

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

In the Matter of

PBA, LOCAL 86,

Respondent,

-and-

Docket No. CE-82-26-61

BOROUGH OF BOGOTA,

Charging Party.

SYNOPSIS

The Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent PBA did not violate Subsections 5.4(b)(3) and (5) of the New Jersey Employer-Employee Relations Act when it included in a petition to initiate compulsory interest arbitration the non-economic issues of binding arbitration and agency shop, which the PBA had never raised previously in collective negotiations prior to impasse. The Hearing Examiner found that it would have a chilling effect on the parties and their use of the procedure to initiate compulsory arbitration if they were prevented from setting forth in an interest arbitration petition those issues which either party desired to place before the Interest Arbitrator. The decisions of the Appellate Division and the Supreme Court in Newark Firemen's Benevolent Association v. City of Newark, 177 N.J. Super. 239 (1981) and 90 N.J. 44 (1982) offer sound support for the Hearing Examiner's recommended decision.

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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Appearances:

For PBA, Local 86  
Loccke & Correia, Esqs.  
(Manuel A. Correia, Esq.)

For the Borough of Bogota  
Dorf & Glickman, Esqs.  
(Mark S. Ruderman, Esq.)

HEARING EXAMINER'S RECOMMENDED REPORT AND  
DECISION ON RESPONDENT'S MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on June 15, 1982 by the Borough of Bogota (hereinafter the "Charging Party" or the "Borough") alleging that PBA, Local 86 (hereinafter the "Respondent" or the "PBA") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that on February 2, 1982, following impasse on January 18, 1982, the PBA filed a petition to initiate compulsory interest arbitration, which petition included as non-economic items binding arbitration and agency shop, which had never been proposed during the seven negotiations sessions between the parties commencing September 14, 1982, and thereafter, at a mediation session before an Interest Arbitrator the Borough objected to the placing of the said non-economic issues before the Interest Arbitrator, following which the PBA continued to pursue its binding arbitration proposal through interest arbitration,

all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(3) and (5) of the Act.<sup>1/</sup>

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 11, 1983. Thereafter, on February 1, 1983 the Respondent filed a Motion For Summary Judgment, as to which the Charging Party responded in opposition on February 14, 1983, and on March 1, 1983 the Chairman of the Commission referred the said Motion to the instant Hearing Examiner pursuant to N.J.A.C. 19:14-4.8(a). The Hearing Examiner heard oral argument on the Motion For Summary Judgment on March 4, 1983 and denied the Motion on the record.

Pursuant to the Complaint and Notice of Hearing, a hearing was held on the merits on March 11, 1983 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The Respondent moved to dismiss, at the conclusion of the Charging Party's case, as to which the Hearing Examiner reserved decision and the Respondent presented its defense without prejudice. For the reasons hereinafter set forth, the Respondent's Motion To Dismiss is granted. Oral argument was waived and the parties relied on the briefs filed previously in connection with the Motion For Summary Judgment.

An Unfair Practice Charge having been filed with the Commission, and a Motion To Dismiss having been made by the Respondent, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the briefs filed by the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

<sup>1/</sup> These Subsections prohibit public employee representatives, their representatives or agents from:

"(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.

"(5) Violating any of the rules and regulations established by the commission."

Upon the record made by the Charging Party prior to Respondent's Motion to Dismiss, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Borough of Bogota is a public employer within the meaning of the Act as amended, and is subject to its provisions.
2. PBA, Local 86 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. The first negotiations session between the parties for the 1982-83 collective negotiations agreement occurred on September 14, 1981. On that date the PBA submitted sixteen written proposals, to which a 17th proposal was added (J-1).
4. At the second negotiations session on September 29, 1981 the Borough submitted counter-proposals (J-2).
5. The Charging Party offered as witnesses at the hearing two Councilwomen who participated in all of the negotiations sessions: Virginia Herrmann and Dorothy Kerkowski. Herrmann testified that at the third negotiations session it was "more or less agreed" that the negotiations proposals of each party would be limited to those on Exhibits J-1 and J-2. Herrmann testified that this was an oral agreement and that the negotiations were conducted in an informal manner. Kerkowski testified that it was "my understanding" that the demands on J-1 and J-2 were the "points" to be negotiated and that she "believed" that the PBA negotiators "understood."<sup>2/</sup> Kerkowski also acknowledged that the negotiations proceedings were informal prior to the initiation of interest arbitration.
6. After seven informal negotiations sessions the PBA concluded that the parties were at "impasse" and on February 3, 1982, following the last negotiations session on January 18, 1982, the PBA filed a petition to initiate compulsory interest arbitration (J-3). The Borough acknowledged that it received a copy of the interest

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<sup>2/</sup> Kerkowski also testified that the PBA negotiators never expressly said that no additional issues would be presented.

arbitration petition shortly after February 3, 1982 and that it was given to the Borough's attorney, Thomas Herten. Notwithstanding the requirements of N.J.A.C. 19:16-5.5(a), which required the Borough to file a written response within seven days of receipt of the interest arbitration petition, the Borough never filed a response, either in a timely or untimely fashion. N.J.A.C. 19:16-5.5(b) provides, in part, that "...if a party has not submitted a response within the time specified, it shall be deemed to have agreed to the request for the initiation of compulsory interest arbitration as submitted by the filing party..." (Emphasis supplied).

7. Schedule "A," annexed to the petition for compulsory interest arbitration (J-3), included under non-economic issues "Grievance procedure"<sup>3/</sup> and "Agency shop clause." According to the Charging Party's witnesses, these two items had never been discussed in the seven negotiations sessions preceding the filing of J-3.

8. Herrmann and Kerkowski testified that the first discussion of binding arbitration in the negotiations was at the first mediation session with the Interest Arbitrator, David C. Randles. At this first meeting with Randles on April 19, 1982 he proposed a settlement, which included binding arbitration along with a number of economic items and several additional non-economic items (J-6). When the Borough Council considered the Interest Arbitrator's settlement proposal it was rejected out of hand because it contained a binding arbitration proposal. Kerkowski testified that the Council did not even discuss the economic issues.

#### THE ISSUE

Did the PBA refuse to negotiate in good faith in violation of Subsection (b)(3) of the Act<sup>4/</sup> when it initiated compulsory interest arbitration on February 3, 1982, which included as non-economic issues binding arbitration and

<sup>3/</sup> Although denominated "Grievance procedure" the PBA intended to seek a provision for binding arbitration in the grievance procedure of the collective negotiations agreement.

<sup>4/</sup> There was no evidence adduced by the Charging Party that the PBA violated any of the rules and regulations established by the Commission and, thus, the Hearing Examiner will recommend dismissal of the Subsection(b)(5) allegations in the Unfair Practice Charge.

agency shop, which had not been the subject of prior informal negotiations between the parties?

DISCUSSION AND ANALYSIS

The PBA Did Not Violate Subsection(b)  
(3) Of The Act When It Included In Its  
Compulsory Interest Arbitration Petition  
The Noneconomic Issues Of Binding  
Arbitration And Agency Shop Which Had  
Not Been The Subject Of Prior Informal  
Negotiations Between The Parties

Counsel for the Charging Party concedes that the initial Act of bad faith on the part of the PBA was its filing of a petition to initiate compulsory interest arbitration on February 3, 1982 (J-3, supra). It would appear to the Hearing Examiner that the Borough also contends that the PBA's bad faith continued during the course of two mediation sessions with the Interest Arbitrator on April 19 and May 13, 1982 inasmuch the PBA continued to press the non-economic issue of binding arbitration, notwithstanding that the PBA abandoned the non-economic proposal for an agency shop clause.

It appears to the Hearing Examiner that this case closely parallels Hamilton Township Board of Education, D.U.P. No. 80-26, 6 NJPER 275 (1980) where the Director of Unfair Practices refused to issue a Complaint. In that case the Charging Party sought the issuance of a Complaint on its Unfair Practice Charge where the facts were that after three negotiations sessions the public employer declared an impasse, notwithstanding the existence of approximately 23 items still in dispute and subject to negotiations. The Director first noted the absence of bad faith in the totality of the public employer's conduct, citing State of New Jersey v. Council of N.J. State College Locals, 141 N.J. Super. 470 (1976). The Director then noted that the filing of a notice of impasse was not in itself an unfair practice since it did not indicate an intent to refrain from further negotiations. Further, the Director stated that the act of filing a notice of impasse is a privilege afforded to the parties "...by Commission rule and its exercise should not be chilled. Thus, the

act of filing a notice of impasse, by itself, cannot constitute an unfair practice..." (6 NJPER at 276). Finally, noting that the issue of the existence of impasse is under the jurisdiction of the Director of Conciliation, the procedure available under the applicable Commission rules is the proper forum to contest the existence of an impasse. "...Litigation of this issue in an unfair practice forum would constitute an inappropriate usurpation of the Director of Conciliation's power, and more importantly, frustrate the public policy of facilitating the prevention and prompt resolution of labor disputes..." (6 NJPER at 276).

The analogy and argument to be made in the instant case vis-a-vis Hamilton Township, supra, is that the Commission has established comprehensive rules governing compulsory interest arbitration pursuant to N.J.S.A. 34:13A-14 et seq. The rule governing the content of the petition to initiate compulsory interest arbitration is N.J.A.C. 19:16-5.4, which provides, in part, that the petition shall include a "...statement indicating which issues are in dispute, identifying the issues as economic or noneconomic within the meaning of N.J.S.A. 34:13A-16(f)(2)..."

The Hearing Examiner finds and concludes that inasmuch as there is a rule governing the right of the PBA herein to identify the economic and non-economic issues, which it deems in dispute, it would be totally improper to deny the PBA the exercise of this important right. To curtail the filing of a petition to initiate compulsory interest arbitration under the Rules would have a chilling effect on the exercise by parties of the right to initiate compulsory arbitration: Hamilton Township Board of Education, supra.

The PBA also cites Glen Rock Board of Education, P.E.R.C. No. 82-11, 7 NJPER 454 (1981) in connection with the contention of the Board in that case that the public employee representative included "false and misleading information" on a Notice of Impasse form. The Commission noted that the statements on a Notice of Impasse are neither verified or certified and are merely intended to give notice of a dispute. The Commission said that the Association's statement set forth only

its "perception of the issues in dispute," which included references to "representation fee" and "agency shop."

So, too, in the instant case, the PBA has included in its petition to initiate compulsory interest arbitration its "perception" of the issues in dispute. The mere fact that, according to the Charging Party's witnesses, neither binding arbitration nor agency shop were the subject of discussion in negotiations prior to impasse cannot operate to preclude the PBA from bringing these issues forward to an Interest Arbitrator. It is the arbitrator who has jurisdiction, after the filing of an interest arbitration petition, to determine whether to accept the "last offer" of the PBA or the Borough as to the economic and non-economic issues submitted to him.

In so holding, the Hearing Examiner has considered carefully the argument of the Charging Party based upon the decisions of the Appellate Division and the Supreme Court in Newark Firemen's Mutual Benevolent Association v. City of Newark, 177 N.J. Super. 239 (1981), aff'd. 90 N.J. 44 (1982). The Hearing Examiner is of the view that there is nothing inconsistent between his conclusion and that of the Courts in Newark, supra. Thus, the statement by the Appellate Division that N.J.S.A. 34:13A-16(f)(1) "...means simply that the parties must enter arbitration with set proposals that may be used as reference points at the beginning but may be changed during the course of the arbitration proceedings..." (177 N.J. Super. at 243) is completely consistent with what happened before the Interest Arbitrator in this case. The PBA's proposals became "set" when they were reduced writing and attached as Schedule "A" to the petition to initiate compulsory interest arbitration (J-3, supra). The Hearing Examiner rejects the Charging Party's argument that the inclusion of binding arbitration and agency shop in the petition of the PBA represented the introduction of new issues.

It is interesting to note that the PBA "narrowed" the issues in dispute by abandoning the agency shop clause in the mediation sessions before Arbitrator Randles. This is precisely what the Supreme Court in Newark had in mind when it



said that: "Any law that prevents the parties in labor negotiations from narrowing their differences impedes the voluntary resolution of labor disputes." (90 N.J. at 54).

Finally, even if the Hearing Examiner was persuaded that the parties could contravene the Commission's rules and the policy of the Act, it is clear that no agreement was reached in the negotiations between the Borough and the PBA, prior to impasse, that no new issues could be put forth by either side. Giving the Charging Party's proofs the benefit of the doubt, the testimony of its two witnesses plainly falls short of establishing any agreement to limit issues beyond those set forth on Exhibits J-1 and J-2.

It is also noted, in conclusion, that the Charging Party could well have been held to have waived its right to object to the inclusion of binding arbitration and agency shop in the presentation by the PBA of its proposals to the Interest Arbitrator since the Borough inexcusably failed to file a timely or untimely response to the petition to initiate compulsory interest arbitration under N.J.A.C. 19:16-5.5(b). However, the Hearing Examiner is not basing his decision on this act of omission by the Borough. The decision is based solely on the cases cited and discussed above.

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Upon the foregoing, and upon the record made by the Charging Party in chief, the Hearing Examiner grants the PBA's Motion To Dismiss and makes the following:

CONCLUSION OF LAW

The Respondent PBA did not violate N.J.S.A. 34:13A-5.4(b)(3) and (5) when it included in its petition to initiate compulsory interest arbitration on February 3, 1982 the non-economic issues of binding arbitration and agency shop.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



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Alar R. Howe  
Hearing Examiner

Dated: March 18, 1983  
Trenton, New Jersey