H.E. NO. 94-26

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

In the Matter of

TOWNSHIP OF EDISON

Respondent,

-and-

Docket Nos. CO-H-92-160
CO-H-92-330
CO-H-92-331

UAW DISTRICT 65,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds, and recommends to the Commission, that UAW District 65, AFL-CIO, failed to raise timely allegations that Edison Township violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it refused to sign a successor collective negotiations agreement for a three year term and when it delayed in paying the second year increases for one year.

The Hearing Examiner further finds, and recommends to the Commission, that under the facts of this case, the Township of Edison did not violate §§ 5.4(a)(1) and (3) of the Act by removing employees from the UAW District 65 Medical Plan and placing them into the Township's non-unit health benefits plan, where anti-union motive was not proven.

The Hearing Examiner further finds, and recommends to the Commission, that under the facts of this case, the Township of Edison did not violate §§ 5.4(a)(1) and (5) of the Act by refusing to negotiate over health benefits levels, health insurance carrier or health insurance premium costs with District 65, where the parties were in the middle of their contract term and the subjects were not mandatorily negotiable.

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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UAW DISTRICT 65,

Charging Party.

Appearances:

For the Respondent,
Genova, Burns & Schott
(Nathaniel L. Ellison, of counsel)

For the Charging Party,
Reinhardt & Schachter
(Paul Schachter, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On November 19, 1991 and April 9, 1992, District 65, UAW, AFL-CIO, filed three unfair practice charges, Docket Nos. CO-92-160; CO-92-330, and CO-92-331, respectively, (C-1)[1/] with the Public Employment Relations Commission, alleging that the Township of Edison violated subsections 5.4 (a)(1), (3), (4) and (5) of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A.

1/ "C-" refers to Commission exhibits; "J-" refers to joint exhibits; "CP-" refers to charging party's exhibits; "R-" refers to respondent's exhibits; "T1" refers to December 1, 1992 hearing transcript, at page 1.

34:13A-1 et seq. ("Act").[2/] District 65 alleges: 1) on June 1, 1991, the Township discriminated against employees because of their union membership by unilaterally changing the medical benefits coverage of only employees who had resigned from the union; 2) since December 15, 1991, the Township has refused to sign a negotiated agreement and implement wage increases for 1991 and 1992; 3) since April 1, 1992, the Township has refused to negotiate with District 65 concerning benefits issues raised in an arbitrator's report; 4) that the Township unilaterally enrolled all unit employees in a benefit plan other than that in the parties' agreement without negotiating with District 65; and 5) that the Township did so as a reprisal for the previous filing of unfair practice charges (C-1).

A Consolidated Complaint and Notice of Hearing was issued on July 6, 1992. On December 1, 1992, I conducted a hearing in Trenton, New Jersey, at which time the parties stipulated certain

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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; (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, petition or complaint or given any information or testimony under this act; and, (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."

facts (T9-T14), presented evidence and examined witnesses.[3/] Post-hearing briefs were filed by February 11, 1993. Based upon the entire record, I make the following:

FINDINGS OF FACTS

The parties stipulated that:

1. The Township is a public employer within the meaning of the Act and is subject to its provisions and District 65, UAW, AFL-CIO, is a public employee representative within the meaning of the Act and is subject to its provisions (T9-T10).

2. District 65 represents all employees employed by the Edison Township Water and Sewer department, excluding supervisory, office and clerical employees (T10).

3. The Township and District 65 had a collective negotiations agreement, effective from January 1, 1988 to December 31, 1989 (T10).

4. On April 5, 1990, the Township and District 65 signed a memorandum of agreement covering certain terms for a successor contract (T10).

5. Subsequently, a full agreement embodying the memorandum of agreement terms and all other previously agreed upon terms was drafted by District 65 and sent to and received by the Township (T11). The full agreement drafted by District 65 was never signed by the Township (T11).

6. The terms of the memorandum of agreement and the District 65 draft have been implemented (T11). The 1990 wage increase was implemented in April 1990; and

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3/ District 65 withdrew its allegation that the Township violated section 5.4 (a)(4) at the hearing on December 1, 1992 (T70).

the 1991 and 1992 wage increases were implemented in January 1992 (T12).[4/]

Based upon the entire record I also find the following facts:

7. An agreement was reached in April 1990, at the time that the Township implemented the negotiated wage increase.

8. The parties' agreements did not specify any particular benefits to be provided (J-1, J-2, T98-T99). The most recent agreement (J-3) requires the Township "to provide and cover all Employees within the bargaining unit, including their dependents, with the District #65 Medical Plan" (J-3, Article VIII, Section-1). The agreement provided that the Township make fixed contributions to the Medical Plan; and there was no provision for these contributions to be increased if the Plan's costs increased (T24, T26, T63).

The UAW Medical Plan has the same legal status as any insurance carrier. Among its provisions is the arbitration of issues having to do with the Plan's financial status. By early 1991, the District 65 Security Plan[5/] was failing to provide

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4/ The transcript states that the 1991 wage increase was implemented in April 1991, but my pre-hearing notes and discussions with the parties about these stipulations indicate that January 1992 is the correct date. Also, CP-2 and R-1, prepared in Nov-Dec 1991, corroborate this in that they both contain a proposal that the Township "adhere to the three page memoranda of agreement signed by the parties on April 5, 1990." This statement would not have been necessary if the 1991 wage increase had already been implemented.

5/ The parties also refer to the UAW health Plan as the "Security Plan."

adequate health care reimbursement, resulting in hardship to unit employees (T53-T57). The Plan's financial status had been the subject of prior arbitration awards and was again the subject of an award issued on June 27, 1991 (CP-3), wherein an arbitrator ordered the Plan to pay all unpaid bills and to find a means to restore the Plan's financial integrity. The arbitrator suggested, but did not order, suspension of all benefits for a period of time, a one-time payment to the Plan by member employers, and increased employer contributions (T67, CP-3).

9. Several employees gave the Plan's failure to reimburse them as their reason for resigning from the District 65 local in Edison Township (J-4; J-5; J-6; J-7; J-8).

10. Barry Miller, a shop steward in the unit, resigned from District 65 in April 1991 (J-4). Miller had experienced serious family medical problems and for this reason he felt he could not afford to be inadequately covered (T58). Miller's medical bills were unpaid by the UAW Medical Plan and so Miller attempted to obtain insurance outside of his employment. He also attempted to have the Township withhold its contributions in an effort to force the Plan to honor the employees' claims (T54, T56, T58-T59). Miller, out of frustration, believed he could not obtain the coverage his family needed by remaining in District 65 (T54, T98, T93, J-4). Miller was not told by the Township that the only way he could be covered under the Township's alternate health insurance was by resigning from District 65 (T57, CP-1, T60, T107). Miller's

resignation preceded his request of the Township to cover him under its non-unit health plan and Miller did not know that he would automatically be covered by the Township because he resigned from District 65 (T55, T86).

Louis Ghilino, also a shop steward, decided to remain in District 65 because he believed the best way to pursue a solution to the health plan problem was through collective action (T107). Ghilino was present at a meeting where Miller explained his reasons for resigning from District 65, but Ghilino was not persuaded to follow Miller's steps and he did not resign from District 65 (T107). However, seven other employees were persuaded to resign from District 65 and to request coverage under the Township's other health plan (J-5, J-6, J-7, J-8, J-9).

11. On April 22, 1991, UAW Organizer George Brunson received a letter from Katherine Aldridge, the Township's Acting Business Administrator, informing him that she had received numerous letters from District 65 members stating their intentions to resign from the union (CP-1, T15-T16). Brunson was aware that certain Edison Township employees were not receiving reimbursements for medical bills under the UAW Plan (T26-T27). Aldridge's letter states:

> Please be advised that Edison Township has not solicited any resignations from your union, nor have we taken any part to contact or encourage any union members regarding their union membership.
>
> As you are aware I cannot require that Union members remain in the Union. Also, pursuant to our medical benefit policy I cannot deny medical coverage for full-time employees who are non-union members (CP-1).

The parties further stipulated:

> 12. In June 1991, the Township removed eight unit employees, who had resigned from District 65, from the District 65 health benefits plan and covered them under the Township's health benefits plan (T13);
>
> 13. In October 1991, District 65 requested that negotiations be reopened on the health benefits plan and in November-December 1991, the parties met and negotiated about health benefits (T12).
>
> 14. In April 1992, the Township unilaterally removed the remainder of the unit employees from the District 65 health benefits plan and covered them under the Township's plan (T13).

I also find that:

15. In late 1991, the parties met and drafted two proposals (R-1, CP-2) which addressed solutions to the health benefits problem (T30, T36, T72-T78, T103-T104, T110). These negotiations did not formally end; no agreement was reached and the Township did not respond to the last counter-proposal (T21, T42-T43, T73-T79, T81-T82 T113).[6/]

6/ Brunson testified that he believed the parties had reached agreement, but I do not credit this testimony (T20, T39-T41). Brunson later admitted that the alleged agreement was subject to the Township's ratification, and no ratification occurred (T43). Further, Business Administrator Nicholas Smolney and Water Utility Worker Louis Ghilino both contradicted the assertion that the parties had reached agreement (T43, T46, T73-T74, T76, T117-T118). The record consistently shows that no written or oral response was received from the Township after the parties last exchange of proposals in late December 1991 (T39).

ANALYSIS

The §§5.4(a)(5) & (a)(1) allegations: The refusal to sign an agreement and delay in paying negotiated wage increases

The above allegations should be dismissed as untimely.

N.J.S.A. 34:13A-5.4(c) states:

> ...no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented.

On April 9, 1992, District 65 first asserted the Township's failure to sign an agreement two years after its negotiations were concluded in April 1990 (Unfair Practice Charge, Docket No. CO-92-330). Nothing in the record indicates that District 65 was prevented from filing its charge until six months before April 1992. The plain language above directs that no violation will be found where a charge is filed after the six months statute of limitations. Even assuming the operative date for statute of limitations purposes was several months after April 1990, District 65's filing in April 1992, was significantly beyond any reasonable six months limitations period.[7/] Accordingly, I recommend that the Commission dismiss this part of the charge.

7/ See No. Warren Bd. of Ed., D.U.P. No. 78-7, 4 NJPER 55 (¶4026 1977); N.J. Turnpike Employees Union Local 914, IFPTE, AFL-CIO, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); Piscataway Township Teachers Ass'n., NJEA (Abbamont), D.U.P. No. 90-10, 16 NJPER 162 (¶21066 1990).

In Docket No. CO-92-330, District 65 claims that the 1992 wage increases were delayed. However, the stipulated facts contradict this (Stipulated Fact Number 6), and I recommend that this part of the charge be dismissed.

This charge was also District 65's first mention that the 1991 wage increase was delayed. Six months prior to the filing of the charge is October 1991. By the time the charge was filed, in April 1992, both the 1991 and 1992 wage increases had been implemented. There is no assertion or evidence that District 65 was unaware that the wage increase due on January 1991 was not being paid or that it was prevented from filing this part of the charge. It had until six months from approximately January 1, 1991, to file its charge. The allegation was not raised, however, for more than one year. Even if timeliness were not at issue, the most that District 65 would be entitled to is a finding of a violation from October 9, 1991 to January 1, 1992, the date that the Township paid the 1991 increase. Since the wage increases have been fully implemented and the agreement has expired, any such violation is de minimis and/or moot.

I recommend that the Commission dismiss the allegations that Edison Township violated N.J.S.A. 34:13A-5.4(a)(1) and (5) by refusing to sign an agreement reached in April 1990 or implement either 1992 or 1991 negotiated wage increases until January 1992, because these charges were not filed within the Act's six months limitations period or are moot.

The Township's refusal to negotiate over health benefits issues

District 65 also alleges that the Township violated subsections 5.4(a)(1) and (5) of the Act by refusing to negotiate with it concerning benefits issues raised in an arbitrator's report after April 1, 1992, and by unilaterally enrolling all unit employees in a benefit plan other than that appearing in the negotiated agreement on April 1, 1992.[8/]

District 65 argues that the Township must negotiate over the subjects suggested by the Plan arbitrator: a surcharge to be paid by the Township and the suspension of employees' benefits during which Edison would continue to pay contributions. The Edison Township and District 65 agreement (J-3) requires the Township "to provide and cover all Employees within the bargaining unit, including their dependents, with the District #65 Medical Plan" (J-3, Article VIII-Section 1). The Plan has the same legal status as any insurance carrier. Among its provisions is the arbitration of issues. These disputes and awards do not address matters between

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8/ District 65 also argued in its brief that the Township unilaterally and unlawfully changed the levels of benefits. This allegation was not specifically pled in any of the charges, nor does any evidence presented show the alleged change in benefits levels. When a change in insurance carrier also changes the level of contractual benefits, an unfair practice charge will ordinarily be deferred to arbitration to ascertain whether the specific level of benefits has been changed. Cape May Cty. Sheriff, P.E.R.C. No. 92-105, 18 NJPER 226 (¶23101 1992); Stafford Tp. Bd. of Ed., P.E.R.C. No. 90-17, 15 NJPER 527 (¶20217 1989); Pennsauken Tp., P.E.R.C. No. 88-53, 14 NJPER 61 (¶19020 1987).

Edison Township and its employees under its collective negotiations agreement, but matters having to do with the Plan's financial status. The financial status of the Plan had been the subject of prior arbitration awards and was again the subject of an award issued on June 27, 1991 (CP-3). The Plan arbitrator ordered the Plan to pay the unpaid bills and to find a means to restore the Plan's financial integrity. The issue of whether Edison Township is bound by the Plan arbitrator's award is not under the Commission's jurisdiction, inasmuch as it concerns the contractual relationship between the Township and its insurance carrier. Accordingly, I do not reach that issue.

District 65 has not shown that the Township had an obligation to negotiate over these subjects: level of benefits, employer contributions to the UAW Medical Plan, surcharge, or suspension of benefits, at the time it demanded negotiations. Parties may agree to reopen negotiations mid-contract but they are not obligated to do so. Middlesex Bd. of Ed., P.E.R.C. No. 94-31, 19 NJPER 544 (¶24257 1993). The parties were in the second year of their agreement in June 1991, when the arbitrator's award was issued. Their agreement contains no reopener clause. A level of benefits and employer contributions had been negotiated for the three-year term of their agreement. The Township was not obligated to negotiate with District 65 over these subjects in the middle of the contract term.

The Township's unilateral placement of all unit employees under its plan

The subjects of carrier choice and premium costs are not mandatorily negotiable.[9/] Thus, the Township did not have a duty to negotiate with District 65 before changing from the UAW Medical Plan to its non-unit carrier. Where a change of carrier changes the level of health care benefits, the public employer has to negotiate over that issue.[10/] But, such changes in benefit levels must be alleged and proven. Here, no allegation that benefits levels changed was made in any of the three unfair practice charges.[11/] At the hearing, no evidence demonstrating a change in benefit levels was produced. The charging party makes much of this argument: that improved benefits were unilaterally offered to employees. It argues that "it is undisputed that the Employer unilaterally offered employees an improved medical plan than that currently in effect" (District 65's Brief, at p. 8). No documents or testimony show what these purportedly improved benefits were. In the cases relied upon

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9/ See City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439 (¶12195 1981); Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-83, 13 NJPER 78 (¶18036 1986); City of Orange Tp., P.E.R.C. No. 86-23, 11 NJPER 522 (¶16184 1985); Borough of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178 1985).

10/ See Borough of Closter, P.E.R.C. No. 86-95, 12 NJPER 202 (¶17078 1986); City of South Amboy, P.E.R.C. No. 85-16, 10 NJPER 511 (¶15234 1984); Borough of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984).

11/ The charging party did argue that there was a change in the level of benefits in its post-hearing brief.

by District 65 the changed benefit level was alleged and proven.[12/]

District 65 has not met its burden of showing by a preponderance of evidence, that the Township unilaterally gave unit employees greater levels of health benefits.[13/] That employees were not being paid under the UAW Plan, and then, were paid under the employer's plan (also not in evidence here) does not represent a change in benefits levels.

Finally, despite that it was not obligated to do so, the Township did negotiate with District 65, pursuant to its request, over the health plan in the Fall 1991. The parties met and exchanged proposals. The Township did not ratify the last counter-proposal and no agreement was reached. No further negotiations occurred after April 1992 when all unit members had been enrolled in the Township's health plan.

12/ In Borough of Clayton, P.E.R.C. No. 88-99, 14 NJPER 325 (¶19119 1988) the issue concerned employer paid HMO coverage; in City of South Amboy, the changes in specific levels were alleged; in Tp. of Pennsauken, P.E.R.C. No.88-55, 14 NJPER 61 (¶19020 1987) the hearing examiner specifically found that the Township had reduced the benefit levels. West Orange Bd. of Ed., P.E.R.C. No. 92-114, 18 NJPER 272 (¶23117 1992) is inapposite; it concerns the negotiability of health benefits for school board employees on unpaid leaves of absence.

13/ But see, Borough of Closter, P.E.R.C. No. 86-95, 12 NJPER 202 (¶17078 1986) (violation found where employer changed health insurance carrier and where three different comparisons of the two plans put into evidence show numerous differences in benefits).

The Township did not violate subsection (a)(5) when it stopped negotiating in December 1991 and enrolled all unit members in its health insurance plan in April 1992. It was not obligated to negotiate over benefits levels because the parties were in the middle of their contract and the subjects of carrier choice and premium costs are not mandatorily negotiable. But, in fact, it did negotiate in late 1991. Accordingly, District 65 has not carried its burden as to the (a)(5) allegation. I recommend that the Commission dismiss this part of the charge.

The section 5.4(a)(3) allegation:
The Township's unilateral grant of alternate health benefits to eight employees who resigned from the UAW

District 65 alleged violations of Sections 5.4(a)(1) and (3) of the Act because of the Township's unilateral change of medical benefits coverage of only those unit employees who had resigned from the union on June 1, 1991.

Subsection 5.4(a)(3) prohibits employers from discriminating in regard to...any term or condition of employment to ...discourage employees in the exercise of protected rights. In Bridgewater Township v. Bridgewater Public Works Association, 95 N.J. 235 (1984), the Supreme Court established that motive is a necessary element in determining whether an employer's actions violate subsection (a)(3) of the Act. Under Bridgewater, no violation will be found unless the charging party has proven, by a preponderance of the evidence, that conduct protected by the Act was a substantial or motivating factor in the adverse action. The

action need not be adverse, an employer violates this subsection when it offers an advantage with the intention of encouraging or discouraging protected activity. This may be proven by direct evidence or by circumstantial evidence showing that the employees engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246. If a charging party satisfies those tests, then the burden shifts to the employer to prove that the adverse action would have occurred for lawful reasons even absent the protected conduct. Id. at 242.

District 65 has failed to produce any direct or circumstantial evidence of the Township's hostility toward it or motivation to discourage the exercise of any protected activity. Although it treated employees disparately based on union/non-union membership in June 1991 by accepting into its health plan only those employees who had resigned from the union, there is no evidence that the Township granted this advantage with the requisite intent of discouraging union membership. No facts show that the Township first approached unit members to induce their resignation from the union or that the Township insisted that acceptance into the Township's plan was conditioned upon resignation from District 65. Instead, Shop Steward Barry Miller initiated the idea that he resign from the union in order to be covered by the Township's alternative health benefits program because of his personal circumstances. And it was Miller who met with other unit members and explained this

situation. I believe that Miller, and perhaps the Township's administrators, were mistaken in the apparent belief that by resigning their union membership they were no longer subject to the terms of the parties' agreement. Some were persuaded to follow his lead and requested the same treatment by the Township. Others, like Louis Ghilino, were not so persuaded and chose to remain in the union. There is no evidence in this record that the Township did anything prior to Miller's official resignation from District 65 to encourage the mistaken beliefs by these employees that simply by resigning their membership, they were no longer covered by the terms and conditions of the parties' agreement.

The apparently discriminatory action should also be viewed in the context of all of the facts. The Township did not refuse District 65's request to meet and negotiate over health benefits, in fact it did meet within 4 months of placing the initial eight employees into the Township plan. It is significant that less than one year after placing eight employees in its own health plan, the Township placed the entire unit into its non-unit health plan, with no evidence of additional resignations from District 65. And, the Township's delayed implementation of the 1991 wage increase until January 1992 and failure to execute the 1990-1992 agreement must be weighed against the turmoil and instability caused to employees and employer alike by the insolvency of the UAW Health Plan. Under all these circumstances, I find that the employer was motivated by a sense of duty to provide these employees with dependable health

benefits and not to undermine the District 65 or discourage membership therein.

Applying the above standard to these facts, I find that the charging party has not met its burden of proof as to the element of anti-union motive in the Township's conduct. Accordingly, I recommend that the Commission dismiss this part of the charge.[14/]

Accordingly, based upon the entire record and above analysis, I make the following:

CONCLUSIONS OF LAW

1. The Charging Party failed to raise timely allegations that the Respondent Township violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when on and after April 5, 1990, it refused to sign a successor collective negotiations agreement containing wage increases and terms and conditions of employment for a three year term from January 1990 to December 31, 1992, and when it delayed in paying the second year increases for one year, until January 1992.

2. The Respondent Township did not violate N.J.S.A. 34:13A-5.4(a)(5) when it ceased negotiating with District 65 over the Medical Plan surcharge and suspension of benefits issues in December 1991.

14/ Even if the charging party had shown anti-union animus, under these circumstances, I would be inclined to find that the Township carried its burden of showing a legally justifiable purpose in granting the request of these employees, that is: its perceived responsibility to provide its employees with reliable health care coverage.

3. The Respondent Township did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when in April 1991, it placed eight unit employees into its non-unit health plan and later in June 1992, placed the entire unit into its health benefits insurance plan.

RECOMMENDATIONS

I recommend that the Commission **ORDER** that the Complaint be dismissed as to the allegations that Edison Township violated N.J.S.A. 34:13A-5.4 (a)(1), (3) and (5).

Elizabeth J. McGoldrick
Hearing Examiner

DATED: June 24, 1994
Trenton, New Jersey