D.U.P. NO. 2020-17

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

BOROUGH OF SHREWSBURY,

Respondent,

-and- Docket No. CO-2020-201

IBT LOCAL 177,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by IBT Local 177 (IBT) against the Borough of Shrewsbury (Borough). The charge alleged the Borough violated section 5.4a(5) of the Act by unilaterally implementing a finger scanning timekeeping system for IBT unit employees and subcontracting lawn maintenance unit work to a private entity. The charge also alleged the Borough violated the Act by requiring unit employees work their full work day on New Year's Eve contrary to a past practice permitting an early departure on New Year's Eve. The Director found the Borough's conduct did not violate the Act because (1) the subcontracting and timekeeping decisions were managerial prerogatives and (2) the Borough can discontinue the practice of allowing early departure and enforce the terms of the parties' collective agreement, which required a full work day on New Years Eve.

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Appearances:

For the Respondent,
Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys
(Nicholas DelGaudio, of counsel)

For the Charging Party,
Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys
(Paul L. Kleinbaum, of counsel)

REFUSAL TO ISSUE COMPLAINT

On February 5, 2020, IBT Local 177 (IBT) filed an unfair practice charge and amended charge against the Borough of Shrewsbury (Borough). The charge alleges that the Borough violated section 5.4a(1) and (5)[1/] of the New Jersey

1/ These provisions 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. (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."

Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by requiring employees to work until the end of the workday on December 31, 2019; installing a new timekeeping system; and approving a contract on or about January 21, 2020 to outsource bargaining unit work.

On April 7, 2020, the Borough served a position statement on the Charging Party. Although the Borough admits the changes alleged by IBT, it asserts that they "are either managerial prerogatives not subject to negotiation or are already negotiated provisions in the parties' contract." (Pages 3-4 of the Borough's position statement).

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd, P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

I find the following facts.

The IBT represents all Department of Public Works (DPW) employees, but excludes the Manager of Public Works, the General

Foreman. IBT and the Borough are parties to a collective negotiations agreement (CNA), that expired on December 31, 2018.

Article 7 of the parties' CNA, entitled "Hours of Work and Overtime," provides in pertinent part:

> A. The normal workday shall consist of eight (8) hours. The normal work week shall consist of five (5) days, forty (40) hours per week.
>
> N. The weekly starting time for the Department of Public Works shall be 7:00 a.m., Monday though Friday.

Article 10 of the parties' CNA, entitled "Benefits", provides in pertinent part:

> A. Paid Holidays
>
> 1. New Year's Day
> 2. Martin Luther King, Jr. Day
> 3. President's Day
> 4. Good Friday
> 5. Memorial Day
> 6. Independence Day
> 7. Labor Day
> 8. Columbus Day
> 9. Veteran's Day
> 10 Thanksgiving Day
> 11. Friday after Thanksgiving Day
> 12. Christmas Day
> 13. Employee's Birthday

On December 31, 2019, the Borough notified IBT unit employees that they would be required to remain at work until the end of their contractual workday, which begins at 7 a.m. and ends at 3 p.m. The parties agree that this decision ". . . was contrary to a consistent past practice going back many years in which the Borough let unit employees go home at 1:00 p.m." (IBT's Charge).

On an unspecified date, the Borough installed a new time-keeping system involving fingerprint technology for DPW employees. The Borough did not negotiate with IBT over the installation of the time-keeping system.

On or about January 21, 2020, the Borough approved a contract with a private company outsourcing bargaining unit lawn maintenance work. The Borough did not negotiate with IBT over its decision to outsource the work.

The parties are currently participating in mediation with a Commission-appointed mediator to reach a successor collective negotiations agreement.

ANALYSIS

Public employers and majority representatives, are obligated to negotiate in good faith over terms and conditions of employment. N.J.S.A. 34:13A-5.3. An employer violates N.J.S.A. 34:13A-5.4(a)(5) when it implements a new rule or changes an old rule concerning a term and condition of employment without first negotiating in good faith or having a managerial prerogative or contractual defense authorizing the change. State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985); Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985).

IBT maintains that the Borough failed or refused to negotiate unilateral changes to terms and conditions of

employment, along with the impact of such changes. The Borough argues that it had no duty to negotiate because it had either a managerial prerogative to implement these changes or already negotiated provisions in the parties' collective negotiations agreement permitting these changes. I find the portions of IBT's charge related to the Borough's duty to negotiate their admitted unilateral changes does not satisfy the complaint issuance standard.

New Year's Eve

The Borough was not obligated to negotiate with IBT over its decision to require employees to stay until the end of their workday on December 31, 2019. Although both parties acknowledge a practice existed for years allowing DPW employees to leave early on New Year's Eve, an employer does not violate the Act by ending a practice granting more generous benefits than those provided by the parties' contract. New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd App. Div. Dkt. No. A-2450-77 (4/2/79); Kittatinny Reg. Bd. of Ed., P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991) (No violation where Board required secretaries to work the hours provided for in the contract, despite practice of reducing hours during holidays and recess periods.); Burlington Cty. Bridge Comm., P.E.R.C. No. 92-47, 17 NJPER 496 (¶22242 1991) (No violation where the

employer's decision not to consider sick or vacation time in computing overtime was authorized by the contract); Passaic Co. Reg. Bd. of Ed., P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990) (No violation where the employer's decision not to consider sick or vacation time in computing overtime was authorized by the contract); Passaic Co. Reg. Bd. of Ed., P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990) (No violation where the Board imposed extra work days which did not exceed the limits set forth in the contract); New Jersey Sports and Exposition Authority, P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987) (No violation where the employer changed the workweek when the contract did not guarantee any particular day or consecutive days off).

No facts suggest that the parties' CNA incorporates the practice of allowing employees to leave early from work on New Year's Eve. Rather, their CNA provides that a normal workday is eight (8) hours, starting at 7:00 am and ending at 3 p.m. New Year's Eve is not recognized as a paid holiday. Therefore, the parties' agreement permits the Borough to require IBT employees to work a full workday on New Year's Eve and discontinue a practice of allowing employees to leave at 1 p.m. on New Year's Eve. Accordingly, I find this allegation does not meet the Commission's complaint issuance standard and dismiss this claim.

Time-keeping system

The Borough has a managerial prerogative to establish and implement timekeeping procedures for DPW employees. The Courts and the Commission have consistently held that public employers have a managerial prerogative to establish and implement timekeeping procedures, including finger scan timekeeping systems, to monitor employee work time. City of Elizabeth, P.E.R.C. No. 2016-83, 42 NJPER 568 (¶158 2016) (The City's decision to implement a biometric timekeeping, attendance, and payroll system, was a non-negotiable managerial prerogative.); Galloway Tp. Bd. of Ed. v. Galloway Tp. Bd Ass'n, 135 N.J. Super. 269 (Ch. Div. 1975), aff'd 142 N.J. Super. 44 (App. Div. 1976); South Hackensack Bd. of Ed., P.E.R.C. No. 98-70, 24 NJPER 14 (¶29009 1997); Paterson State-Operated School Dist., P.E.R.C No. 97-107, 23 NJPER 202 (¶28097 1997); Butler Bor., P.E.R.C. No. 94-51, 19 NJPER 587 (¶24281 1993).

The Borough acted within its managerial prerogative in implementing a timekeeping system with finger print technology for DPW unit employees. As such, the Borough had no obligation to negotiate with IBT regarding the institution of the timekeeping system. Accordingly, I find the complaint issuance standard has not been met with respect to the installation of the timekeeping system and dismiss that portion of the charge.

Outsourcing of lawn maintenance work

The Borough also has no obligation to negotiate with IBT over outsourcing lawn maintenance work under a well established managerial prerogative to subcontract unit work. Under the Supreme Court's holding in Local 195, IFPTE v. State of New Jersey, 88 N.J. 393 (1982), a public sector employer need not negotiate over a decision to subcontract with a private sector company to have that company take over governmental services. Burlington Cty. Bd. of Social Services, P.E.R.C. No. 98-62, 24 NJPER 2 (¶29001 1997). The Court recognized the employees' vital interest in not losing their jobs, but held that this interest was outweighed by the employer's interest in determining "whether governmental services are provided by contractual arrangements with private organizations" and making "basic judgments about how work or services should be performed to best satisfy the concerns and responsibilities of government." Local 195 at 407. No negotiations duty attaches even if a subcontracting decision is based solely on a desire to save money and even if employees will lose their jobs as a result. In such instances, however, public employees can seek a contractual provision requiring the employer to discuss (rather than negotiate) economic issues, thus giving them a chance to show that they can do the work at a price competitive with that charged by a private sector subcontractor. Local 195.

Following Local 195, the Commission has prohibited negotiations or arbitration over decisions to subcontract work to private sector companies. See, e.g., Ridgewood Bd. of Ed., P.E.R.C. No. 93-81, 19 NJPER 208 (¶24098 1993), aff'd 20 NJPER 410 (¶25208 App. Div. 1994), certif. den. 137 N.J. 312 (1994); Borough of Pompton Lakes, P.E.R.C. No. 90-68, 16 NJPER 134 (¶21052 1990); Lacey Tp., P.E.R.C. No. 90-59, 16 NJPER 43 (¶21019 1989). Local 195's holding applies even if the subcontracting occurs during the life of a contract, Ridgewood Bd. of Ed., or if the parties have negotiated a unit work preservation clause, Cape May Cty. Bridge Comm'n, P.E.R.C. No. 92-8, 17 NJPER 382 (¶22180 1991).

In accordance with the holding in Local 195, the Borough did not have an obligation to negotiate with IBT over its decision to subcontract lawn maintenance work. Accordingly, I find that this allegation does not meet the complaint issuance standard, and I dismiss that portion of the charge.

Although the Borough has managerial prerogatives to install the timekeeping system and to outsource lawn maintenance work, the exercise of them would not relieve the Borough of an obligation to negotiate the severable impact of those decisions, if IBT made such a demand. When an employer exercises a managerial prerogative, the majority representative bears the burden of requesting or demanding negotiations over severable

impacts and/or procedural issues arising from the exercise of that prerogative. Monroe Bd of Ed., P.E.R.C. No. 85-35, 10 NJPER 560 (¶15265 1984) (Union was obligated to request negotiations over severable issues concerning severance pay and recall rights arising from employer's subcontracting decision). The filing of an unfair practice charge does not substitute for a request or demand to negotiate. Monroe Bd of Ed., 10 NJPER at 570 (fn. 6); Livingston Tp., D.U.P. No. 2015-9, 41 NJPER 289, 291 (¶96 2014). A pre-charge request to negotiate is a prerequisite for a refusal to negotiate claim. Monroe Bd of Ed.

Under the circumstances of this case, I don't find that the Borough is obligated to negotiate impact because the charge doesn't allege that on a specific or approximate date, IBT demanded to negotiate the impact of installing the timekeeping system or the decision to outsource lawn maintenance work. The charge avers only that the Borough "failed and refused to negotiate. . . the impact on terms and conditions of employment." Even if this allegation doesn't imply an initial burden on the Borough to negotiate the impact of its exercise of managerial prerogatives, the charge fails to allege any facts about when the IBT's demand occurred. Also, IBT does not allege any specific

impact resulting from the Borough's decisions.[2/] See East Orange Fire Officers' Assn. P.E.R.C. 2020-36, 46 NJPER 318 (¶78 2020).

For all the reasons set forth above, I find that the charge must be dismissed in its entirety. N.J.A.C. 19:14-2.3.

ORDER

The unfair practice charge is dismissed.

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: June 17, 2020
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by July 01, 2020.

2/ For example, no alleged facts indicate that any unit employees were laid off as a consequence of the Borough's decision to subcontract lawn maintenance work.