P.E.R.C. NO. 88-76

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CLIFTON,

Respondent,

-and- Docket No. CO-H-87-340

CLIFTON SUPERVISORS ASSOCIATION,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, dismisses a Complaint based on an unfair practice charge filed by the Clifton Supervisors Association against the City of Clifton. The charge alleged the City violated the New Jersey Employer-Employee Relations Act when it unilaterally increased the salary and benefits of its administrative analyst. The Chairman, in agreement with the Hearing Examiner and in the absence of exceptions, finds that the City had the right to unilaterally act because the Association was not the administrative analyst's majority representative.

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Charging Party.

Appearances:

For the Respondent, Sam Monchak, Esq.

For the Charging Party, Stuart Palfreyman, Association President

DECISION AND ORDER

On May 26, 1987, the Clifton Supervisors Association filed an unfair practice charge against the City of Clifton ("City"). The charge alleges the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4(a)(5),[1/] when it unilaterally increased the salary and benefits of its administrative analyst, Thomas Fenton.

1/ This subsection prohibits public employers, their representatives or agents from: (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.

On June 23, 1987, a Complaint and Notice of Hearing issued. On July 9, 1987, the City filed its Answer. It contended that Fenton was not a member of the Association's negotiations unit.

On July 29, 1987, Hearing Examiner Susan Wood Osborn conducted a hearing. The parties examined a witness and introduced exhibits. The City filed a post-hearing brief.

On February 9, 1988, the Hearing Examiner recommended that the Complaint be dismissed. H.E. No. 88-37, 14 NJPER ___ (¶_____ 1988). She concluded that the Board had the right to unilaterally increase Fenton's salary because the Association was not his majority representative.

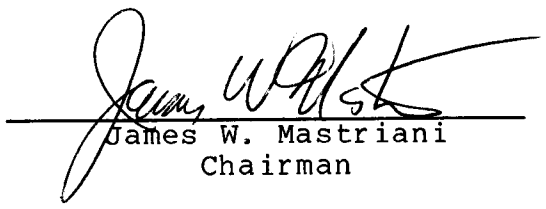
The Hearing Examiner served her report on the parties and informed them that exceptions were due on or before February 24, 1988. Neither party filed exceptions.

I have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-6) are accurate. I adopt and incorporate them here. Acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I agree that the Complaint should be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: Trenton, New Jersey
March 3, 1988

H.E. NO. 88-37

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

In the Matter of

CITY OF CLIFTON,

Respondent,

-and- Docket No. CO-H-87-340

CLIFTON SUPERVISORS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss the Complaint of the Supervisors Association, alleging that the Respondent City violated §5.4(a)(5) of the New Jersey Employer-Employee Relations Act by paying the administrative analyst a retroactive salary increase in 1986 without negotiations with the Association. The Hearing Examiner found that the Association failed to prove that the administrative analyst had ever been included in the supervisors 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. 88-37

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

In the Matter of

CITY OF CLIFTON,

Respondent,

-and- Docket No. CO-H-87-340

CLIFTON SUPERVISORS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent
Office of the City Counsel
Sam Monchak, Esquire

For the Charging Party
Stuart Palfreyman, Association President

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On May 26, 1987, the Clifton Supervisors Association ("Association") filed an unfair practice charge with the Public Employment Relations Commission ("Commission"). The Association charges that the City of Clifton ("City") violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., ("the

Act"), and specifically subsection 5.4(a)(5)[1/] by increasing Thomas Fenton's 1986 salary and benefits without negotiations with the Association.

On June 23, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On July 9, 1987, the City filed an Answer to the Complaint. It relied upon and supplemented its May 27 statement of position generally denying the allegations, and denying that Thomas Fenton is a member of the negotiations unit represented by the Association.

On July 29, 1987, I conducted a hearing in this matter.[2/] The parties were permitted to examine witnesses, present relevant exhibits, and argue orally.[3/] The City submitted a post-hearing brief on September 30, 1987.

Upon the entire record, I make the following:

1/ This subsection prohibits public employers, their representatives or agents from... (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.

2/ At the hearing, I granted the Association's motion to amend the Complaint to include a similar allegation with regard to a second employee, Anthony Saffioti, Superintendent of Public Works. The Association subsequently withdrew its amendment.

3/ The transcript from the July 29, 1987 hearing will be referred to as "T."

FINDINGS OF FACT

1. The Association is the recognized exclusive representative of the City's supervisory employees (J-1, J-2, J-3).[4/]

2. On January 19, 1981, Thomas Fenton, a former City employee, was provisionally appointed (pending civil service examination) to the title "administrative aide" in the department of public works at a salary not found on the Association salary guide (CP-2; J-5a; J-5b).

4. As a result of a Civil Service job audit, Fenton's title was reclassified to administrative analyst on June 30, 1981 (Exhibit CP-3, T-22).

5. The City's originally recognized the Association by January 3, 1980 resolution (J-1)[5/] as the exclusive representative of the City's supervisory employees, including the title "administrative clerk, public works", but not the title "administrative aide".[6/]

4/ Exhibits are designated as follows: Joint exhibits are designated as "J-"; Association exhibits are designated as "CP-".

5/ Pursuant to N.J.A.C. 19:14-6.6, I take administrative notice of the filing of a Petition for Certification by the Association and a Unit Clarification Petition filed by the City, each seeking to remove supervisors from the non-supervisory unit represented by the Clifton Employees Association. The resolution recognizing the Association is the product of those filings.

6/ It appears that the administrative clerk-public works title and the administrative aide title were not intended to be the same position.

6. In 1980, the City and the Association entered into their first collective negotiations agreement covering this unit for the period January 1, 1980 through December 30, 1982 (J-2). Except for minor title changes, the recognition clause in J-2 mirrors the recognition in J-1. The title administrative clerk, public works remained. Neither administrative aide nor administrative analyst is listed. (Compare J-1 and J-2). Excluded from this agreement are police, firemen, confidential employees, managerial executives and professional employees, as well as employees covered by the Clifton City Employees Association ("CEA").

7. On June 2, 1980, the City passed two ordinances implementing contractual salary increases and benefits: one implementing the contractual salary and benefits for supervisory employees, those represented by the Association (J-5a), and one (J-4a) implementing 1980 salary increases and benefits for "non-uniformed employees", a term the parties stipulated applies to those employees represented by CEA (T-11). Both ordinances (J-5a and J-4a) was amended in late 1980 to implement the 1981 and 1982 contractual increases for each unit. While the "administrative clerk-public works" title is listed in the original supervisors' ordinance and its amendment, the "administrative aide" title and the "administrative analyst" title are not listed in any of these ordinances.

8. On March 2, 1982, the City passed an ordinance (J-4c) amending the non-uniformed employees' ordinance (J-4a) by abolishing the administrative aide position, adding the new title

administrative analyst and establishing its salary range of $16,203-$20,684. Fenton was placed in the new title in about 1982 (T-23). The administrative clerk position continued and was filled by Charles Reeves until at least 1985 (T24-T25).

9. In 1984 the City and the Association entered into a successor agreement covering the period January 1, 1983 through December 31, 1985. Thomas Fenton, among others, signed the agreement for the Association negotiating committee (Exhibit J-3). That agreement contains a recognition clause identical to the one found in the prior agreement (Exhibit J-2).

10. On January 8, 1985, the City passed two salary and benefit ordinances: J-4e for non-uniformed employees, and J-5e for supervisors. J-4e lists 1985 salary ranges for titles in the CEA unit, including, administrative analyst. J-5e lists supervisory employees' salary ranges for each title and does not include administrative analyst.

11. In December, 1985, the City Manager recommended that the administrative analyst salary range be increased to a range equal with that of public works foreman. The agenda memorandum to the mayor and council asserts that,

> "it is recommended that [Fenton's] salary be increased since this employee has similar duties and responsibilities as the foreman. In order for him

to be effective with the other employees his compensation also should be similar" (CP-4).7/

12. On January 21, 1986, the City amended the non-uniformed employees ordinance to increase the administrative analyst's salary range (J-4f).

13. Fenton went on terminal leave in September, 1986. He retired effective December 31, 1986. On December 23, 1986, the City approved a retroactive 5% salary increase for Fenton for 1986, and on January 23, 1987, the City paid him a retroactively (CP-10; CP-11). In January, the Association learned of Fenton's increase and advised the City by letter (CP-7) that, as Fenton's majority representative, it objected. The Association's letter (CP-7) further asserts that Fenton had been a dues-paying member of the Association since 1981.8/

The City and the Association are continuing to negotiate an agreement for 1986-87.

ANALYSIS

The question presented here is: Did the Board violate N.J.S.A. 34:13A-5.4 (a)(5), by paying Fenton a salary increase for 1986? A charging party bears the burden of proving: (1) a change

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7/ I declined to permit the Association to prove its case by hearsay testimony concerning Fenton's supervisory duties. I also advised the charging party that it must demonstrate that Fenton's position was included in the unit, not that it should be.

8/ This statement is self-serving and not otherwise supported in the record. Therefore, it is insufficient to prove Fenton's Association membership.

(2) in a term and condition of employment (3) without negotiations with the majority representative. E.g., State of New Jersey (Ramapo State College), P.E.R.C. 86-28, 11 NJPER 580 (¶16202 1985); Willingboro Bd. of Ed., P.E.R.C. 86-76, 12 NJPER 32 (¶17012 1985).

Compensation for an employee reclassified or promoted to a new unit title is mandatorily negotiable. Fairview Bd. of Ed., P.E.R.C. No. 84-43, 9 NJPER 659 (¶14285 1983); Essex County College, P.E.R.C. No. 87-17, 12 NJPER 736 (¶17375 1986); Bergen Pines County Hospital, P.E.R.C. No. 87-25, 12 NJPER 753 (¶17283 1986); Twp. of Gloucester, P.E.R.C. No. 87-42, 12 NJPER 805 (¶17308 1986), North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 86-29, 11 NJPER 583 (¶16203 1985).

In Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970), the Court emphasized the legislative command and public policies requiring collective negotiations over compensation and rejected a claim that employers should be free to increase individual employee compensation unilaterally.[9/]

The City does not dispute that it increased Fenton's compensation without negotiations with the Association. It maintains that it had the right to do so because the Association is not Fenton's majority representative. Thus, in order to sustain its (a)(5) claim, the Association had to prove by a preponderance of the

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9/ The City argues that the money paid to Fenton was not an "increase" but a "salary adjustment". I find that either is a negotiable change in compensation.

evidence that it was Fenton's majority representative. I find that the Association did not meet that burden of proof.

An employee organization is responsible for searching out new titles and promptly seeking to negotiate for them. Wayne Bd. of Ed., P.E.R.C. No. 80-94, 6 NJPER 54 (¶11028 1980), (Wayne); Rutgers University, D.R. No. 84-19, 10 NJPER 284 (¶15140 1984), (Rutgers); Bergen Pines County Hospital, D.R. No.80-20, 6 NJPER 61 (¶11034 1980), Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977) (Clearview). In Wayne, the Commission held that where the majority representative had slept on its rights with regard to a particular title -- that is, if a majority representative had allowed a title to remain outside its unit for a substantial period of time -- then it has waived its right to clarify the unit to include such a disputed title. Absent a change in circumstances or change in duties, the execution of a successor contract constitutes a waiver of the claim for the title. Rutgers.[10/]

The record does not show that Fenton was ever included in the unit. Fenton was first appointed to the title administrative aide, at a salary not on the Association's guide. The record does not establish that this title was ever included in the unit. It neither appears in the Association collective agreements, nor in the

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10/ While these cases were decided in the context of a unit clarification proceeding, the same principles of waiver must be applied where the organization is asserting a claim in an unfair practice context, that the title is already included in the unit.

ordinances covering supervisors salary and benefits. Fenton's title had been administrative analyst since sometime in 1981. The Association has not established that the administrative analyst title was ever included in its unit. The Association could have sought to include the title when it was first created in 1982. Apparently it did not. Although Fenton was a member of the Association negotiations committee, the Association did not include the title in its 1983-85 successor contract. Published ordinances continued to show the administrative analyst among the titles represented by the CEA unit and not in the supervisors group. There is no evidence that the Association objected. In 1985, the City passed an ordinance granting an adjustment to Fenton's salary range. Again, the Association did not object.

Even assuming that Fenton was a member of the Association or its negotiations team, membership or participation in an employee organization does not establish inclusion in the unit. See, N.J.S.A. 34:13A-5.3; Union Council #8 v. Housing Authority of Elizabeth, 124 N.J. Super 584 (L. Div. 1973).

Based upon the entire record, I find that the Association did not prove that it was the majority representative of the administrative analyst, Thomas Fenton.[11/]

11/ I am not finding that the administrative analyst was a non-supervisory employee, but only that the title was not represented by the Clifton Association. Nor do I suggest the appropriate unit placement for the title, if it continues to exist in the future. That issue may be addressed in an appropriate representation proceeding. See Clearview.

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.

Susan W. Osborn
Susan Wood Osborn
Hearing Examiner

DATED: February 9, 1988
Trenton, New Jersey