

P.E.R.C. NO. 85-104

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY,

Public Employer,

-and

Docket No. RO-83-174

LOCAL 1158 INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS,
AFL-CIO,

Petitioner,

-and-

ESSEX COUNTY EMPLOYEES ASSOCIATION,

Intervenor.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, dismisses a Petition for Certification of Public Employee Representative filed with the Public Employment Relations Commission by Local 1158, International Brotherhood of Electrical Workers, AFL-CIO. The petition sought to sever all security officers from a county-wide unit of employees represented by the Essex County Employees Association. In the absence of exceptions and in agreement with the Hearing Officer, the Chairman holds that the Petitioner did not establish that the Association failed to provide responsible representation to the security guards and that the severance from the existing county-wide unit was inappropriate.

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Intervenor.

Appearances:

For the Public Employer, Elaine K. Hyman, County
Counsel

For the Petitioner, Gerald E. Fusella, Esquire

For the Intervenor, Thomas E. Durkin, Esquire

DECISION AND ORDER

On June 17, 1983, Local 1158, International Brotherhood of Electrical Workers, AFL-CIO ("Petitioner") filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission. The Petitioner seeks to sever all security officers from a county-wide unit of employees represented by the Essex County Employees Association ("Association"). The Petitioner alleges that the Association has failed to provide responsible representation to the guards and the Association denies

the allegation. The County of Essex ("County") the employer of the employees in question takes no position.

On December 21, 1983, the Director of Representation issued a Notice of Hearing. On April 26 and 27, 1984, Hearing Officer Marc F. Stuart conducted a hearing. The parties examined witnesses and introduced documents. Both the Petitioner and the Association filed post-hearing briefs.

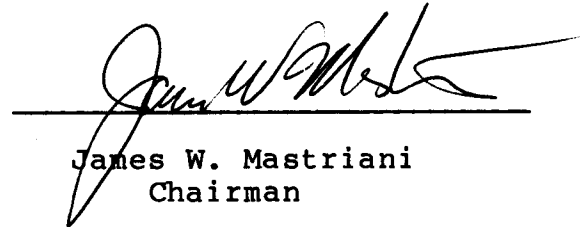
On December 19, 1984, the Hearing Officer issued his report and recommended decision. H.O. No. 85-8, 11 NJPER 36 (Para 16020 1984). The Hearing Officer found that the incumbent Association has provided responsible representation and a stable organization to the petitioned for security officers and that their severance from the existing county-wide unit was inappropriate. Exceptions, if any, were due on or before January 2, 1985. None of the parties filed exceptions or requested an extension of time.

Acting under authority delegated to the Chairman by the full Commission, I have been delegated the authority to decide this case. I have reviewed the record. The Hearing Officer's findings of fact are accurate. I adopt and incorporate them here. Based on the findings of fact, and in the absence of exceptions,^{1/} I agree with the Hearing Officer that the petitioned-for unit, under the circumstances of this case, is inappropriate.

1/ Further, I note that there is no claim that the security guards have a conflict of interest with the other employees.

ORDER

The Petition for Certification of Public Employee
Representative is dismissed.



James W. Mastriani
Chairman

DATED: Trenton, New Jersey
April 22, 1985

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

In the Matter of

ESSEX COUNTY,

Public Employer,

-and-

LOCAL 1158 INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO,

Docket No. R0-83-174

Petitioner,

-and-

ESSEX COUNTY EMPLOYEES
ASSOCIATION,

Intervenor.

SYNOPSIS

A Hearing Officer recommends the dismissal of a Petition for Certification of Public Employee Representative filed by Local 1158, International Brotherhood of Electrical Workers, AFL-CIO, seeking to sever from an existing county-wide unit represented by the Essex County Employee's Association, all security officers and senior security officers employed by the County of Essex. The Hearing Officer concludes that the Association has provided responsible representation and a stable organization to security officers.

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

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

In the Matter of

ESSEX COUNTY,

Public Employer,

- and -

LOCAL 1158 INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO,

Docket No. R0-83-174

Petitioner,

- and -

ESSEX COUNTY EMPLOYEES
ASSOCIATION,

Intervenor.

Appearances:

For the Public Employer,
Elaine K. Hyman, County Counsel

For the Petitioner
Gerald E. Fusella, Esquire

For the Intervenor
Thomas E. Durkin, Esquire

HEARING OFFICER'S
REPORT AND RECOMMENDATION

On June 17, 1983, Local 1158, International Brotherhood of Electrical Workers, AFL-CIO ("Petitioner") filed a timely petition for Certification of public employee representative, supported by an adequate showing of interest, with the Public Employment Relations Commission ("Commission") seeking certification as the exclusive representative for collective negotiations of a unit of employees employed by the County of Essex ("County"). The Petitioner seeks to

sever all security officers (guards) employed by the County from a county-wide unit currently represented by the Essex County Employees Association ("Association"). The Association is a proper party intervenor in these proceedings.

The Association maintains that the unit structure should remain unchanged. The existing unit is currently comprised of all County employees with certain specified exclusions. The County takes no position with regard to any issue involved in this matter. ^{1/}

Pursuant to a Notice of Hearing dated December 21, 1983, hearings were held before the undersigned Hearing Officer on April 26 and 27, 1984, in Newark, New Jersey, at which time all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Both Petitioner and the Association filed post-hearing briefs, the last of which was received on July 10, 1984.

FINDINGS OF FACT

Upon the entire record, the Hearing Officer finds:

1. The County of Essex is a public employer within the meaning of the New Jersey Employer-Employee Relations Act ("Act"), is subject to its provisions and is the employer of the employees who are the subject of this petition (TA-6). ^{2/}

^{1/} The County declined to participate in the hearing in this matter except to compile and introduce a list of all County negotiations units designated J-5 in evidence.

^{2/} Transcript designations are as follows: "TA" refers to the transcript dated April 26, 1984; "TB" refers to the transcript dated April 27, 1984.

2. Local 1158, I.B.E.W., AFL-CIO and the Essex County Employees Association are employee organizations within the meaning of the New Jersey Employer-Employee Relations Act ("Act") and are subject to its provisions (TA-5-6).

3. The Association currently represents all security officers in its county-wide unit.

4. The Petitioner seeks a unit including all security officers and senior security officers.

5. The Association alleges it has provided responsible representation to security officers, and that its county-wide unit is stable; and, accordingly, has refused to consent to a secret-ballot election among the security officers. Thus, there is a question concerning representation, properly before the Hearing Officer, for Report and Recommendations. 3/

6. Joseph DeLeva, a security officer at Cedar Grove Hospital Center (TA-16) testified he is a member of the Essex County Employees Association (TA-17), and that he filed, with Daniel Fortunato, his then Association Representative, an oral grievance relating to shift transfers, which Fortunato never processed (TA-19-20). DeLeva, however, testified on cross-examination that Fortunato did meet with his (DeLeva's) superior, as his employee representative, to discuss the proposed shift changes (TA-67-70). Upon earlier cross-examination, DeLeva testified, although he never heard anything further from

3/ It should be noted that the issue present in the instant matter was previously raised and litigated between the same parties and is reported in the matter of In re Essex County, H.O. No. 80-19, 6 NJPER 336, (¶ 11168 1980), aff'd D.R. No. 81-61, 6 NJPER 426 (¶ 11214 1980).

Fortunato about his grievance, he (DeLeva) never followed up on it either (TA-45). DeLeva testified that he submitted a second grievance in writing to Fortunato regarding vacation time (P-1), which Fortunato did not process (TA-20-21; P-1). ^{4/} DeLeva offered additional testimony that his superior (now deceased) ordered that the security guards' uniforms be changed and that the security guards absorb the cost through their clothing allowance; that the security guards objected to this and that their superior contacted Fortunato at the Union, who indicated that he had nothing to do with this, and he would not become involved in the matter (TA-29-30). ^{5/} DeLeva further testified that Fortunato was never directly contacted for assistance in this matter (TA-30), and also that the security guards have not been asked to pay for the new uniforms (TA-32), although he (DeLeva) believes they have been delivered to his superiors (TA-31).

7. James Larkin, another Association member, testified that he filed a written grievance (P-3) over the requirement that security guards answer the telephone switchboard at the Hospital Center at Cedar Grove during the regular operator's lunch period and shift gap; but, that Fortunato never responded and the situation continues to this day (TA-74; TA-83-84; P-3). Larkin testified on cross-examination that the security guards did not want their clothing allowance spent for new uniforms, that he would have been one to get a new uniform, but that his clothing allowance has been paid to him in

^{4/} Exhibit designations are as follows: "P" refers to Petitioner's exhibits; "I" refers to Intervenor's exhibits; "C" refers to Commission exhibits; "J" refers to joint exhibits.

^{5/} The testimony offered by DeLeva in this regard is somewhat unclear.

full (TA-121). Larkin further testified that he filed a written grievance over shift and location changes in conflict with the order of seniority; but, that no action was taken by Fortunato (TA-94). However, Larkin testified on cross-examination that he really did not know whether Fortunato had, in fact, received any grievances; if he did receive them whether he took any action; and if he did receive them and took action, what the result of that action was (TA-116). Larkin testified that Director Senatore (his superior) indicated to him that Fortunato indicated to her at an open meeting between the Director and the superiors of the Security Division, that he (Fortunato) no longer represented the security guards (TA-105).

8. Anthony Giuliano, former Director of Security at the County of Essex, testified that one John Quigley, a security officer, told him (Giuliano) that he (Quigley) filed a written grievance with the Association over attendance at the Hospital Center Admissions Office, but that Fortunato never sought to adjust this grievance with him (Giuliano) (TA-125-126; TA-30-131). Giuliano further testified that Larkin and DeLeva told him that they had filed grievances with the Association (TA-131), and that he (Giuliano) had, in fact, seen the DeLeva grievance (TA-131). On cross-examination, Giuliano admitted that although he told Quigley, Larkin and DeLeva to file their grievances with the Association, he did not know whether or not they actually did so. Moreover, Giuliano indicated that although he did see the DeLeva grievance, he saw it prior in time to any subsequent filing with the Association (TA-134). Giuliano further testified that Fortunato never sought to discuss the Larkin grievance involving transfers with him

to discuss either of the two DeLeva grievances with him (TA-128-129). Giuliano testified on redirect that Fortunato was the Association representative who heard all grievances from unit members (TA-139).

9. Anthony Fortunato, the Association representative and past President (TB-7), testified that between January and October of 1983, he negotiated for Association members including security guards, a one-half hour lunch, a work break, a 6-1/2 percent pay increase, an increased clothing allowance, and an increase in certain shift differentials, all in exchange for an extra hour's work per day (TB-11). Fortunato further testified that DeLeva served with him on this negotiating committee (TB-12); and, in fact signed, along with Fortunato, the memorandum of agreement memorializing their negotiated agreement (TB-14; I-1). Fortunato testified that he negotiated with Director Senatore over Senatore's proposal to use the clothing allowance to purchase new uniforms, and that their negotiations resulted in Senatore's not using the clothing allowance for this purpose, and the employees' eventual receipt of their entire clothing allowance (TB-22-23). Fortunato testified that DeLeva presented three grievances to him in 1983 (TB-27). The first of these involved answering the telephone during the lunch hour; however, Fortunato testified that DeLeva later checked with the affected individuals, found they did not have a strong objection to this, and then withdrew the grievance (TB-28). Fortunato testified that a second grievance filed by DeLeva arose when the men were told that they had to answer the telephone all day. Fortunato indicated to DeLeva that they should not do so and spoke to Mr. Frederico, Director of Public Works, who adjusted the matter in

the grievants' favor (TB-29). Fortunato further testified that DeLeva filed one further oral grievance over vacation time he (DeLeva) believed would be denied to him; that Fortunato, anticipating an extended grievance procedure in this matter, requested that DeLeva put the grievance in writing; but that DeLeva never filed any typed or written grievance (TB-32-35). Fortunato testified he did not know James Larkin and Larkin never filed, or even attempted to file, any grievance with him (TB-36-37). Fortunato testified that he did not know John Quigley, and Quigley never filed or attempted to file a grievance with him (TB-38). Fortunato denied ever having said to anyone that the Association did not represent security guards (TB-38-39). He testified that although there were other Association representatives who worked with him, he handled all grievances personally (TB-49-50; TB-89).

Fortunato testified that in 1982, the Association established a new policy that it would give non-members the best representation it could without spending "money on them" (TB-67); however, Fortunato also testified that the situation has not yet arisen and this policy has not been implemented (TB-61; TB-71). Moreover, Fortunato testified on redirect, by way of explanation for this new policy, that in 1981 and thereabouts, the Association had been bankrupt (TB-87). ^{6/} Fortunato testified he handled all grievances from the security department

^{6/} Despite this testimony, the record suggests that the Association's financial situation in 1981 was a temporary condition. Additionally, no evidence was offered that this financial condition occasioned either inadequate representation or an unstable organization.

personally (TB-85), and that valid grievances were brought to arbitration for security guard members and non-members alike (TB-58). Fortunato testified on redirect that he never declined to investigate a grievance for any employee and he never made any distinction between members and non-members (TB-87-88). ^{7/}

BACKGROUND, ISSUE,
AND POSITION OF THE PARTIES

The Association was certified by the Commission, following a secret-ballot election in 1970, to represent certain employees of the County of Essex. ^{8/} Currently, this unit includes the titles security officer and senior security officer, which titles are the subject of the instant petition. The issue for determination here is whether the incumbent Association has provided responsible representation and a stable organization to the security officers. The Association takes the position that the unit structure should remain unchanged and denies it has failed to provide responsible representation and stability to the security officers.

^{7/} Some confusion exists in the record as to whether the Association treated non-members differently from members; however, the instant matter is capable of resolution without reaching this issue. Both DeLeva and Larkin paid dues to the Association, and there is no fee collected from non-members (TA-34; TA-85; TB-55). Thus, it follows that the issues in dispute here, at least with regard to DeLeva and Larkin, involve dues-paying members. The testimony of the third witness for the Petitioner (Giuliano) consisted of hearsay testimony that one John Quigley told him (Giuliano) that he filed a grievance. However, without Quigley's testimony, it is not possible to ascertain whether Quigley is a member of the Association or not, nor is it possible to corroborate Giuliano's testimony or subject it to cross-examination. Thus the undersigned has not considered Giuliano's testimony in this regard and, accordingly, the member/non-member issue need not be considered with regard to the Giuliano testimony.

^{8/} J-3; J-4.

ANALYSIS

The Commission has favored the formation of negotiations units along broad-based, functional lines rather than by distinct occupational groupings. In re State of New Jersey, P.E.R.C. No. 68 (1971), aff'd 64 N.J. 231 (1974). Particularly, the Commission has applied this policy in making unit determination for units of County employees. In re Board of Chosen Freeholders of the County of Burlington, P.E.R.C. No. 58 (1969); In re Bergen County Board of Chosen Freeholders, P.E.R.C. No. 69 (1972). See also In re Union County Board of Chosen Freeholders, E.D. No. 49 (1974); and In re Union County Board of Chosen Freeholders, E.D. No. 68 (1975). Furthermore, the Commission has established standards for severance of employees from appropriate collective negotiations units. In In re Jefferson Township Board of Education, P.E.R.C. No. 61 (1971), the Commission stated:

The underlying question is a policy one: assuming without deciding that a community of interest exists for the unit sought, should that consideration prevail and be permitted to disturb the existing relationship in the absence of a showing that such relationship is unstable or that the incumbent organization has not provided a responsible representation. We think not. To hold otherwise would leave every unit open to re-definition simply on a showing that one sub-category of employees enjoyed a community of interest among themselves. Such a course would predictably lead to continuous agitation and uncertainty, would run counter to statutory objective and would, for that matter, ignore that the existing relationship may also demonstrate its own community of interest.

See also, In re Warren County, D.R. No. 84-13, 9 NJPER 703 (¶ 14036 1983); In re City of Jersey City, D.R. No. 84-6, 9 NJPER 556, (¶ 14231 1983).

At the outset, it should be noted that no party to these proceedings alleges that the current unit structure is inappropriate. Instead, the instant matter involves a contention by the Petitioner that the Association has failed to provide responsible representation and a stable organization to security officers. In support thereof, the Petitioner relies on (1) the Association's failure to process and/or indifference to grievances concerning security officers, (2) a remark allegedly made by Daniel Fortunato, the then President of the Association, to Director Senatore, that the Association no longer represents security officers.

The Petitioner attempted to show that the Association has not diligently processed grievances presented by security officers. Specifically, two of the three witnesses for the Petitioner testified that they filed written (typed) grievances with the Association (P-1, P-3) and that these grievances were never processed or acted upon by the Association. ^{9/} Additionally, Petitioner's witnesses appeared to be suggesting that such has been the case with other grievances filed by security officers (TA-31), although they offered no evidence to support this suggestion.

By way of rebuttal, the Association's then President (Fortunato) testified that he personally handled all grievances filed by security officers, and that he never, prior to this hearing, saw or heard about either of the two filings testified to by Petitioner's second and third witnesses. Fortunato testified that written grievances

9/ A third witness for petitioner testified that a third Association member told him he was going to file a grievance with the Association; however, the undersigned has discounted this testimony as being unreliable hearsay, not subject to corroboration.

are a rarity and he would certainly have remembered seeing them had they been sent to him. Furthermore, in accordance with his procedures for processing grievances, he would have retained copies for a period of at least five years (TB-72-73). He indicated having no such copies in his possession. Additionally, Fortunato testified credibly that it was well known that he was the Association President, that he remain accessible to all unit members during the hours of his employment, and where a member would occasionally try to reach him by telephone and fail to do so, he would always return the call within a reasonable period of time.

In further support of his position Fortunato testified that during 1983 Josph DeLeva filed three oral grievances with him. The first involved answering the telephone during lunch hour, the second involved answering the telephone all day, and the third involved vacation time DeLeva believed would be denied him. The record establishes that the first grievance was not pursued by the grievant following Fortunato's initial inquiry into this matter. Fortunato was able to process and resolve the second grievance, apparently to everybody's satisfaction. Finally, with regard to the third grievance, Fortunato testified that, again, due to the small number of written grievances filed; and also based upon his supposition that if DeLeva had actually filed a grievance over vacation time due him that he certainly would have heard from DeLeva had the grievance not been processed and/or resolved, ^{10/} he (Fortunato) was certain that no written grievance was ever filed over the vacation time issue.

^{10/} Fortunato testified that DeLeva called him referring to a potential problem involving his accrued vacation time, and that Fortunato advised DeLeva to investigate and determine whether or not there actually was going to be a problem, and if so, to get back to him. Fortunato further testified that he never heard from DeLeva again about it and he assumed that the issue had either been resolved, or did not develop into a grievable matter.

With regard to Petitioner's allegation that Fortunato stated to Director Senatore that the Association no longer represented security officers, the undersigned cannot attach much weight to this hearsay statement where the person allegedly making the statement, is unavailable to testify and be cross-examined. ^{11/} Although the undersigned is not strictly bound by the rules of evidence, such rules are meant to be a guide, particularly with regard to the relative weight to be given to testimony. Additionally, Fortunato denied ever having made the statement attributed to him.

In analyzing the entire record, the undersigned finds that the Association has not failed to provide responsible representation and a stable organization to security officers. With regard to the latter claim, the Petitioner did not provide evidence of the Association's alleged instability. With regard to the former claim, the undersigned finds that Fortunato testified credibly that he had negotiated over the Director's proposal to utilize the clothing allowance for new uniforms and that he pursued two of the DeLeva grievances, resolving the first thorough conversation with the grievant. The second was adjusted in the grievant's favor, and Fortunato testified credibly that he never received the third in writing, as requested. Additionally, Fortunato testified credibly that he never received written grievances from Larkin and Quigley. Moreover, Petitioner failed to adequately establish that Fortunato had indicated that the Association did not represent security officers, and, in light of the attendant circumstances surrounding this issue (i.e., the hearsay nature of the alleged remark), the undersigned credits Fortunato's testimony in this regard (TB-38-90).

11/ Director Senatore is now deceased.

The record reveals that the Association has processed grievances, has gone to arbitration with regard to grievances filed by both members and non-members, and has maintained an adequate degree of visibility appropriate to its status as the majority representative for security officers employed by the County. Finally, the record indicates, without contradiction, that during the period January through October 1983, the Association negotiated, for Association members including security guards, a one-half hour lunch, a work-break, a 6-1/2% pay increase, an increased clothing allowance and an increase in certain shift differentials, all in exchange for an extra hour's work per day. Thus, affirmative representation of security officers by the Association is established.

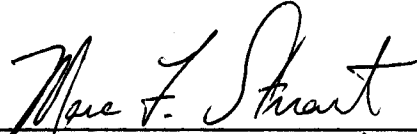
A majority representative is responsible for representing the interests of all employees without discriminating on the basis of individual differences or even organizational membership. ^{12/} Responsible representation is measured by the conduct of the Association as a whole in negotiating collective bargaining agreements, and in processing grievances. Occasional oversights or failures to act with the utmost dispatch, if inadvertent, do not amount to inadequate or irresponsible representation. Here, it appears likely that certain security officers have been disappointed with the results of certain of their grievances; however, while some results may have been

^{12/} The testimony is somewhat confused on this issue. The Association's President testified that the Association has always been non-discriminatory in its representation of members and non-members; however, he also stated that the Association, due to its financially bankrupt condition in 1981, established a policy whereby it decided not to continue to assume the cost of arbitrating non-member's grievances. However, the record appears clear that this new policy has never been implemented if for no other reason than the situation has not yet arisen. In any event, the presence vel non of such a policy is not determinative of the issues involved herein, as both of Petitioner's witnesses, who offered direct testimony to establish the Association's failure to process grievances, were Association members.

personally unsatisfactory, such is not, in any way, tantamount to inadequate representation by the Association. Moreover, although the record does not conclusively show that any errors of judgement or failures to act with dispatch were actually committed by the Association, the record, as a whole, also does not support the conclusion that if such had been the case, that they were likely to have been intentional or frequent in number.

RECOMMENDATION

Based upon the entire record, the undersigned recommends that the instant petition be dismissed.



Marc F. Stuart, Hearing Officer

DATED: December 19, 1984
Trenton, New Jersey