

P.E.R.C. NO. 89-54

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY COUNCIL
NO. 10, N.J.C.S.A.,

Respondent,

-and-

Docket No. CI-H-87-73

WILLIAM CLEMMENS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses an unfair practice charge filed by William Clemmens against Camden County Council No. 10, N.J.C.S.A. The charge alleges that Council 10 violated the New Jersey Employer-Employee Relations Act by negotiating an unreasonably low salary increase for Clemmens after he was reclassified into a new dual title. The Commission finds that Council 10's action was neither arbitrary, discriminatory nor in bad faith and that therefore the charging party has failed to prove that his union's conduct breached its duty of fair representation.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY COUNCIL NO. 10, N.J.C.S.A.,

Respondent,

-and-

Docket No. CI-H-87-73

WILLIAM CLEMMENS,

Charging Party.

Appearances:

For the Respondent, Tomar, Seliger, Simonoff, Adourian & O'Brien, Esqs. (Mary L. Crangle, of counsel)

For the Charging Party, Joseph A. Carmen, Esq.

DECISION AND ORDER

On May 18, 1987, William Clemmens filed an unfair practice charge against Camden County Council No. 10, N.J.C.S.A. ("Council 10"). The charge alleges that Council 10 violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(b)(1) and (5),^{1/} by negotiating an unreasonably low salary increase for Clemmens after he was reclassified into a new dual title.

^{1/} These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Violating any of the rules and regulations established by the commission."

On July 15, 1987, a Complaint and Notice of Hearing issued. On July 22, Council 10 filed its Answer denying it violated the Act and claiming it acted properly in negotiating a salary for Clemmens' new position.

On January 7, 1988, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On May 27, 1988, the Hearing Examiner issued his report and recommended decision. H.E. No. 88-59, __ NJPER __ (¶ ____ 1988). He found that Council 10 President David Polniak acted out of personal animus in negotiating Clemmens' increase. He concluded that Council 10 violated the Act by negotiating, arbitrarily and in bad faith, an artificially low salary increase for Clemmens' title. By way of remedy, he recommended that Council 10 be ordered to pay the difference between the increase Clemmens received and the salary increase offered by the County, plus interest, for the duration of the collective negotiations agreement, including any increases. He further recommended that Council 10 be ordered to negotiate in good faith regarding Clemmens' salary at the contract's expiration.

On June 6, 1988, Clemmens filed exceptions urging that he be awarded counsel fees. On June 15, Council 10 filed a reply opposing the award of counsel fees.

On June 22, 1988, after an extension of time, Council 10 filed exceptions to numerous factual findings and legal conclusions.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-12) are generally accurate. We adopt and incorporate them with these modifications:

(1) Clemmens requested the original County desk audit (T37);

(2) Polniak told Dodson that Polniak did not feel Clemmens was doing security guard duties (T95) and that Dodson should look into it. Dodson told Polniak he did not know anything about it and Dodson asked DiFante to check into it (T95, T137);

(3) Clemmens was angry at Council 10 when he called Polniak in late September. Clemmens was upset that Polniak had gotten the County to "pull" consideration of his salary increase from the Freeholders' agenda. Polniak explained that the County did not have the right to unilaterally set salaries for new titles and that Council 10 historically opposed dual titles (T138). Polniak suggested that Clemmens tailor his functions to that of a senior clerk driver, a position earning \$3437 more than the clerk driver/security guard position (R-1). Clemmens claims that Polniak told him in 1987 that he refused to negotiate a salary for his dual title. We note, however, that Clemmens was not reclassified by Civil Service until January 20, 1987;

(4) Polniak never indicated he was reluctant to negotiate a salary for a dual title (T107; T119). He told Dodson that Council 10 was opposed to establishing another dual title and that he did not think Clemmens' duties warranted the security guard half of the title. Dodson testified that the inference that "if it's not warranted then it shouldn't be established, and there's no need to discuss a salary" was left unsaid (T119); Clemmens' department head, Benton, told Dodson to be very careful in negotiating Clemmens' salary because Clemmens was a very determined employee and somewhat litigious. He cautioned Dodson to make sure the County was not caught out on a limb on this (T97). After Dodson's conversation with Benton, Dodson did not think it wise to leave the County

exposed and he thought a thousand dollars was something that could not be challenged as an unreasonable first offer. Dodson believed Benton did not want to get involved and would find the money in his budget for whatever increase Dodson agreed to. Dodson believed Benton was basing his position on fear of Clemmens, not on an assessment of Clemmens' duties (T113-T114). Dodson did not conduct any research in deciding what amount to offer (T114);

(5) Dodson testified that he tried but did not always achieve increases between \$1000 and \$2000 (T117). Polniak testified that increases could be less than \$1000 (T156). We do not find a conflict in that testimony and therefore need not make a credibility determination.

(6) R-1 does not rank titles; Class I clerk driver was paid \$17,507; Class I senior clerk driver was paid \$17,506; Class I clerk driver/security guard was paid \$14,069; Class II clerk driver was paid \$18,820; Class II senior clerk driver was paid \$18,819; Class II clerk driver/security guard was paid \$15,125; Class III clerk driver was paid \$20,703; Class III senior clerk driver was paid \$20,923; Class III clerk driver/security guard was paid \$16,638;

(7) Polniak stated that not every time he negotiates with Dodson "is it a situation where it's similar to what happened with Mr. Clemmens" (T159). However, his treatment of Clemmens followed his normal practice of comparing Class III salaries;

(8) At the Trustees meeting, Clemmens objected to Polniak having caused the removal of his upgrade from the Freeholders' agenda. He told the Trustees he was coming to them to fight for a higher salary before he went further with legal action (T188). One trustee asked Clemmens whether Polniak's alleged failure to represent him was motivated by Clemmens' running for office. Clemmens did not say why he felt the union was not representing him (T183; T188);

(9) Clemmens claimed that at a shop stewards' meeting after the County offered \$1000, Polniak stated, "I'm going to cut it as low as I can.

I'm going to teach you a lesson. You are going to learn." Polniak denied making those statements (T147). The Hearing Examiner did not make a finding as to the statement. In the context of Polniak's actions, we find that Polniak probably did not make the statements. He counter-offered \$219 based on his usual formula of dealing from the Class III rates in the salary schedule. He could have asked for less. Dodson would have agreed to less, but was concerned about a challenge from Clemmens (T98);

(10) Polniak had previously counter-offered lower than Dodson's first offer (T100);

(11) Dodson was also surprised the Clemmens matter was on the Freeholders' agenda (T110).

The issue is whether Council 10 breached its duty of fair representation when its president negotiated a salary for a new dual title established through a civil service desk audit. The Hearing Examiner found that Council 10, arbitrarily and in bad faith, negotiated an artificially low salary increase and thus violated its duty. We disagree.

Unions have broad power to represent unit members and to negotiate their terms and conditions of employment. They must represent the interest of all such employees without discrimination. N.J.S.A. 34:13A-5.3. A breach of the duty of fair representation occurs only when a union's conduct toward a unit member is arbitrary, discriminatory, or in bad faith. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976), citing Vaca v. Sipes, 386 U.S. 171 (1967).

The mere fact that a negotiated agreement results in a detriment to one group of employees does not establish a breach of the duty by the union. Id. at 491. In Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), the Court expressed the realities that underlie this rule of law:

The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in servicing the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. [Id. at 337-338]

See also Humphrey v. Moore, 375 U.S. 335 (1964).

"[All] the facts of each case must be scrutinized to determine whether a breach has been proven; there are no bright line tests." City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98, 99-100 (¶13040 1982). We have studied the chronology of events and determined that, under all the circumstances, Clemmens failed to prove that Council 10 breached its duty.

Council 10 had long opposed dual titles. In August 1986, its president discovered that a new dual title for Clemmens was about to be established and a salary set unilaterally. He informed the County's personnel director who was also surprised to see it on the Freeholder's agenda. The matter was appropriately pulled.

Consistent with union policy, Polniak questioned Dodson about the validity of the new dual title. Clemmens told Polniak he didn't like the union's position. In response, Polniak suggested other ways to achieve a salary increase without getting a new dual

title. One suggestion was for Clemmens to become a clerk driver. That would have given him a \$3438 increase.

After his upgrade was stopped, Clemmens ran for union office on a slate opposing Polniak's. The Polniak slate won by at least a three to one margin. There was no evidence of hostility. Clemmens publicly thanked the Polniak team for conducting a clean campaign.

Clemmens asked to appear before Council 10's Board of Trustees, protested the union's position, and offered them an opportunity to act as he wished before he began legal action. In December, counsel for the Trustees wrote Clemmens and explained that if the Department of Personnel (formerly Civil Service) determined that he was classified in a unit title for which no salary existed, the union would negotiate a salary. She also informed him that the Board of Trustees found no basis for his allegations against the union or Polniak. She reaffirmed the union's vigorous opposition to dual titles and referred to the options Polniak suggested to achieve a salary increase without resorting to a dual title.

In January, the Department of Personnel reclassified Clemmens to senior clerk driver/security guard. Dodson advised Polniak of that decision. Polniak asked for a salary offer. Dodson later offered \$1000. That offer was based on the County's desire not to get into a dispute with Clemmens. His supervisor had warned Dodson that Clemmens was determined and somewhat litigious. Polniak based his counter-offer on his usual formula of comparing rates

between jobs in Class III. Clemmens was going from clerk driver/security guard to senior clerk driver/security guard. The difference between clerk driver and senior clerk driver was \$220. The counter-offer was \$219.^{2/} Dodson accepted the counter-offer and Clemmens filed this unfair practice charge.

Council 10's action accorded with its policy of opposing dual titles and Polniak's formula for negotiating salaries for new titles. That policy was neither arbitrary nor discriminatory. It reflected a collective interest in an equitable title structure and a desire to preserve competitive opportunities for promotion under the merit-and-fitness system. Polniak's conduct in negotiating Clemmens' salary was not in Clemmens' best financial interest, but that does not make it illegal. It was neither arbitrary, discriminatory nor in bad faith. It was based on his practice of comparing Level III salaries. By contrast, the County's \$1000 offer was based on fear of Clemmens' reaction.

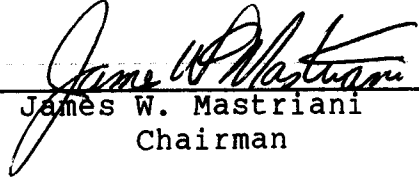
Being outspoken at union meetings or running on an opposition slate does not insulate an employee from being treated like other unit members. The charging party has failed to prove that his union's conduct breached its duty of fair representation. Accordingly, we dismiss the Complaint.

^{2/} The salary guide's internal inconsistency is demonstrated by the fact that at Clemmens' Class I level, a senior clerk driver earns \$1 less than a clerk driver.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Smith and Bertolino voted in favor of this decision. Commissioner Wenzler was not present. None opposed.

DATED: Trenton, New Jersey
October 20, 1988
ISSUED: October 21, 1988

H.E. NO. 88-59

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

In the Matter of

CAMDEN COUNCIL NO. 10, NJCSA,

Respondent,

-and-

Docket No. CI-H-87-73

WILLIAM CLEMMENS,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that Camden Council No. 10, NJCSA violated section 5.4(b)(1) of the New Jersey Employer-Employee Relations Act by negotiating, arbitrarily and in bad faith, an artificially low salary increase for an employee in the unit.

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.

H.E. NO. 88-59

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

In the Matter of

CAMDEN COUNCIL NO. 10, NJCSA,

Respondent,

-and-

Docket No. CI-H-87-73

WILLIAM CLEMMENS,

Charging Party.

Appearances:

For the Respondent

Tomar, Seliger, Simonoff, Adourian & O'Brien, Esqs.
(Mary L. Crangle, of counsel)

For the Charging Party

Joseph A. Carmen, Esq.

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On May 18, 1987, William Clemmens ("Charging Party") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that Camden County Council No. 10, NJCSA ("Council 10") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). Specifically, the Charging Party alleges that Council 10 violated subsections 5.4(b)(1) and (5)^{1/} of the

^{1/} These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Violating any of the rules and regulations established by the commission."

Act when it negotiated an unreasonably low salary increase in retaliation for Clemmens' speaking out against union policy, running for union office against the incumbent leadership and accepting the dual title of Senior Clerk Driver/Security Guard in contravention of a union policy discouraging the use of dual titles.

A Complaint and Notice of Hearing was issued on July 15, 1987. On July 20, 1987, Council 10 filed an Answer generally denying the charge's allegations and relying upon its June 1, 1987 statement of position and affirmative defenses.

On January 7, 1988, I conducted a hearing. The parties examined witnesses and introduced exhibits. A briefing schedule was established providing for the simultaneous submission of briefs by the close of business -- 5 p.m. -- February 26, 1988. I received Council 10's brief on February 29, 1988 and Mr. Clemmens' brief, in accordance with extensions granted, on March 18, 1988. The parties were provided with an opportunity to file response briefs. I received Council 10's response brief on April 4, 1988. No response brief was filed on behalf of Mr. Clemmens.

Upon the entire record, I make the following:

FINDINGS OF FACT

Camden County Council No. 10, NJCSA is an employee representative and William Clemmens is an employee within the meaning of the Act (T6).^{2/}

^{2/} T6 refers to the transcript dated January 7, 1988, page 6.

William Clemmens is employed by the Camden County Department of Health as a senior clerk driver/security guard. Prior to serving in that title Clemmens was a clerk driver/security guard (CP-2).^{3/} Clemmens has been a shop steward for Council 10 for over two years (T46) and has regularly attended union meetings.

In or about August 1986, the County conducted an audit of Clemmens' job duties. The audit revealed that Clemmens' title should be upgraded to senior clerk driver/security guard.

On August 6, 1986, Clemmens was called to the Health Department personnel office to sign the personnel action form (CS-66A) which would change his title and salary (CP-1). CP-1 provides for a \$3117 salary increase.

Clemmens' title and \$3117 salary change were included on the agenda for the August 14, 1986, Camden County Board of Freeholders' meeting (R-2). David Polniak, President of Council 10, attended the meeting and noticed Clemmens' personnel action on the agenda. Polniak immediately approached Richard Dodson, the County's Personnel Director, to inquire concerning the action, and point out that the County and the union had not negotiated and reached agreement on the salary change. Dodson told Polniak that Clemmens' personnel actions were mistakenly listed on the agenda and immediately had the actions removed.

^{3/} Charging Party's exhibits are designated "CP." Respondent's exhibits are designated "R."

Shortly thereafter, Polniak spoke to Dodson regarding Clemmens' job audit and questioned its accuracy. Polniak indicated that he did not believe that Clemmens' job duties included sufficient security responsibilities to warrant the "dual title" of senior clerk driver/security guard.

In late September 1986, Clemmens contacted the Health Department's personnel office in order to ascertain the status of his new job title. Clemmens was told to contact Dodson. Dodson told Clemmens that Council 10 was having problems accepting the dual title and questioned the accuracy of the County's job audit. Clemmens then telephoned Polniak to inquire concerning the status of his title change. Clemmens was angry with Council 10 for having his title removed from the Board of Freeholders' agenda and asked what right the union had to take such action. Polniak told Clemmens that the County could not unilaterally establish a salary for a new job title (T138).

The personnel office keeps a record card on every County employee containing a summary of the employee's employment history. At the beginning of their phone conversation in late September, Polniak read Clemmens the information contained on the personnel record card of a William Clemmens. It was discovered

that the card was for another employee with the same name.^{4/} Clemmens was upset with the fact that Polniak had access to his personnel card and a confrontational discussion continued concerning Council 10's access to the personnel card and why it was not proceeding with negotiations to establish a salary for Clemmens' proposed title. Polniak told Clemmens that it was union policy to discourage the use of dual titles and that he was reluctant to negotiate a salary for Clemmens' new title.^{5/}

On November 5, 1986, Clemmens requested Civil Service to conduct an audit of his job. On January 20, 1987, Civil Service issued a letter finding that the duties performed by Clemmens

^{4/} Clemmens testified that when he told Polniak that he (Polniak) was reading from the wrong personnel card, Polniak called him a liar (T51). Polniak denies this and testified that there was not even an angry exchange with Mr. Clemmens (T142). The resolution of this case is not contingent upon whether or not Polniak called Clemmens a liar and, therefore, I shall not render a determination on that point. However, on the basis of my observation of Clemmens and Polniak as witnesses, I am firmly convinced that the telephone conversation was heated and confrontational.

^{5/} One of the issues in dispute in this case is whether Polniak refused to negotiate a salary for Clemmens' new title. Council 10 incurred no obligation to negotiate a salary for the new title until January 20, 1987 (the date Civil Service classified Clemmens' title as a senior clerk driver/security guard). Polniak did not refuse to negotiate a salary after January 20, 1987. Prior to January 20, 1987, he would not negotiate a salary for the dual title (T21; T50-T52). Polniak testified that he never said that he would not negotiate a salary (T144-T145). However, while Polniak may have never used those exact words, Dodson's testimony supports the finding that Polniak was at least reluctant to negotiate a salary for a dual title and made this viewpoint known (T107; T119).

should be classified under the title of senior clerk driver/security guard (CP-3). The County officially moved Clemmens into the senior clerk driver/security guard title on January 20, 1987. The County made no salary proposal to the union and no negotiations occurred until that time.

On or about January 20, 1987, Dodson contacted Polniak in order to advise him that Civil Service classified Clemmens' title as a senior clerk driver/security guard. Polniak asked Dodson if the County was prepared to make a salary offer on the new title. Dodson indicated that he was not prepared to do so at that time. Shortly thereafter, Dodson called Polniak and made an initial proposal to establish a salary level for Clemmens' new title at \$1000 above the salary he was then receiving. Polniak said he would consider the County's offer and respond at a later time. Later, Polniak saw Clemmens at a shop steward meeting. In response to Clemmens' questions concerning the status of salary negotiations for his new title, Polniak advised him that the County offered \$1000 and that he (Polniak) intended to counter-offer a lesser amount (T78-T79). Several days later Polniak called Dodson and counter-offered \$219. Dodson accepted.

Dodson believed that a \$1000 salary increase for Clemmens' new title was a reasonable initial offer by the County (T98, T119). In circumstances where a new title is established, such as in Clemmens' case, Dodson tries to maintain an average salary

increase of \$1000 to \$2000 (T117).^{6/} Dodson is not always successful in achieving this average (T117). In any situation where an average is involved, there are times when a new title is established and the employee receives more or less than \$1000. While it is unusual for Polniak to respond with a counter-offer below the County's initial offer, on very rare occasions, Polniak has proposed a lower figure (T100).

An example of Council 10 refusing to agree to certain salary increases proposed by the County occurred in late 1986 and through most of 1987, when the County was laying off employees. The County wished to give raises to a few employees. Council 10 took the position that if the County had enough money to give raises, then that money should be used to keep or refill jobs (T132). Six to eight months later, the threat of layoffs abated and the County and Council 10 reached a compromise. Those employees whose salaries the County wished to raise received raises, and certain other employees who Polniak believed were being underpaid also received raises (T101, T121). The evidence does not disclose the amount of the raises received by these employees. Council 10 has not contended that Clemmens' salary was affected by such layoff considerations.

^{6/} Polniak testified that there was no average salary increase in the County when a new title is established (T155-T156). I credit Dodson's testimony. As County personnel director, Dodson negotiates all of the salaries for newly established titles; he is in a position to know the facts. Additionally, Dodson is basically a disinterested party with respect to this litigation, whereas Polniak is not. Indeed, the propriety of Polniak's conduct is the central issue of this dispute.

The salary guide shows the wage rate for each County title (R-1). The guide has three "classes" for each title; each class shows a different salary. Employees hired since 1982 fall into Class I. Class II covers employees hired between 1979 and 1981. Class III establishes the salaries for employees hired in 1978 or earlier. Class I salaries are the lowest, Class III the highest. The parties have not attempted to establish any rationality between titles on the salary guide. For example, while senior clerk driver is considered a higher level title than clerk driver, Class I and II clerk drivers receive higher annual salaries than Class I and II senior clerk drivers, respectively.

Once Dodson advised Council 10 that Civil Service found that Clemmens' title was appropriately classified as senior clerk driver/security guard, Polniak accepted the title and entered into salary negotiations for the title (T120, T122). Polniak arrived at the \$219 salary increase by comparing the Class III salaries of the clerk driver and senior clerk driver titles (T160).^{7/} Polniak stated that he "...normally go[es] to the Class III salary and deal[s] from there" (T159). Polniak reasoned that since the change in Clemmens' job title reflected an increase in the clerk driver portion of his job and not the security portion, \$219 was an appropriate increase in this case (T162). However, Polniak also pointed out that the negotiations concerning Clemmens' salary did

^{7/} The actual difference between the Class III salaries shown on R-1 for clerk driver and senior clerk driver is \$220.

not necessarily represent the typical situation (T159). Polniak made no evaluation regarding the propriety of the County's offer to increase Clemmens' salary by \$1000 for the new job (T163).

For at least several years prior to the time Clemmens' job was audited by the County, Council 10 had adopted a policy opposing the use of dual titles (T105, T180, T186). The basis for the policy was that dual titles may allow an employer to manipulate the merit and fitness system by tailoring a job so that only one individual would be qualified to fill it. Consequently, no Civil Service examination would be required and other employees would be precluded from competing for the vacancy. Polniak expressed to Dodson his concerns regarding the use of a dual title when he first learned of the result of the County's audit of Clemmens' job in August 1986. Polniak had previously stated similar concerns to Dodson regarding the use of dual titles. (T122, T143).

In discussions with Clemmens, Polniak made it clear that Council 10 was opposed to the use of dual titles. Polniak suggested alternatives for Clemmens to consider in lieu of a dual title (CP-4). For example, Polniak urged Clemmens to remove the security guard component of the title and obtain the title senior clerk driver (T60, T72). Polniak pointed out that in this way, Clemmens could earn more money and not occupy a dual title (T138-T139). Clemmens refused to cooperate with Polniak's suggestions, asserting that he (Clemmens) could neither alter the duties assigned to him nor dictate the title prescribed as a result

of the job audit. Clemmens maintained that that was the responsibility of the County or Civil Service. Moreover, Clemmens rejected Polniak's suggestion in regard to seeking a non-dual title, because if Clemmens moved into a non-dual title, he could be bumped from the title by another employee on a Civil Service list, or he might have to take a Civil Service examination in order to keep the job (T60, T72, T139-T140).

Council 10's organizational structure contains 4 officers and a Board of Trustees. The officers are elected for two year terms. Elections are conducted in October (T150-T151). In the fall of 1986, Polniak headed a slate of candidates for various offices in Council 10. Polniak ran for president. Bob Hardy ran against Polniak for president. In September 1986, Clemmens announced that he would run for the vice presidency on the Hardy slate against Richard Riggs, an employee running on the Polniak slate. The election results were announced during a regular union meeting at the end of October. Each candidate on the Polniak slate was elected to the office he/she sought by at least a three to one margin. After the results of the election were announced, Clemmens addressed the people at the meeting in order to thank those who supported him and the Hardy slate, and to congratulate Polniak and his slate on their victory. Clemmens thanked the Polniak team for conducting a clean campaign (T153, T184).

During the fall, 1986, Clemmens spoke to Polniak several times about the status of salary negotiations for his proposed

title (T63). Clemmens repeatedly asked Polniak to represent him in negotiations with the County to establish a higher salary for the senior clerk driver/security guard title. In or about October 1986, Clemmens gave a Council 10 Trustee a letter requesting a hearing before the Board of Trustees regarding Polniak's alleged refusal to negotiate a salary for Clemmens' new title. The Trustee gave Polniak the letter and a few minutes later Polniak approached Clemmens and told him that he (Polniak) would schedule a hearing for November. On November 12, 1986, Clemmens appeared before the Board of Trustees. Clemmens told the Trustees the history of how the senior clerk driver/security guard title came about and informed the Trustees that Polniak would not negotiate a salary for the job because it was a dual title. Clemmens advised the Trustees that he requested the hearing in order to provide them the opportunity to resolve the problem before he pursued further legal channels. Since Polniak did not attend the meeting, the Trustees reserved decision until they had a chance to discuss the matter with him (T64-T67, T154-T155). On December 17, 1986, the Board of Trustees, through legal counsel, sent Clemmens a letter advising him that it found no basis for wrongdoing by Council 10 or Polniak (CP-4).

Clemmens was one of many employees who were outspoken union activists, often expressing positions during union meetings which were contrary to those taken by the union leadership (T81). They were also openly critical of the union leadership's actions in

collective negotiations (T157, T187). Clemmens never contended during his hearing before the Board of Trustees that Polniak refused to negotiate a salary for his new title in retaliation for his running for union office against the Polniak slate or for his outspokenness at union meetings (T188).

ANALYSIS

N.J.S.A. 34:13A-5.3 provides in relevant part:

Representatives designated or selected by public employees for the purpose of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the commission as authorized by this act shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit.

* * *

A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership.

In Lullo v. Intern. Ass'n. of Fire Fighters, 55 N.J. 409, 429 (1970), the New Jersey Supreme Court, in emphasizing that a majority representative has a fiduciary duty to represent fairly the interests of all employees, stated that a majority representative

...cannot lawfully refuse to perform or neglect to perform fully and in complete good faith the duty, which is inseparable from the power of exclusive representation, to represent the entire membership of employees in the unit.

In Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Federation of Teachers, 142 N.J. Super. 486 (App. Div. 1976), the Court explained the standard to be applied in evaluating a majority representative's conduct in a negotiations context:

Designation of an exclusive bargaining agent under the New Jersey Employer-Employee Relations Act confers on a union broad power to represent the members of the bargaining unit and to negotiate the terms and conditions of their employment. Along with this power comes the obligation to represent all employees "without discrimination." N.J.S.A. 34:13A-5.3. This duty of fair representation of a union toward its members has received extensive development in the experience and adjudications under the National Labor Relations Act, which we find to be an appropriate guide for the interpretation of our own enactment. See Lullo v. Intern. Ass'n of Fire Fighters, *supra*. In Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), the United States Supreme Court stated (at 190, 87 S.Ct. at 916): "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."

* * *

...[T]he mere fact that a negotiated agreement results, as it did here, in a detriment to one group of employees does not establish a breach of duty by the union. The realities of labor-management relations which underlie this rule of law were expressed in Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S. Ct. 681, 97 L.Ed. 1048 (1953), where the court wrote:

...The complete satisfaction of all who are represented is hardly to be expected. A wide range or reasonableness must be allowed a statutory bargaining representation in servicing the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion....[at 337-338, 73 S. Ct. at 686]

[142 N.J. Super. at 490-491]

See also, Humphrey v. Moore, 375 U.S. 335 (1964); Hamilton Tp. Ed. Ass'n, P.E.R.C. No. 79-20, 4 NJPER 476 (¶4215 1978). Accordingly, absent clear evidence of bad faith, fraud or invidious discrimination, an employee organization may make compromises which adversely affect some members of a negotiations unit, while resulting in greater benefits for other members. See, Jersey City, P.E.R.C. No. 87-56, 12 NJPER 853 (¶17329 1986); AFT Local 481, P.E.R.C. No. 87-16, 12 NJPER 734 (¶17274 1986) adopting H.E. No. 87-7, 12 NJPER 628 (¶17237 1986); Bridgewater Raritan Ed. Ass'n., D.U.P. No. 86-7, 12 NJPER 239 (¶17100 1986). However, it is important to stress "...that all the facts of each case must be scrutinized to determine whether a breach has been proven; there are no bright line tests." City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98, 99-100 (¶13040 1982).

While a breach of the duty does not rise from mere disparities in wage increases or decreases, see, Belen v. Woodbridge Bd. of Ed., supra; Hamilton Tp. Ed. Ass'n, supra, a breach does exist when...the exclusive representative makes a deliberate decision in bad faith to cause a unit member economic harm. An employee representative which lacks any reason, besides the desire to punish, for its refusal to seek a compensation increase for a certain position per force operates outside the wide range of reasonableness. Id. at 100.

Council 10 has opposed the use of dual titles for a number of years. The adoption of this policy long precedes Clemmens' job audit. Council 10 argues that its anti-dual title policy was established because it believes that dual titles provide an employer with the means to manipulate the Civil Service merit and fitness

system. Council 10 asserts that such manipulation could result in benefiting a few at the expense of the majority. The adoption and furtherance of a policy by an employee organization that is designed to advantage the majority of the membership at what may perhaps amount to a detriment to a few is clearly proper. See, Bridgewater Raritan Ed. Ass'n, supra; PBA Local 119, P.E.R.C. No. 84-76, 10 NJPER 41 (¶15023 1983). However, a policy which is proper on its face cannot be used to justify an action taken in bad faith. Accordingly, while Council 10 may assert pressure on the County to discourage the use of dual titles, it must accept a dual title classification once Civil Service has reached such determination, and it must act upon the classification in good faith.

I find that Council 10 ultimately accepted the dual title assigned to Clemmens' job by Civil Service. Indeed, Council 10 negotiated a salary for Clemmens' title soon after Civil Service rendered its classification determination on January 20, 1987. However, I also find that the policy was used, in this case, as a pretext in an effort to control a well known dissident union member and, thereby, send a message to others who are not supportive of the union leadership.

Clemmens has been an active union member for several years. Prior to August 1986, the time when the County reclassified his job, Clemmens was an outspoken union activist, who took positions contrary to Polniak's. Moreover, Clemmens has openly argued against positions which Polniak has urged the membership to

support in Council 10's negotiations with the County. Clemmens' open opposition to Council 10's leadership continued through the last half of 1986.

Since August 1986, contact between Polniak and Clemmens had increased because of Clemmens' reclassification. Repeatedly, Clemmens would press Polniak to negotiate a salary on his behalf. At best, these conversations could be characterized as strained.

In September 1986, Clemmens announced that he would run for union office on a slate of candidates opposing the Polniak slate. While the evidence shows that the election was run cleanly and fairly, and, although Clemmens did not run for office directly against Polniak, the campaign represents another opportunity for Clemmens and Polniak to be at odds with each other.

In November, 1986, Clemmens had a hearing before Council 10's Board of Trustees. Clemmens complained that Polniak refused to negotiate a salary for his (Clemmens) new title in dereliction of Polniak's duties as President. Clemmens sought to recruit Board of Trustees' support against Polniak. While Polniak promptly arranged the hearing and Clemmens did not contend at the hearing that Polniak's actions were retaliatory, nonetheless, this episode represents another occasion where Clemmens and Polniak encounter each other in a confrontational posture.

On January 20, 1987, Civil Service determined Clemmens' title to be properly classified as "senior clerk driver/security guard. Council 10 had little alternative but to

negotiate. Polniak testified that since the change in Clemmens' title concerned the clerk driver portion of the title he used the extant salary guide to compare the Class III salary of clerk driver with the Class III salary of senior clerk driver. That comparison amounted to \$219; the salary increase Polniak proposed for Clemmens' new job.

The evidence establishes that Polniak used an arbitrary method to set Clemmens' salary. While Polniak may normally review the Class III salaries of related titles when a new title is established, it is not normal for him to stop the analysis there. Polniak testified that he "...normally go[es] to the Class III salary and deal[s] from there." (T159)(emphasis added). Obviously, the clear implication is that salaries higher than the salary guide comparison are routinely sought by Polniak. Polniak conceded that the setting of Clemmens' salary did not represent the typical situation. Indeed, the County, on the basis of their experience in similar matters, thought that a proposed \$1000 salary increase was only a reasonable starting point. Polniak conceded that after going through the mechanics in order to arrive at \$219, he made no further evaluation of the propriety of the County's opening salary offer.

An additional but very important flaw exists in Council 10's argument. It is undisputed that there exists no rationality to the salary guide. Yet Polniak relied solely on the irrational guide as justification for arriving at Clemmens' salary increase.

When the individual incidents related above are viewed as part of an overall pattern of behavior regarding Council 10's representational responsibilities toward Clemmens, and the timing of such incidents is analyzed in terms of the negotiations of Clemmens's salary increase, see, City of Margate, H.E. No. 87-46, 13 NJPER 149 (¶18067 1987) adopted P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985), one can only conclude that the hostility which developed between Clemmens and Polniak, as individuals, resulted in Polniak exercising the discretion granted to him as President in a manner which was not subject to "complete good faith and honesty of purpose." Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super. at 491. Thus, the salary negotiations for Clemmens' new title were not genuinely based on effectuation of sound union policy objectives; rather, it was an arbitrary exercise of authority motivated by personal animus. Accordingly, I find that Council 10 breached its duty of fair representation in violation of the Act by going beyond the permissible "wide range of reasonableness" by negotiating, arbitrarily and in bad faith, an artificially low salary increase for Clemmens' title.

Clemmens also alleges that Council 10 violated §5.4(b)(5) of the Act. Clemmens did not introduce evidence showing that Council 10 violated any of the rules and regulations established by the Commission.

REMEDY

While the evidence does not indicate the actual date Clemmens initially received the salary increase for serving in the senior clerk driver/security guard title, it is clear that Civil Service made its classification determination on January 20, 1987. I find January 20, 1987 to be the appropriate date from which to calculate damages.

The County proposed a \$1000 increase in Clemmens' salary for his new position. After negotiations between the County and Council 10 Clemmens only received \$219. I find that Clemmens is entitled to receive from Council 10 the difference between the increase he actually received (\$219) and the salary increase offered by the County (\$1000), on a pro-rata basis (from January 20, 1987) for each calendar year, plus interest at the rate established by R.4:42-11(a), for the duration of the current collective agreement. Additionally, this amount must be adjusted upwards by the appropriate amount for any negotiated salary increase(s) granted since January 20, 1987, as of the implementation date of such increase(s). Upon expiration of the current agreement, Council 10 shall enter into good faith negotiations with the County regarding Clemmens' salary.

Accordingly, on the basis of all of the evidence presented and the analysis set forth above, I make the following:

CONCLUSIONS OF LAW

Camden Council No. 10, NJCSA, violated N.J.S.A. 34:13A-5.4(b)(1) when it breached its duty of fair representation by negotiating William Clemmens' salary arbitrarily and in bad faith.

William Clemmens did not prove by a preponderance of the evidence that Camden Council No. 10 violated N.J.S.A. 34:13A-5.4(b)(5). Accordingly, I find that the unfair practice charge concerning this section of the Act be dismissed.

RECOMMENDED ORDER

I recommend that the Commission ORDER the following:

A. Respondent Camden Council No. 10, NJCSA, cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, specifically by breaching its duty of fair representation when it negotiated William Clemmens' salary arbitrarily and in bad faith.

B. Respondent Camden Council No. 10, NJCSA, take the following affirmative action:

1. Camden Council No. 10 shall pay William Clemmens the difference between the increase he actually received (\$219) and the salary increase offered by the County (\$1000), on a pro-rata basis (from January 20, 1987) for each calendar year, plus interest at the rate established by R.4:42-11(a), for the duration of the current collective agreement. Additionally, this amount must be adjusted upwards by the appropriate amount for any negotiated salary increase(s) granted since January 20, 1987, as of the implementation date of such increase(s). Upon expiration of the current agreement, Council 10 shall enter into good faith negotiations with the County regarding Clemmens' salary.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be 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 materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this ORDER.


Stuart Reichman
Hearing Examiner

Dated: May 27, 1988
Trenton, New Jersey

NOTICE TO ALL 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 NOT continue to interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, specifically by negotiating, arbitrarily and in bad faith, an artificially low salary increase for William Clemmens' newly established title and thereby breaching our duty of fair representation.

Docket No. CI-H-87-73

CAMDEN COUNCIL NO. 10, NJCSA
(Public Employee Organization)

Dated _____

By _____
(Title)

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 St., CN 429, Trenton, NJ 08625 (609) 984-7372.