

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY BOARD OF FREEHOLDERS
and CAMDEN COUNCIL #10, NJCSA,
MILDRED DI FANTE, PRESIDENT,

Respondents,

-and-

Docket No. CI-80-3-32

THERESE M. DONLAN,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Camden County Board of Freeholders and Council #10, NJCSA and Mildred Di Fante violated the New Jersey Employer-Employee Relations Act when they permitted Di Fante to handle a grievance filed by a unit employee, Therese M. Donlan, in Di Fante's capacities as both County personnel assistant and Council #10 president. The Commission also holds that the County illegally laid off and failed to reinstate and promote Donlan because she filed the grievance.

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MILDRED DI FANTE, PRESIDENT,

Respondents,

-and-

Docket No. CI-80-3-32

THERESE M. DONLAN,

Charging Party.

Appearances:

For the Camden County Board of Freeholders,
Vincent J. Paglione, First Assistant County Counsel

For the Camden Council #10, NJCSA
Carmen & Mills, Esqs. (Joseph Carmen, of Counsel)

For the Charging Party, Therese M. Donlan, Pro Se

DECISION AND ORDER

On August 8, 1979, Therese M. Donlan, an employee of the Camden County Board of Freeholders ("County"), filed an unfair practice charge with the Public Employment Relations Commission against Camden Council No. 10, NJCSA ("Council #10") and its president, Mildred Di Fante. The charge alleged that Council #10, a majority representative of certain County employees including Donlan, and Di Fante violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically subsections 5.4(b)(1), (3), and (4),^{1/} when

^{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; (3) Refusing to negotiate in good faith with a public employer if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit and (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

Di Fante simultaneously held positions as both president of Council #10 and personnel assistant for the County, (2) Di Fante failed to process a grievance submitted by Donlan, (3) Di Fante and the County failed to provide a salary increase to Donlan when she was promoted and (4) Donlan was not permitted to have her union shop steward with her when she met with Di Fante and the County Administrator, Ronald Kerins.

On November 28, 1979, Donlan filed two amendments to her original charge. She added the County and certain agents as respondents. She claimed that these respondents violated subsections 5.4(a)(1), (2), (3), (4), (5), (6), and (7)^{2/} of the Act when the County (1) threatened her in an attempt to make her withdraw her original charge, (2) filled a vacant senior planner position with a lower ranking, less senior applicant, and (3) laid her off from September, 1979 until November, 1979.

^{2/} These subsections 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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit or complaint or given any information or testimony under this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; and (7) Violating any of the rules and regulations established by the commission."

Donlan also made further allegations against Di Fante and Council #10. She asserted that Di Fante and Council #10 restrained employees in the exercise of their rights under the Act in that "employees of the County who are members of Council #10 hesitate to follow up on grievances which [Di Fante] ignores... [since the employees] fear some sort of retribution in her position in the Personnel Department" and that there "was a conflict of interest in Di Fante's holding [the positions of president of Council #10 and personnel assistant]." In addition to the subsections listed in the original charge, Donlan alleged that Council #10 violated subsection 5.4(b)(5).^{3/}

On September 21, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The County filed an Answer in which it denied all charges of impropriety. Di Fante and Council #10 filed a statement of position in which they also denied the Complaint's allegations.

On January 19 and 20, 1982, Commission Hearing Examiner Edmund G. Gerber conducted a hearing. He allowed all parties to present evidence, examine witnesses, and argue orally. Only Donlan testified and presented evidence. No party chose to file a post-hearing brief.

On or about October 25, 1982, the Hearing Examiner issued his report and recommendations, H.E. No. 83-13, 8 NJPER

^{3/} This subsection prohibits employee organizations, their representatives or agents from: "(5) Violating any of the rules and regulations established by the commission."

____ (¶ _____ 1982). He found that Di Fante's exercise of responsibilities within the County personnel department made her a supervisor or managerial executive within the meaning of the Act, and concluded that the County violated subsection 5.4(a)(2) of the Act when it allowed Di Fante to serve as president of Council #10. In addition, he found that the County violated subsection 5.4(a)(1) when it laid off Donlan and promoted another employee besides Donlan to the vacant senior planner position. The Hearing Examiner also found that Council #10 violated subsection 5.4(b)(1) when it failed to process Donlan's grievance. He recommended a remedy which would bar Di Fante from maintaining her position as Council #10 president while continuing to hold her position as personnel assistant, notify the employees of the County's violations, require Council #10 to stop refusing to process employee grievances, and reimburse Donlan for two weeks' salary for the period in September, 1979 when Donlan was laid off but never reimbursed.

On November 4, 1982, Di Fante and Council #10 filed Exceptions. They assert that the Hearing Examiner erred in finding a conflict of interest between Di Fante's work as a personnel assistant and as Council #10's president and that Council #10 did not breach its duty of fair representation with respect to the Donlan grievance.

On November 8, 1982, Donlan filed Exceptions. She agrees with the Hearing Examiner's recommendations, but believes they are not sufficient in all respects. She asserts, in particular, that the Hearing Examiner erred in not ordering Council

#10 to reimburse her for the expense of pursuing her grievance after Council #10 refused to do so and erred in finding that she had been rehired as an assistant planner. The County has not filed any Exceptions.

We have reviewed the record. We adopt, with the minor modifications set forth below, the Hearing Examiner's findings of fact, conclusions of law, and recommended remedy.

We specifically agree with the Hearing Examiner that under all the circumstances an intolerable conflict of interest existed with respect to Donlan's grievance because of Di Fante's dual actions as a County personnel assistant and as an officer of Council #10. The second highest personnel officer in the County, Di Fante played a significant role in hiring, firing, and promoting employees and in effectively recommending these actions. When Donlan received a promotion to assistant planner, she signed a form which indicated that the current base salary for that position was \$13,467. The personnel department, however, subsequently amended the form by lowering the base salary to \$12,242. Donlan initiated the grievance procedure by contacting her supervisor; the supervisor in turn contacted a County personnel assistant -- Di Fante. Donlan then met with the County Administrator and Di Fante; the Administrator and Di Fante denied Donlan's request to be represented by a shop steward. The Administrator and Di Fante then denied Donlan's grievance, stating that the County and Council #10 had an oral understanding that anyone hired to fill a vacancy would be paid at the prior year's

salary.^{4/} Donlan then attempted to appeal her grievance by sending a certified letter to the Employee Grievance Committee care of Di Fante. Di Fante refused to process Donlan's grievance further or even to accept the letter. We believe that these un rebutted facts establish an actual conflict of interest which made a charade of the process for considering Donlan's grievance. This unacceptable intertwining of management/union interests constitutes a wrongful interference with an employee's protected rights.^{5/}

Based on the record, and in particular this evidence of conflict of interest and collusion, we approve the Hearing Examiner's conclusion that the County violated subsections 5.4(a) (1) and (2) when it permitted Di Fante to participate as a personnel assistant in the handling of Donlan's grievance at the same time Di Fante served as an officer of Council #10. See, e.g., Miranda Fuel, 140 NLRB 181, 51 LRRM 1584 (1962). Similarly, we hold that Council #10 breached its duty of fair representation when it permitted Di Fante as its president to refuse to process Donlan's grievance at the same time Di Fante served as the County's personnel assistant handling the grievance. City of Union City

^{4/} In another grievance proceeding, a different labor organization representing a different unit of County employees challenged the practice of paying new employees at the prior year's rate. An arbitrator sustained the grievance.

^{5/} We need not decide whether Di Fante was, in a technical sense, a managerial executive in order to find that her actions with respect to Donlan's grievance were wholly inappropriate. We also need not decide, since the parties have not litigated this issue, whether Di Fante was a confidential employee. Finally, we also reject the argument of Di Fante and Council #10 that they had stipulated with the County that Di Fante did not perform any managerial or supervisory functions. The record does not contain any such stipulation and even if it did, it would not bind Donlan since she did not also enter the alleged stipulation.

and F.M.B.A. Local No. 12 and Wesley Spell, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982); cf. In re County of Camden and Registered Prof. Nursing Unit #1 and Camden Council #10, NJCSA, D.R. No. 81-3, 6 NJPER 415 (¶11209 1980) (Director of Representation finds that Di Fante and Council #10 had acted irresponsibly and arbitrarily in the processing of grievances).^{6/}

The County has not filed Exceptions to the Hearing Examiner's determination that the County violated subsection 5.4(a)(1) when it laid off Donlan in September, 1979 and then promoted another employee to a senior planner position in October, 1979. For the reasons stated in the Hearing Examiner's report, we approve that determination.^{7/}

We turn now to the proper remedy for the violations we have found. We, of course, have broad discretion in fashioning a remedy which will make an aggrieved party whole and effectuate the purposes of the Act. Galloway Twp. Bd. of Ed. v. Galloway Twp. Ass'n of Ed. Sec'ys, 78 N.J. 1 (1978). With the following modifications, we approve the recommended remedy.

^{6/} In their Exceptions, Di Fante and Council #10 claim that a union trustee had been fired for not completing his work assignments because he had spent too much time handling a Donlan grievance. This contention is not supported by the record. In any event, the mere fact that a majority representative processes one grievance does not mean that it may arbitrarily, discriminatorily, or in bad faith fail to process another.

^{7/} We also find a violation of subsection 5.4(a)(3) as a result of these personnel actions since there is a clear causal connection between Donlan's protected activity in processing a grievance and the County's subsequent punitive actions. In the absence of supporting evidence, however, we dismiss those portions of the Complaint alleging violations of subsections 5.4(a)(4), (5), (6), and (7), and (b)(3), (4), and (5).

The Hearing Examiner recommended, based on the conflict of interest he found, that Di Fante should be barred from maintaining her position as a Council #10 officer while continuing to hold her position as personnel assistant. We modify this portion of the recommended order to bar the County and Council #10 from permitting Di Fante to act both as a personnel assistant and as a Council #10 officer with respect to specific grievances of employees whom Council #10 represents.

The Hearing Examiner also recommended that Council #10 be ordered to cease and desist from refusing to process the grievances of its employees, specifically Therese Donlan. Under our Act, a majority representative has a statutory obligation to initially present a unit member's grievance to a public employer and a duty of fair representation to refrain from acting arbitrarily, discriminatorily, or in bad faith in deciding whether to process that grievance further. In re New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979). We will modify the proposed cease and desist order in accordance with this statement of the law. We will also require Council #10 to notify unit members of its violation and the remedy ordered.

Donlan has excepted to the Hearing Examiner's failure to award her the amount -- \$250 -- she spent to take her claim concerning salary to arbitration after Di Fante refused to process it. The contract between the County and Council #10 requires Council #10 to pay one-half the cost of arbitration. After Donlan's grievance was denied, the County agreed to go to arbi-

tration, despite Council #10's unwillingness to do so on behalf of Donlan, if Donlan paid the \$250 necessary to cover Council #10's share of the costs. Donlan paid it. We believe that Council #10's breach of the duty of fair representation entitles Donlan to reimbursement for an expense necessary to assure her untainted presentation and consideration of her grievance.

The Hearing Examiner also ordered the County to reimburse Donlan for the approximately two weeks' salary she lost in September 1979 as a result of her lay-off in violation of subsection 5.4(a)(1). Donlan excepts to the Hearing Examiner's finding that she was rehired as an assistant planner. She claims she was in fact rehired as a planner trainee at a salary \$2,000 below what she was making when she was laid off. Further, she asserts that while the County paid her back pay for six of the eight weeks she was laid off, it did so at the planner trainee salary rate. She asks us to adjust the recommended back pay award accordingly. We agree with Donlan that she was rehired as a planner trainee rather than an assistant planner. However, we disagree, for the following reasons, with Donlan's assertion that she is entitled to back pay at the assistant planner salary.

The record reveals that on August 27, 1979, Carol O'Neil, a landscape architect with the County, was advised by the New Jersey Department of Civil Service that she was being laid off. O'Neil was further advised that she had special reemployment rights ["bumping"] to the assistant planner position previously held by Donlan. O'Neil exercised these rights and bumped Donlan

from her position in September 1979. Donlan was then terminated from County employment, the County having informed her there were no vacancies in the planning department.

On October 1, 1979, the County hired Steven Leone, a new employee, in the position of planner trainee. Donlan protested that she was entitled to this position. On November 25, 1982, Donlan was rehired as a planner trainee. Donlan, however, believed she was entitled to the higher salary she had received prior to being bumped by O'Neil. The County, as a result of its own administrative investigation, determined that Donlan was entitled to back pay as a planner trainee for the period beginning October 1, 1979, the date Leone was improperly hired as a planner trainee in place of Donlan. Donlan was not satisfied with this result and proceeded to arbitration against the County.

Donlan testified that at some unspecified date, O'Neil was reinstated to her landscape architect position. Donlan further testified that she requested to be put back in her then vacant assistant planner position, but that her requests to the County went unanswered. Donlan subsequently left the employ of the County.

Since it appears from this tangled web of events that Donlan's being bumped from her assistant planner position occurred as a result of Civil Service regulations, we reject Donlan's assertion that she is entitled to back pay as an assistant planner for the entire period she was out of that title. After being

bumped, Donlan was entitled to bump into an appropriate position, in this case a planner trainee position, until such time as an assistant planner vacancy was filled. The County violated Donlan's rights not as a result of the decision to bump her from her assistant planner position, but rather as a result of its failure to bump her into an available planner trainee position. We therefore find the Hearing Examiner's recommended back pay award covering the two week period from the date of her improper layoff to the date Leone was hired to be appropriate.

It further appears that once O'Neil was reinstated to her previous position and had vacated the assistant planner position, Donlan herself was entitled to reinstatement as an assistant planner. Accordingly, we will order that the County reimburse her for the salary she would have received had she been properly reinstated as an assistant planner.

Donlan finally requests that if Council #10 arbitrates and prevails upon the same claim that AFSCME arbitrated and prevailed upon and that Donlan presented in her grievance, then the County should be ordered to pay her the salary differential due between August 7, 1978 and September 24, 1979. In order to insure that Donlan is made whole, we will include such a provision in our order.

ORDER

IT IS HEREBY ORDERED that the Camden County Board of Freeholders:

1) cease and desist from allowing Mildred Di Fante to act as a personnel assistant with respect to Council #10 employee

grievances at the same time she serves as an officer of Camden Council #10, NJCSA.

2) cease and desist from interfering with the exercise of protected rights of its employees by laying off or failing to promote or reinstate its employees because they file grievances or otherwise seek to enforce their claimed contractual rights;

3) cease and desist from discriminating in promoting, laying off, or reinstating employees to discourage employees in the exercise of the rights guaranteed to them by the Act;

4) preclude Mildred Di Fante from acting as a personnel assistant with respect to Council #10 employee grievances at the same time she serves as an officer of Camden Council #10, NJCSA;

5) pay Therese Donlan the salary she lost during the period she was illegally laid off by subtracting the amount of back pay for that layoff she has already received from the amount of salary she would have received as a planner trainee had she not been laid off, together with 12% interest;

6) pay Therese Donlan the salary she lost as a result of not being reinstated in the position of assistant planner once Carol O'Neil left the position, together with 12% interest;

7) in the event Council #10 arbitrates and prevails upon the same claim that AFSCME arbitrated and prevailed upon and Donlan presented in her grievance, pay Therese Donlan the salary differential she would have been entitled to between August 7, 1978 and September 24, 1979, together with 12% interest;

8) 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 County's authorized representative, shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced, or covered by other material; and

9) Notify the Chairman of the Commission within twenty (20) days of receipt what steps it has taken to comply with this order.

IT IS HEREBY ORDERED that Camden Council #10, NJCSA:

1) cease and desist from violating its duty of fair representation by refusing to present a unit member's grievance initially to a public employer and by acting arbitrarily, discriminatorily, and in bad faith in deciding whether to process that grievance further;

2) cease and desist from allowing Mildred Di Fante to act as an officer of Council #10 in handling grievances at the same time she works as an assistant personnel officer;

3) pay Therese Donlan the \$250 she spent to file for arbitration of a grievance which Council #10, in violation of its duty of fair representation, had refused to process, together with 12% interest;

4) preclude Mildred Di Fante from acting as an officer of Council #10 with respect to employee grievances at the same time she works as a personnel assistant;

5) post in all places where Council #10 customarily posts notices to employees in its unit, copies of the attached notice marked as Appendix "B." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof, and, after being signed by Council #10's authorized representative, shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by Camden Council #10 to ensure that such notices are not altered, defaced, or covered by other material, and;

6) Notify the Chairman of the Commission within twenty (20) days of receipt what steps Council #10 has taken to comply with this order.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Newbaker, Hipp, Suskin, Butch and Hartnett voted for this decision. Commissioner Graves abstained. None opposed.

DATED: Trenton, New Jersey
February 16, 1983
ISSUED: February 17, 1983

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 cease and desist from allowing Mildred Di Fante to act as a personnel assistant with respect to Council #10 employee grievances at the same time she serves as an officer of Camden Council #10, NJCSA.

WE WILL cease and desist from interfering with the exercise of protected rights of our employees by laying off or failing to promote or reinstate our employees because they file grievances or otherwise seek to enforce their claimed contractual rights.

WE WILL cease and desist from discriminating in promoting, laying off, or reinstating employees to discourage employees in the exercise of the rights guaranteed to them by the Act.

WE WILL preclude Mildred Di Fante from acting as a personnel assistant with respect to Council #10 employee grievances at the same time she serves as an officer of Camden Council #10, NJCSA.

WE WILL pay Therese Donlan the salary she lost during the period she was illegally laid off by subtracting the amount of back pay for that layoff she has already received from the amount of salary she would have received as a planner trainee had she not been laid off, together with 12% interest.

WE WILL pay Therese Donlan the salary she lost as a result of not being reinstated to the position of assistant planner once Carol O'Neil left that position, together with 12% interest.

WE WILL, in the event Council #10 arbitrates and prevails upon the same claim that AFSCME arbitrated and prevailed upon and Donlan presented in her grievance, pay Therese Donlan the salary differential she would have been entitled to between August 7, 1978 and September 24, 1979, together with 12% interest.

CAMDEN COUNTY BOARD OF FREEHOLDERS
(Public Employer)

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,
429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

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 all employees represented by Council #10, NJCSA that:

WE WILL cease and desist from violating our duty of fair representation by refusing to present a unit member's grievance initially to a public employer and by acting arbitrarily, discriminatorily, and in bad faith in deciding whether to process that grievance further.

WE WILL cease and desist from allowing Mildred Di Fante to act as an officer of Council #10 in handling Council #10 grievances at the same time she works as an assistant personnel officer on these grievances.

WE WILL pay Therese Donlan the \$250 she spent to file for arbitration of a grievance which Council #10, in violation of our duty of fair representation, had refused to process, together with 12% interest.

WE WILL preclude Mildred Di Fante from acting as an officer of Council #10 with respect to Council #10 employee grievances at the same time she works as a personnel assistant on these grievances.

CAMDEN COUNCIL #10, NJCSA

Public Employee Representative

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,
429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

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

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and CAMDEN COUNCIL #10, NJCSA,
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Respondents,

-and-

Docket No. CI-80-3-32

THERESE M. DONLAN,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Camden County Board of Freeholders committed an unfair practice when they allowed the Assistant Personnel Director Mildred DiFante to serve as the President of the designated majority representative, Camden Council #10 since she functioned in the County as a high-level supervisor if not a managerial executive and, accordingly, her serving simultaneous positions constituted a violation of N.J.S.A. 34:13A-5.4(a)(2).

It was also found that Camden Council #10 violated subsection (b)(1) when it failed to properly represent the individual who brought the instant charge.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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Docket No. CI-80-3-32

THERESE M. DONLAN,

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Appearances:

For Camden County Board of Freeholders
Vincent J. Paglione, First Assistant County Counsel

For Camden Council #10, NJCSA
Carmen and Mills, Esqs.
(Joseph Carmen, Esq.)

For the Charging Party
Therese M. Donlan, Pro Se

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On August 8, 1979, Therese M. Donlan, an individual, filed an Unfair Practice Charge with the Public Employment Relations Commission (Commission) alleging Mildred DiFante, President of Camden Council No. 10, NJCSA, engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(b) (1), (3) and (4) ^{1/} in that (1) Mildred DiFante's holding simultaneous positions as both president of Council 10

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; (3) Refusing to negotiate in good faith with a public employer if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

and Personnel Assistant for the County serves to restrain employees in their exercise of rights in that "employees of the County who are members of Council 10 hesitate to follow up on grievances which she ignores ...for fear of some type of retribution by her in her position in the Personnel Department. There is a conflict of interest in DiFante's holding the two capacities." (2) DiFante, president of the Board of Trustees of Council #10 failed to process a grievance submitted by the Charging Party regarding a salary dispute of February 13, 1979. (3) DiFante and Ronald Kerins, Camden County Administrator, failed to provide a salary increase pursuant to the contract when the Charging Party was given a promotion. Respondents advised Charging Party that a policy exists whereby any title which is vacant on January 1 does not receive the negotiated salary increase. When the Charging Party asked to see a copy of that policy she was told it was not a written policy and further was never furnished a copy of the contract by either the County or the Association. It was also alleged that Donlan's shop steward, Michael Geddin, accompanied Donlan to the meeting with Kerins and DiFante but was not permitted by either of these parties to be present at the meeting.

On November 28, 1979, Donlan filed two amendments to her original charge wherein she named the Camden County Board of Freeholders, and its agents as well as Camden Council 10 and DiFante as Respondents. It was specifically alleged that 1) since the time that the original unfair practice charge was filed the County had, through its agents, made threats to her to drop the instant action.

2) that she had made formal applications to have her position of Assistant Planner upgraded to Senior Planner since she performed higher level work than was required by her job description. During the time period in question, there was an opening for the position of Senior Planner. Donlan took the test for this position, came in number one but never got the job. The person who came in number two was hired on October 29, 1979, yet that person had three years less seniority. 3) At the same time Donlan received a notice of layoff and in fact was laid off from September 1979 until November of 1979. Donlan claimed that the County's action vis-a-vis the denial of the higher classification and the subsequent layoff were designed to interfere with her exercise of protected rights.

It was claimed that the County violated N.J.S.A. 34:13A-5.4(a) (1), (2), (3), (4), (5), (6) and (7) and the Association violated §5.4(b) (1), (3), (4) and (5).

It appearing that the allegations of the charge if true

1/ These subsections 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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit or complaint or given any information or testimony under this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (7) Violating any of the rules and regulations established by the commission."

might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 21, 1981. Hearings were held on January 19 and 20, 1982, before the undersigned at which time all parties were given an opportunity to present evidence, examine and cross-examine witnesses, argue orally and present briefs. ^{3/}

It is noted that neither Camden County nor Council 10 produced witnesses or introduced any evidence at this hearing. The findings of fact below are based entirely upon the testimony of Therese Donlan, the Charging Party

Therese Donlan served as a Planner Trainee for the County. On January 5, 1979, she received notice, via a Civil Service CS-6 form that she had received a promotion to the title of Assistant Planner. The form was signed by Donlan's department head, Joseph Patermo. The form indicated that her salary would go from \$10,415 to a new base salary of \$13,467. Donlan signed the form and it was returned to her on February 13, 1979, after being processed by the Department of Personnel. However, the typed in base salary of \$13,467 was struck and written in by hand was the salary of \$12,242.

The contract between Council 10 and the County contains a grievance procedure that ends in binding arbitration. The first step of the grievance procedure provides that the "employee shall take up the grievance or dispute with the immediate supervisor within five working days of its occurrence." In accordance with this provision, on February 14, 1979 Donlan sent a memo to her

^{3/} Although both the County and Council 10 and Mildred DiFante expressed an interest in filing briefs in this matter, neither of them has done so.

supervisor Patermo noting her objection to this alteration of her salary as expressed on the CS-6 form. The only response that Donlan ever received in reference to this "Notice of Dispute" was that Patermo told Donlan that he had apprised Mildred DiFante, the Personnel Assistant for the County, of the letter. Donlan then contacted DiFante asking her about this incident. She also asked DiFante to provide her with a copy of the contract between Council 10 and the County. A copy of it was provided but there was no list of any salaries in the contract. Donlan then asked DiFante to provide her with a copy of the salary schedule. This was denied her. DiFante would only show Donlan her own salary as stated in the County records. Donlan testified as to how she went back and forth from DiFante to several county officials looking for a copy of the salary schedules but was never able to obtain one.

Donlan had a meeting with DiFante and the County Administrator Ronald C. Kerins wherein she complained about how her new salary was reduced on the CS-6 form. Donlan went to this meeting accompanied by her shop steward. He was not allowed to attend this meeting by DiFante and Kerins. But DiFante never made clear whether her position at this meeting was as Council president or as representative of the County. It was explained to Donlan that it was a county policy that when a position is vacant at the first of the year anyone who is hired to fill that vacancy will be paid at the prior year's salary and not the current salary under the contract. DiFante acknowledged this was not part of the written contract but claimed this was an oral understanding between Council

10 and the County.

Donlan then attempted to appeal her grievance on the salary. She sent a certified letter to DiFante, addressed to the Employee Grievance Committee, care of DiFante. DiFante refused to accept the letter or further process Donlan's grievance. Donlan began an extensive letter writing campaign to County officials and made numerous requests to any number of people in the County administration but the Association never pursued her grievance. ^{4/}

Donlan also claimed that she should have been paid at the rate of a Senior Planner. In May of 1979 she applied to Civil Service to have her position upgraded. After her application was denied by the County, Civil Service conducted a desk audit upon the work of Donlan and determined that she was not doing work at the Senior Planner level and denied the request.

In September 1979 Mrs. Donlan was laid off. A few weeks later the County hired another employee into the planning department at a Planner Trainee level. Donlan appealed this action to the County and in November of 1979 Donlan was rehired as an Assistant Planner. She was also awarded backpay, retroactive to the time that the County hired this other employee for, approximately six of the eight weeks she was laid off. She was not paid for the approximately two weeks that the position was vacant.

Finally, the County had an opening for a Senior Planner in Transportation. A Civil Service test was conducted and Donlan came in first on the test. She was passed over and on October 29, 1979, the individual who came in second on the test was appointed to the position.

^{4/} It is noted that another union, AFSCME, which represented County employees in a different unit, brought this same issue of paying new employees at the prior year's pay rate to arbitration and was successful in that proceeding.

It is significant that on January 10, 1980 (after the initial charges were filed), the County, through the office of the County Counsel, agreed to bring her outstanding grievances and charges against the County to arbitration. The matters included in the agreement were "the 10% increase in Assistant Planner salary retroactive from August 7, 1978 to May 21, 1979, to compensation as a Senior Planner from May 22, 1979 to September 24, 1979, and appointment to Senior Planner Transportation as permanent employee effective October 29, 1979." No mention was made of the approximately two weeks' back salary that Donlan never received when she appealed her layoff.

At the time, the County agreed to waive all timeliness requirements and agreed to allow Ms. Donlan to bring these matters to arbitration. However, Ms. Donlan left the employ of the County and abandoned the arbitration on her own.

* * * * *

In Jeffrey Beale and the N.J. Tpk Auth, P.E.R.C. No. 81-64, 6 NJPER 570 (¶11284 1980), affm'd App. Div. N.L. A-1263-80T3 (10/31/81) the Commission held "we do not believe that an individual employee in the absence of any allegations of collusion or unfair representation by the majority representative can use the unfair practice forum to litigate an alleged breach of a collective negotiations agreement unrelated to union activity. The violation of the duty to negotiate terms and conditions of employment implied by such an allegation is more appropriately asserted by the majority representative." Here DiFante's dual roles by their very nature

smack of collusion and are violative of §5.4(a)(5). In this regard it is significant that the County agreed to take all of Donlan's grievances to arbitration to resolve her claimed contract rights. To that extent the County's actions have corrected the harm in this situation as that harm relates to Donlan as an individual.

As to Donlan's claim that she should be paid as a Senior Planner because she was doing Senior Planner work, her lower salary as an Assistant Planner was the result of a desk audit and a Civil Service decision. The appeal of that decision belongs before Civil Service. This is not a matter for the Commission.

Donlan did establish a prima facie case to constitute a §5.4(a)(1) violation.

Donlan introduced many documents relating to her outstanding performance on the job, yet in September of 1979 she was laid off and shortly thereafter another person was hired to take her place and the very next month on October 29, 1979, she was passed over when the County promoted an employee to the vacant Senior Planner position. Both actions came on the heels of Donlan's difficulties with DiFante.

Proof of motive of anti-union animus is not an essential element to establish an independent violation of §5.4(a)(1).

In re New Jersey College of Medicine and Dentistry, P.E.R.C. No. 80-11, 4 NJPER 421 (1978); In re City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (1978), affm'd App. Div. Docket No. A-3562-77 (unpublished opinion 1979); In re New Jersey Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Given Donlan's out-

standing record as an employee, her run-in with DiFante, who controlled both the County Personnel Office and the Association, and Donlan's subsequent letter writing campaign, there is a clear causal connection between Donlan's exercise of her protected rights and her being passed over. In this regard her layoff in September is also significant. She was reinstated only after an internal administrative hearing and the hearing officer who found she should be reinstated with backpay was not part of Mildred DiFante's personnel office. Rather he was with the Office of the County Counsel.

The County had the opportunity to present evidence as to any business justification they may have had for passing over Donlan but they declined to do so.

As to the claim relating to the Association's duty of fair representation, an Association "must exercise reasonable care and diligence in investigating, processing and presenting grievances; it must make a good faith judgment in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitrability for similar grievances of equal merit." N.J. Turnpike Employees Union Local 194 IFPTE, AFL-CIO and Kaczmarek, P.E.R.C. No. 80-38, 5 NJPER 112 (¶10215 1979).

DeFante systematically avoided Donlan and ignored her registered letters and never even processed her grievances. It was established that DiFante as Personnel Assistant was the second highest personnel officer in the County. It was not established at the hearing what Mildred DiFante's exact duties were but DiFante

clearly held a high level administrative position while simultaneously serving as President of Council #10. ^{5/}

Pursuant to §5.3 managerial executives may not "form, join or assist" employee associations. Subsection 34:13A-3(f) defines a managerial executive:

Managerial executive of a public employer means...persons who are charged with the responsibility of directing the effectuation of such management policies and practices...

The original grievance brought by Donlan in effect challenged the County policy that new employees filling vacant positions would not receive a salary raise after January 1 of the previous year.

DiFante, as Personnel Assistant, applied this policy in accordance with the County position. Undeniably such an application was at odds with the interests of County employees. DiFante's actions, in this instance at least, were the actions of a managerial executive. See Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980), where the Commission established a test for the above definition within the representation context. In arriving at this test, the Commission looked to the NLRB.

The NLRB and reviewing courts, have adopted several tests to determine managerial executives. ^{6/} The pertinent test here is "those who are so closely aligned with management and its labor policies as to place the employees in a position in a potential conflict of interest between the employer and their fellow workers."

^{5/} There was a representation made by the attorney for Council #10 and DiFante that DiFante no longer performs supervisory functions for the County. This representation is not evidence and cannot be considered here.

^{6/} See Lullo v. Int'l Assn of Fire Fighters, 85 N.J. 409 (1970) as to the appropriateness of looking to the NLRB.

See e.g. NLRB v. Bell Aerospace Co., 416 U.S. 267, 85 LRRM 2945 (1974); Illinois State Journal Register, Inc. v. NLRB, 412 F.2d 37, 71 LRRM 2668 (7th Cir. 1969); In re Palace Laundry & Dry Cleaning Corp, 75 NLRB No. 40, 21 LRRM 1039 (1947); In re Kitsap Cty Auto Dealers Ass'n, 124 NLRB 123, 44 LRRM 1560 (1959); In re General Dynamics Corp, 215 NLRB No. 124, 87 LRRM 1705 (1974); In re Textron, Inc., 219 NLRB No. 42, 89 LRRM 1664 (1975). See also R. Gorman, Basic Text on Labor Law, p. 37-39 (1976). DiFante's position that promoted employees are paid on the prior year's salary structure even though there is no mention of this in the contract clearly shows the inherent conflict in her holding the two positions.

The undersigned is satisfied that, under the statutory definition and the NLRB tests which grew out of its administrative experience, Mildred DiFante functions as a managerial executive in the administration of the County's labor relations policies, and the County dominated and interfered with the administration of Council #10 NJCSA when it permitted DiFante to serve in both the County and Employee Association administrations.

Moreover, it is not necessary to make a definitive finding that DiFante is a managerial employee to find the County violated §5.4(a)(2). The Act states "Public employers, their representatives or agents are prohibited from...dominating or interfering with the...administration of any employee organization."

The NLRB has continually found that it is unlawful interference when an employer permits a high-level employee to actively participate in union affairs. See, Welsbach Electrical Corp, 236

NLRB No. 63, 99 LRRM 1271 (1978) where the employer violated §8(a)(2) of NLRA when it interfered with the administration of a union by permitting high-level supervisors to become and remain officers of the union while simultaneously permitting them to hold their positions as supervisors. See also Abilene Sheet Metal Contractors Ass'n, 236 NLRB No. 94, 95 LRRM 1129 (1977); Western Exterminator Co., 223 NLRB No. 181, 92 LRRM 1162 (1976). ^{7/}

It is clear here that the County interfered with its employee Therese Donlan in her exercise of protected rights by permitting Mildred DiFante to maintain her position of President in the Association while continuing to hold a position of high-level supervisor.

I further recommend that the Commission find the Association committed a violation of §5.4(b)(1) for DiFante's refusal to process Donlan's grievances violated the Association's duty of fair representation. A breach of the duty of fair representation occurs only when a union's conduct is arbitrary, discriminatory or in bad faith. Sanginaro v Attorney General, State of New Jersey, 87 N.J. 480 (1981); City of Union City and Wesley Spell, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982). Section 5.3 provides that a majority representative shall be responsible for representing the interests of all employees without discrimination. No reason was offered by the Association as to why Donlan's grievances were not processed by

^{7/} But see, Nassau and Suffolk Contractors Ass'n, Inc., 118 NLRB 174, 40 LRRM 174, 40 LRRM 1146 (1957) where although a violation was found, it was recognized that in certain industries certain low-level supervisors, i.e. formen, may serve actively in unions without violating §8(a)(2). In this regard the Commission held in Bergen Cty Bd. of Chosen Freeholders and Bergen Cty CSA Council 5, P.E.R.C. No. 69 (1971) that a low-level supervisory employee of the county who did not have the power to hire, fire, discipline or effectively recommend same had the right to serve as council president.

the Association and accordingly it must be found that such failure was by reason of bad faith due to DiFante's conflicting positions. ^{8/}

In fashioning a remedy here it must be borne in mind that the employer did attempt to resolve Donlan's complaint against the County via arbitration. The Act provides at §5.3 that grievance procedures established by agreement between the public employer and the representatives organization shall be utilized for any dispute covered by the terms of such agreement. Given Donlan's refusal to avail herself of arbitration in contravention of the statutory scheme, I do not believe that a "make whole" remedy as to Donlan salary disputes would serve the best interests of that statutory scheme.^{9/} The arbitration agreement however did not resolve the salary for the approximately two weeks that Donlan did not receive as a result of the County's own internal hearing. I will therefore recommend that the Commission issue the following order.

Recommended Order

The Respondent Camden County cease and desist

1) from interfering with the exercise of protected rights of its employees by failing to promote its employees when they file grievances or otherwise enforce their contractual rights.

2) from interfering with the administration of any employee organization by permitting Mildred DiFante from holding a high level supervisory and/or managerial position in the County while serving as President of Camden Council #10 NJCSA.

^{8/} See In the Matter of Cty of Camden and Registered Prof. Nursing Unit #1 and Camden Council #10, NJCSA, D.R. No. 81-3, 6 NJPER 415 (¶11209 1980) where the Director of Representation found that the president of Council #10 DiFante failed to provide responsible representation and acted in an arbitrary manner in her handling of grievances and representation of employees.

^{9/} The Commission has long held that the utilization of arbitration is to be encouraged and the Commission will defer to arbitration in the proper instance.

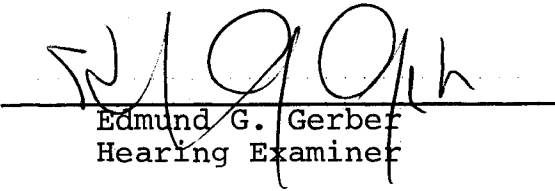
3) Order Mildred DiFante as an employee of the Camden County Board of Freeholders to cease and desist from maintaining a high level managerial and/or supervisory position with the County while at the same time serving as President of Camden Council #10 NJCSA.

4) Reimburse Therese Donlan for approximately two weeks' salary for the period in September 1979 when Donlan was laid off but was never reimbursed.

5) Order the Respondent Camden Council #10 to cease and desist from interfering with employees in the exercise of protected rights by refusing to process the grievances of its employees, specifically Therese Donlan.

6) Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notices on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, and, after being signed by the Respondents' authorized representatives, shall be maintained by them for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondents to ensure that such notices are not altered, defaced, or covered by other materials.

7) Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondents have taken to comply herewith.


Edmund G. Gerber
Hearing Examiner

Dated: October 25, 1982
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 interfere with the exercise of protected rights of our employees by failing to promote our employees when they file grievances or otherwise enforce their contractual rights.

WE WILL NOT interfere with the administration of any employee organization by permitting Mildred DiFante from holding a high level supervisory and/or managerial position in the County while serving as President of Camden Council #10, NJCSA.

WE WILL order Mildred DiFante as an employee of the Camden County Board of Freeholders to cease and desist from maintaining a high level managerial and/or supervisory position with the County while at the same time serving as President of Camden Council #10 NJCSA.

WE WILL reimburse Therese Donlan for approximately two weeks' salary for the period in September 1979 when Donlan was laid off but was never reimburse.

CAMDEN COUNTY BOARD OF FREEHOLDERS

(Public Employer)

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 James Mastriani, Chairman, Public Employment Relations Commission, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.