alleging violations of the Act. The Hearing Officer has considered the entire record and finds:

1. The City of Elizabeth is a Public Employer within the meaning of the Act and is subject to the provisions of the Act.
2. The Elizabeth Fire Officers Association is an employee representative within the meaning of the Act.
3. Charges having been filed with the Commission alleging unfair labor practices and a refusal by the public employer to negotiate in good faith under the Act, a question concerning alleged violations of Section 7 of the Act exists and this matter is appropriately before the undersigned for Report and Recommendations.
4. The record indicates that pursuant to a Certification of Representative issued by the Public Employment Relations Commission on August 8, 1969, the Elizabeth Fire Officers Association has been designated and selected by the majority of the Fire Officers and Probationary Fire Officers as their representative for the purpose of collective negotiations and is the exclusive representative of all

employees in such unit for the purposes of collective negotiations with respect to terms and conditions of employment. On September 10, 1969, William J. Sheridan, President of the Association in a letter to the Honorable Michael A. McGuire enclosed a copy of the Certification of Representative and requested a meeting with the City Council to negotiate terms and conditions of employment. The request for a meeting and collective negotiations was renewed by the employee representative on October 1, 1969. In a response dated October 3, 1969 by John J. Dwyer, City Clerk, it was indicated the City Council did not choose to recognize nor negotiate with the certified public employee representative.

5. It is argued by the public employer that the Chief, Deputy Chiefs and Battalion Chiefs in the Elizabeth Fire Department are managerial executives within the meaning of Section 7 of the Act and are, thereby, barred from inclusion in the unit found appropriate by the Commission for collective negotiations. Accordingly, the public employer seeks to justify its refusal to negotiate with the public employee representative in such unit.

The Hearing Officer takes official notice of a Notice of Hearing issued by the Executive Director of the Commission, dated April 3, 1969 with certified copies to the Honorable Thomas Dunn, Mayor, City of Elizabeth; and Mr. Charles Africano, President of Local 777, Elizabeth Firefighters Association in a proceeding entitled Elizabeth, City of, and Elizabeth Firefighters Association, Local 777, Docket No. R-3. The aforementioned Notice provides that "a hearing will be held covering the matter of representation and related matters concerning claims of representation made with respect to employees of the City of Elizabeth, Fire Department, in the following classifications, Elizabeth City Fire Department personnel, by employee organizations listed below and other

interested parties." The record indicates pursuant to such Notice of Hearing, a hearing was held before ad hoc Hearing Officer Howard W. Kleeb. The employee representatives, International Association of Firefighters, Local 777, AFL-CIO; Firemen's Mutual Benevolent Association Local 9; and Elizabeth Fire Officer's Association mutually agreed to a voting group to include "all fire officers, and probationary fire officers excluding uniformed firemen, probationary fireman, linemen, and the supervisor in the Bureau of Communications, mechanics and the supervisor in the Bureau of Repair and all clerical employees". Frank P. Trocino, Esquire, First Assistant City Attorney of the City of Elizabeth appeared at the hearing to advise that the public employer was taking no position on the issues and was prepared to abide by the decision of the Public Employment Relations Commission. On May 14, 1969, the Commission issued a Decision and Direction of Election finding, inter alia; on the basis of the agreed upon facts the above mentioned voting group to be appropriate and directed a secret ballot election among the employees in the unit. An election was held by the American Arbitration Association on July 9, 1969. The record reveals every fire officer including the Chief cast a ballot in the election without challenge nor objection. The Commission issued the above noted Certification of Representative on August 8, 1969.

It is evident that the question of the inclusion of the Chief, Deputy Chiefs and Battalion Chiefs in the unit found to be appropriate was decided by the Commission in the representation proceeding on the basis of an agreement of the parties and the stipulation of the public employer to abide in the decision of the Commission.

In the representation proceeding, the public employer had full opportunity to present all of its present contentions concerning the validity of the certification. The public employer, thus, is seeking

to relitigate the Commission's decision four months later in a subsequent collateral unfair labor practice proceeding.

A certification of representative is issued to stabilize the negotiating relationship and to place the parties in a state of certainty and finality with respect to material and pertinent questions concerning the representation of public employees. Accordingly, in the absence of newly discovered or previously unavailable evidence or special circumstances, the hearing officer is estopped to hear in a proceeding alleging violations of the Act, issues which could have been heard in a prior related representation proceeding.

There, thus, being no newly discovered or previously unavailable evidence or special circumstances, the Certification of Representative is res adjudicata and dispositive of the issues raised before the undersigned.

6. On the basis of the record before the undersigned, the public employer since on or about September 10, 1969, though requested by the duly certified employee representative to negotiate, has refused and is continuing to refuse to negotiate collectively with the Elizabeth Fire Officers Association as such representative. By thus refusing to negotiate collectively, the public employer has engaged in unfair labor practices in violation of Section 7 of the Act and Section 19:13-2(a)5 of the Commission's Rules and Regulations and Statement of Procedure; and has interfered with, restrained and coerced its employees in violation of Section 7 of the Act and Section 19:13-2(a)1 of the Commission's Rules and Regulations and Statement of Procedure. Based upon the foregoing, I recommend the Commission issue the following:

ORDER

The respondent, City of Elizabeth, its officers and agents shall:

1. Cease and desist from:

(a) Refusing to negotiate collectively with the Elizabeth Fire Officers Association as the exclusive collective negotiating representative of the employees in the following unit: All Fire Officers and Probationary Fire Officers.

(b) Interfering with the efforts of said employee organization to negotiate for or represent employees as such exclusive collective-negotiating representative.

2. Take the following affirmative actions, which will effectuate the policies of the Act.

(a) Upon request negotiate collectively with the Elizabeth Fire Officers Association as the exclusive representative of all employees in the unit with respect to grievances and terms and conditions of employment.

(b) Post in appropriate places in the City of Elizabeth Fire Department, copies of the attached Notice marked "appendix", or by mailing it to each of its employees.

Theodore A. Winard

Theodore A. Winard
Hearing Officer

APPENDIX

NOTICE TO ALL EMPLOYEES

PUBLIC EMPLOYMENT RELATIONS COMMISSION

In order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, 1968

we hereby notify our employees that:

WE WILL NOT refuse to negotiate collectively with the Elizabeth Fire Officers Association as the exclusive collective negotiating representative of the Fire Officers and Probationary Fire Officers in the Fire Department of the City of Elizabeth.

WE WILL NOT interfere with the efforts of the employee organization to negotiate for or represent employees as exclusive collective negotiating representative.

WE WILL negotiate collectively with the employee organization as the exclusive collective negotiating representative of the Fire Officers and Probationary Fire Officers in the Fire Department in the City of Elizabeth.

(Public Employer)

DATED _____

BY _____

(Title)