P.E.R.C. NO. 88-14

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY SPORTS AND
EXPOSITION AUTHORITY,

Respondent,

-and- Docket No. CO-87-256-116

LABORERS INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 734,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Laborers International Union of North America, Local 734 against the New Jersey Sports and Exposition Authority. The charge alleged that the Authority violated the New Jersey Employer-Employee Relations Act when it changed the workweek of employees who cleaned the Meadowlands Racetrack Facilities. The Commission finds that the Authority had the contractual right to change the workweek.

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LABORERS INTERNATIONAL UNION
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Charging Party.

Appearances:

For the Respondent, Grotta, Glassman & Hoffman, P.A. (M. Joan Foster, of counsel; Mark E. Faber, on the brief)

For the Charging Party, Schneider, Cohen, Solomon, Leder & Montalbano, Esqs. (Bruce D. Leder, of counsel)

DECISION AND ORDER

On March 5, 1987, the Laborers International Union of North America, Local 734 ("Local 734") filed an unfair practice charge against the New Jersey Sports and Exposition Authority ("Authority"). The charge alleges that the Authority violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),[1/] when it

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1/ 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; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and

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changed the workweek of employees who cleaned the Meadowlands Racetrack facilities.[2/]

On March 11, a Complaint and Notice of Hearing issued.[3/] The Authority asserts that it had a managerial prerogative and a contractual right to change these employees' workweek.

On April 2 and 10, Hearing Examiner Arnold Zudick conducted a hearing. The parties stipulated many facts, examined witnesses and introduced exhibits. They filed post-hearing briefs by April 28 and requested that the Hearing Examiner also review their interim relief briefs.

On June 2, the Hearing Examiner recommended the Complaint's dismissal. H.E. No. 87-71, 13 NJPER 543 (¶18201 1987). While he rejected the managerial prerogative defense, he found the Authority had a contractual right to change the workweek. He also found that

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1/ Footnote Continued From Previous Page

conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ Local 734 sought interim relief restoring a Monday through Friday work schedule. On March 10, 1987, Commission designee Edmund G. Gerber conducted a hearing. The next day he denied interim relief. I.R. No. 87-20, 12 NJPER 252 (¶18102 1987).

3/ The unfair practice charge was consolidated for hearing with a scope of negotiations petition concerning related issues. After the hearing, the scope petition was transferred back to the Commission which issued its decision on May 21. New Jersey Sports and Exposition Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), appeal pending, App. Div. Dkt. No. A-4781-86T8.

the Authority had in fact negotiated in good faith and until impasse over the workweek changes.

On June 19, Local 734 filed exceptions. It asserts the Hearing Examiner erred in finding that the Authority had a contractual right to change the workweek and that it negotiated in good faith until impasse.

On July 1, the Authority filed a cross-exception and a response. It asserts that the Hearing Examiner erred in finding that the workweek change was a mandatorily negotiable subject, but correctly found that it had a contractual right to make the change and it negotiated in good faith until impasse.

We have reviewed the record. The Hearing Examiner's thorough findings of fact (pp. 4-21) have not been questioned and are accurate. We adopt and incorporate them here. We will, however, clarify this statement in finding of fact no. 8: "Both Tishuk and Lio explained that the standard of service and number of employees could be reduced on Monday through Wednesday and increased Thursday through Saturday." (TB32, TB95). The Authority closed some parts of the racetrack facility and reduced the number of cleaners. On Thursday through Saturday, the Authority reopened the closed areas and restored the number of cleaners back to the pre-change levels. The number of cleaners was not increased beyond that level.

We agree with the Hearing Examiner that the workweek of the racetrack employees is a mandatorily negotiable subject and that the

employer did not have a non-negotiable managerial prerogative to dictate the workweek unilaterally. The Authority has the right to determine the hours and days its services will be offered and the number of employees working at any given time. Given these determinations, however, the days and hours of work are mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J. 383, 411-412 (1982); Woodstown-Pilesgrove Reg. Sch. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980); Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10 (1973); In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); Hamilton Tp., P.E.R.C. No. 86-106, 12 NJPER 338 (¶17129 1986), aff'd App. Div. Dkt. No. A-4801-85T7 (4/2/87), certif. den. __ N.J. __ (1987). The obligation to negotiate imposes no obligation to agree. The Authority's budgetary concerns are a legitimate factor in formulating a negotiations position, but they do not eliminate the negotiations obligation entirely. Had the Authority agreed, either during overall contract negotiations over the current contract in late 1985 or during negotiations on this issue in January and February 1986, that the workweek would be Monday through Friday with Saturday work paid at overtime rates, that agreement would have been enforceable.

We agree with the Hearing Examiner that the Authority did not make such a commitment. Instead it had a contractual right to change the workweek.

Article 3 provides, in part:

> Section 1: The workweek shall be Monday through Sunday both inclusive and shall be comprised of eight (8) hour days....
>
> Section 2: All hours worked in excess of eight (8) hours per day and forty (40) hours in a workweek shall be paid for at the rate of one and one-half (1-1/2)times the employees' regular hourly rate....

The contract does not guarantee any particular day or consecutive days off or call for premium pay for Saturday and Sunday work. While racetrack employees had worked Monday through Friday with Saturday overtime assignments before the change, employees at Brendan Byrne Arena and Giants Stadium had worked different days of the week depending on the schedule of events and Saturday and Sunday had been used as regular work days. The same contract language covers racetrack, arena and stadium employees and grants the employer the same flexibility to adjust the workweek. Under all these circumstances, we hold that the contract authorized the workweek changes without further negotiations. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. Bd. of Ed., 78 N.J. 122, 140 (1978); Ramapo State College, P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985); Old Bridge Municipal Utilities Auth., P.E.R.C. No. 84-116, 10 NJPER 261 (¶15126 1984); Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13202 1982).[4/]

4/ Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985) is distinguishable since the contract there was silent on the workweek while the contract here specifies that the workweek shall be Monday through Sunday both inclusive. Further here, unlike there, the contract language has been applied to permit changes in the schedules of other employees.

The Hearing Examiner finally determined that even if the contract did not authorize the change without further negotiations, the Authority in fact negotiated in good faith until impasse before making the change. We do not decide that question.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith were opposed.

DATED: Trenton, New Jersey
August 19, 1987
ISSUED: August 20, 1987

H.E. NO. 87-71

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

In the Matters of

NEW JERSEY SPORTS AND
EXPOSITION AUTHORITY,

Respondent,

-and-

Docket No. CO-87-256-116

LABORERS INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 734,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the New Jersey Sports and Exposition Authority did not violate the New Jersey Employer-Employee Relations Act when it changed the work week schedule of employees represented by Local 734 at the Meadowlands Racetrack. The Hearing Examiner concluded that the Authority had acted pursuant to its collective agreement and, therefore, did not violate the Act.

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. 87-71

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

In the Matters of

NEW JERSEY SPORTS AND
EXPOSITION AUTHORITY,

Respondent,

-and-

Docket No. CO-87-256-116

LABORERS INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 734,

Charging Party.

Appearances:

For the Respondent
Grotta, Glassman & Hoffman, P.A.
(M. Joan Foster, of Counsel; Mark E. Faber, on the Brief)

For the Charging Party
Schneider, Cohen, Solomon, Leder & Montalbano, Esqs.
(Bruce D. Leder, of Counsel)

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (Commission) on March 5, 1987 by the Laborers International Union of North America, Local 734 (Local 734) alleging that the New Jersey Sports and Exposition Authority (Authority) violated subsections 5.4(a)(1) and (5) of the New Jersey

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[1/] Local 734 alleged that the Authority violated the Act by unilaterally changing the Monday through Friday work week of Authority employees it represents at the Meadowlands Racetrack, and it seeks an order returning the work week to a Monday through Friday work schedule. The Authority had announced on February 24, 1987 that it would make the change effective March 16, 1987. Local 734 argued contractual and past practice facts in support of its Charge.[2/]

A Complaint and Notice of Hearing was issued on March 11, 1987.[3/] The Authority filed an Answer on March 26, 1987 denying

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the 3ights guaranteed to them by 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."

2/ The Charge was accompanied by an Application for Interim Relief. An Order to Show Cause was executed on March 6, 1987, returnable for March 10, 1987. Both parties submitted affidavits or certifications and briefs in support of their positions by March 9, 1987. An interim relief hearing regarding the Charge was held on March 10, 1987 before Commission Designee Edmund G. Gerber. On March 11, 1987 the Commission Designee issued a decision denying the Application for Interim Relief. N.J. Sports and Exposition Auth., I.R. No. 87-20, 13 NJPER 252 (¶18102 1987).

3/ When the Complaint and Notice of Hearing issued on March 11, 1987, the instant charge was consolidated for hearing with a scope of negotiations petition in Docket No. SN-87-48. A complete factual record was made regarding both the Charge and

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having committed any violation of the Act. The Authority alleged that the work-schedule change was a managerial prerogative. In its post hearing brief and its interim relief pleadings the Authority also raised a contractual defense to the Charge.

Hearings were held in this matter on April 2 and 10, 1987 at which time the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally.[4/] Both parties mailed post-hearing briefs by April 28, 1987. The parties also jointly requested that I take administrative notice of their briefs filed in the interim relief matter. (TA16).

3/ Footnote Continued From Previous Page

the Petition, and the parties were instructed that I reserved the right to review all of the facts in reaching my decision on the whole case. On May 15, 1987, the Chairman of the Commission notified the parties that the Commission transferred the entire scope matter to itself for determination. The Commission issued a decision on the petition on May 21, 1987, New Jersey Sports and Exposition Authority, P.E.R.C. No. 87-143, 13 NJPER ___ (¶ 1987). The unfair practice charge remained before me for determination.

4/ The transcript from April 2, 1987 will be referred to as "TA" and the transcript from April 10, 1987 will be referred to as "TB."

At the hearing on April 10 counsel for the Authority advised me that there were errors made in the transcript of the April 2 hearing. By letter of April 15, 1987 the Authority itemized the various transcript errors it discovered. I have reviewed TA and the errors raised by the Authority. None of the errors made were of a substantive nature, nor did the necessary corrections result in changing any material evidence or testimony. Since the errors were minor, and since Local 734 raised no objections to the proposed corrections, I adopted the proposed corrections which are now reflected in TA.

Upon the entire record I make the following:

Findings of Fact

1. The Authority is a public employer within the meaning of the Act, and Local 734 is an employee representative within the meaning of the Act.

2. The Authority and Local 734 have been parties to collective negotiations agreements since 1976 (TA34). Local 734 represents all full-time and part-time building maintenance cleaning employees, restroom attendants, and stock clerks employed by the Authority at three different locations: the Meadowlands Racetrack, the Brendan Byrne Arena, and Giants Stadium (J-1, J-2, TA8, TB187).

3. Exhibit J-1 was the parties' collective agreement from December 1982 through November 1985. Exhibit J-2 is the parties' current collective agreement effective from December 1985 through November 1988. Both contracts contain grievance procedures which culminate in binding arbitration.

Article 3, Section 1, of both contracts sets forth the work week as Monday through Sunday, inclusive; and the workday as eight-hour days:

> Art. 3, Sec. 1
>
> The work week shall be Monday through Sunday both inclusive and shall be comprised of eight (8) hour days. Arena events cleaners will have a four (4) hour call.

Article 3, Section 2 of J-2 provides that a normal work week is 40 hours a week; that overtime will be paid for any work done in excess of eight hours per day or 40 hours per week; and, that there shall be no premium pay.

Art. 3, Sec. 2

> All hours worked in excess of eight (8) hours per day for forty (40) hours in a work week shall be paid for at the rate of one and one-half (1-1/2) times the employees regular hourly rate. There shall be no pyramiding of overtime or premium pay.

Article 6, Section 1 of J-2 provides that the Authority will not engage (I presume that means "hire") cleaners unless full-time cleaners are working at least 40 hours per week.

Art. 6, Sec. 6

> The Employer agrees that he will not engage any new employees in the bargaining unit unless all of the employees regularly employed on a full time basis by the Employer are working at least forty (40) hours per week. This provision shall apply only if said employees are capable of performing the work desired.5/

Nothing in J-2 provides that Saturday and Sunday, or any other specific days, shall be days off, or that days off must be consecutive (TA53). Similarly, J-2 does not provide for premium pay--additional pay per hour--for working on Saturday and/or Sunday.

Racetrack

4. At the hearing on April 2, 1987 the parties stipulated to the following relevant facts which pertain to the Racetrack (both the Racetrack Scope and Charge matters) (TA8-TA15).

> a. Local 734 represents all maintenance and cleaning employees and restroom attendants at the Meadowlands Racetrack. Cleaners are responsible for cleaning all areas in and around the grandstand,

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5/ Full-time employees are defined in Article 12, Section 3 of J-2 as those employees who have worked 24 hours or more during four consecutive weeks.

including the standee floor, grandstand and clubhouse floors and the clubhouse, handicapped dining room and Pegasus Restaurant.

b. There are currently 127 full-time and approximately 35 part-time employees in the bargaining unit. Currently there are 48 employees working during the day shift and 37 employees during the night shift on Mondays, Tuesdays and Wednesdays, and 72 employees working on the day shift and 55 employees on the night shift on Thursday, Friday and Saturday. Prior to March 16th, 1987, the numbers were 72 on the day shift and 55 on the night shift for Monday, Tuesday and Saturday.6/

c. With regard to the Racetrack unfair labor practice charge and the scope petition proceeding, the Racetrack began operation in September, 1976. The employees were hired in August of 1976. From September of 1976 to August of 1986, the employees were required to work six days a week, except when there was no racing due to weather conditions or conflicting events in which case employees worked five days, including Saturday at straight time. The six days of the week that they worked, Monday through Saturday, were generally eight-hour tours of duty each day. Employees normally worked Monday through Saturday, eight hours per day. Employees were required to work on Sundays when necessary and to work double shifts when there were two racing cards.

d. In August, 1986, the Authority implemented a policy of filling its manning needs on Saturdays with part-timers on straight time. It utilized part-time employees on two Saturdays at straight time. All but three full-time employees who otherwise would have worked those Saturdays did not.

The Authority was unable to obtain a specific number of part-timers to fill its Saturday manning needs during live racing, and beginning in September, 1986 [through December 1986] permitted full-time employees to volunteer to work Saturdays by signing on a sign-up sheet.

6/ Although the transcript at TA9-13 actually says "Monday, Tuesday and Saturday," in the context of this case it makes no sense placing those days together. It is more likely that the stipulation was intended to be Monday through Saturday.

All who volunteered were permitted to work. The number of full-timers who signed up to work on Saturdays was insufficient to meet Saturday manning needs.

e. In January, 1987, the Authority set the number of full-time employees who can volunteer to work on Saturdays at 40 full-timers during the days and 25 or 30 full-timers during the nights. That's the day and night shift.

The Authority based the 40/30 number on its estimate of the number needed to meeting manning needs based upon the complement or numbers of part-timers available to work on Saturdays.

The Authority filled the number of 30 positions by posting a sign-up sheet providing for 40 employees during the day and 25 or 30 employees during the night. If more employees signed up, they were not permitted to work.

On occasion, the number of 40/30 was exceeded.

The Authority based the 40/30 number on its estimate of the number needed to meet manning needs based upon the complement or number of part-timers available to work on Saturdays.

f. On January 16, 1987, a meeting was held with the representatives of the Authority and the union to discuss a revised work schedule under which services and manning requirements would be reduced on Mondays, Tuesdays and Wednesdays and maintained as full-service levels as on Thursdays, Fridays and Saturdays. See J-4, J-5, J-6 and J-7.7/

7/ Exhibit J-4 is a letter of January 21, 1987 from John Feketie, the Authority's Director of Labor Relations, to George Wilkins, Local 734 Business Manager, explaining that the Authority was considering implementation of a work schedule at the Racetrack where some employees would be off Monday,some on Tuesday, and some on Wednesday. In the letter the Authority offers to negotiate over which employees will have which days off.

J-5 is Wilkins' January 27, 1987 response to J-4. He indicated that Local 734 did not believe that J-2 permitted the scheduling change. He also cited the seniority clause in Article 7, Section 9 of J-2 (which was Art. 7, Sec. 12 of J-1), and agreed to meet with Feketie

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On February 13, 1987, the union notified the Authority that it would file an unfair labor practice charge and go before the Commission to seek a temporary restraining order.

The Authority voluntarily rescinded implementation of the revised work schedule J-8.8/

On February 23, 1987, the parties met in an attempt to resolve the matter and were unable to do so.

The union made application for an interim restraint, which was denied by order of the Commission.

The Authority implemented the revised work schedule on March 16, 1987. See J-9.9/

Under this work schedule, full-time employees are off on Monday, Tuesday or Wednesday and work a five-day workweek, including Saturday.

5. Exhibit R-1, the certification of James Durkin, the Authority's Chief Financial Officer, provides the following facts

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7/ Footnote Continued From Previous Page

but would not agree to change layoff procedures.

Exhibit J-6 is a February 9, 1987 memorandum to the maintenance employees informing them that a new schedule would be implemented on February 16, and advising them of their right to choose a day off on Monday, Tuesday or Wednesday.

Exhibit J-7 is a February 12, 1987 memorandum to the maintenance employees listing the day off for each employee under the new schedule.

8/ Exhibit J-8 is the February 13, 1987 notice to employees cancelling J-6.

9/ Exhibit J-9 is a February 24, 1987 memorandum to the maintenance employees advising them that a work schedule change will be implemented on March 16, 1987. Employees were again given the opportunity to select a day off on Monday, Tuesday or Wednesday.

regarding the Authority's financial condition as of March 6, 1987, the date of the certification.

a. There has been a sharp decrease in the Authority's revenues and net income over the past two years. Specifically, net income for the year ended December 31, 1984 totalled $45,046,000. For the year ended December 31, 1985, net income decreased to $37,060.000. The estimated net income for the year ended December 3, 1986 totals approximately $30,000,000.

b. Since the Racetrack is the major source of revenues for the Sports Complex, most of the decline in net income can be attributed to the operation of the Racetrack. Net income from the Racetrack operation has decreased from approximately $39,000,000 in 1984 to $26,300,000 in 1986....

c. In addition, during this two-year period, the New Jersey Generals have ceased to function as a professional football team resulting in lost income to the Sports Complex of approximately $1,000,000....

d. These events required the Sports Authority to initiate a cost containment program which resulted in reductions in staff personnel, elimination of salary increases for the majority of administrative employees during 1986, reduction or elimination of some vendor services for all facilities, and drastic cutbacks in inventory of maintenance and office supplies, all of which were accomplished through the efforts of top management during departmental budget review.

e. The Sports Authority has managed to pay its annual debt service (principal and interest payments) on bonds issued to finance the construction of the Complex facilities without taxpayer assistance. In the past, the Sports Authority has paid the State of New Jersey over $50,000,000 in surplus payments that are akin to year-end dividends. In 1984 and 1985 these surplus distributions amounted to $2,000,000. No distribution will be made for 1986 because the fall off in net income resulted in the lack of any surplus funds available to be distributed to the State.

f. The preparation of the 1987 budget is currently underway with a heightened emphasis on cost containment. It is anticipated that even with a slight increase in net income projected for 1987, that because

of increased annual debt service payments, the Sports Authority will not generate sufficient income to meet its capital improvement requirements.

6. In the Fall of 1985 the Authority's Executive Director met with the various unions representing Authority employees and informed them that the Authority's revenues had decreased (TB183).

Negotiations leading to J-2 began in November 1985 and Feketie headed the Authority's negotiating team and prepared the Authority's proposals for those negotiations (TA63-TA64). During those negotiations Feketie never proposed that Racetrack full-time employees work only five days a week (TA64); that Saturday overtime be eliminated (TA70); or that the Racetrack work schedule be changed (TB178-TB179).

On April 7, 1986 Feketie told Wilkins that the Authority needed to reduce overtime and eliminate the sixth day of work (TB4-TB7). Feketie also told Wilkins that the change would occur in August 1986 (TB5). Feketie explained that he told Wilkins that the Authority would reduce overtime by either reducing cleaning employees to five days a week, or by changing the work schedule and reducing services on certain days (TB7). Wilkins responded that the contract did not allow such changes (TB7) and that overtime could not be reduced (TB181).

Wilkins testified that Feketie often told him that he would reduce overtime (TB181, TB183), and he did not deny that on April 7, 1986 Feketie told him about reducing overtime (TB180).

7. The Racetrack normally operates six days a week, Monday through Saturday (TB13). Prior to August 1986 full-time cleaners worked the same six days a week, Monday through Saturday (Stipulation c, supra). Full-timers have always been employed for at least 40 hours per week (TB46). Monday through Friday was their regular 40-hour week, and Saturday was paid at overtime (Stipulation c, TA10; J-2, Art. 3, Sec. 2). The Authority employed approximately 72 full-time employees on the day shift and approximately 52 full-time employees on the night shift (Stipulation c, TA9). The day shift consists of two schedules, five employees report from 5:00 a.m. to 1:30 p.m. and the remainder of the day shift report from 7:00 a.m.-3:30 p.m. (TB14). The night shift works from 5:00 p.m. until one-half hour after the last race which could be as late as midnight (TB14). Prior to August 1986, part-time employees were not used at the Racetrack on a regular basis (TB45). Both full- and part-time employees are paid on an hourly basis (TB46), and part-timers earned $1.25 less per hour (J-2, Art. 12, Sec. 2; TB67).

In early 1986 Gus Tishuk, the Maintenance Manager at the Racetrack, was told to reduce his cleaning budget by $850,000 (TB19). Tishuk sought to accomplish that goal by implementing a layoff or reduction in force (RIF) of certain employees; reducing inventories and supplies; and by reducing overtime costs. First, he RIFed two salaried supervisors and one full-time secretary and hired a part-time secretary (TB20). Second, he RIFed a total of seven trade union employees (electricians, plumbers, etc.)(TB21-TB24).

Third, he reduced supply inventories and the quality of cleaning supplies (TB24-TB25). Fourth, he scheduled the work week of full-time cleaners from Monday through Friday (rather than always Monday through Saturday) and used as many part-time employees on Saturday as possible before bringing in full-time employees to work on overtime (TB25). Tishuk explained that the first three steps reduced his budget by about $450,000, but the fourth step was necessary to reach the $850,000 goal (TB25-TB26).

8. On Saturdays, August 16 and 23, 1986, instead of using all full-time employees on overtime, the Authority used part-time employees on straight time and most full-time employees on overtime to fill its manning needs. Due to the use of part-timers on those days, all but three full-time employees who otherwise would have worked those Saturdays did not (Stipulation d, supra)(TA11-TA12). On August 18, 1986 Local 734 filed a grievance (Exhibit J-3A) on behalf of full-time cleaners who were not allowed to work that day and any succeeding Saturday. Local 734 sought reimbursement for those employees who lost pay.

That grievance was denied by the Authority prompting Local 734 to file for arbitration with the State Board of Mediation (NJSBM Docket No. 86-271). An arbitrator was selected, then the Authority filed Scope petition SN-87-48.

Since the Authority was unable to find enough part-timers to fill its Saturday needs without using full-time employees, from September through December 1986 the Authority allowed full-time

employees to volunteer for Saturday work at overtime (Stipulation d; TA12, TB29). The part-time employees only worked on Saturday, not during the week (TB45). All full-timers who volunteered for Saturday were permitted to work (Stipulation d; TA12). Between September and December 1986 a total of only 85-90 full and part-timers worked on Saturday (TB113). But Tishuk testified that even with all the full-time volunteers and the part-timers, Saturday coverage was still inadequate (Stipulation d; TA12; TB29-TB31). Tishuk indicated that 127 employees were needed to fully staff a Saturday schedule (TB113).

Effective January 1, 1987 Mark Lio, the Authority's Assistant Manager of Cleaning and Operations at the Racetrack, set the limit for the number of full-time employees who could volunteer to work overtime on Saturday to 40 for the day shift, and 25 or 30 for the night shift (Stipulation e; TA12-TA13; TB93-TB94). Those numbers were determined by the number of part-time employees and full-time volunteers available to work on Saturday (TB93-TB94).10/

10/ Lio testified that between January 1, 1987 and March 16, 1987 the Authority on Saturday used 8 to 15 part-timers during the day and 18 to 25 part-timers at night (TB102). He further testified that the full-timers on Saturday were limited to 40 for the day and 25 or 30 at night (TB102-TB103). Based upon those numbers the maximum number of employees on the day shift was 55 and was 55 at night which was less than the 72 day and 55 night set forth in Stipulation b, TA9-13. Since I am not certain of the language in Stipulation b, I am inclined to credit Lio's testimony as to the employee complement on Saturday.

In early January 1987, however, Tishuk realized that the Saturday schedule was not adequately servicing the Racetrack patrons, nor was it adequately reducing his budget (TB31). He was not able to obtain enough part-timers to do the job and keep his overtime expenses down (TB31). Thus, in mid-January he made a proposal to change the full-timers' work schedule by eliminating Saturday overtime and still providing complete coverage. Tishuk explained that Racetrack attendance was at its lowest on Monday through Wednesday, and highest Thursday through Saturday (TB32-TB33). Both Tishuk and Lio explained that the standard of service and number of employees could be reduced on Monday through Wednesday, and increased Thursday through Saturday (TB32, TB95). Thus, Tishuk recommended that one-third of the work force be off on Monday, Tuesday, and Wednesday, and everyone work on Thursday, Friday and Saturday (TB31-TB33, TB95). Every workday would be a regular workday at straight time. Tishuk explained that the new schedule would function by full-time cleaners choosing a day off by seniority on Monday, Tuesday or Wednesday (TB31), in addition to being off on Sunday.

Tishuk made the proposal to the Authority's Executive Director and then to Feketie (TB33), who indicated that the Authority would not change the schedule before talking to Local 734 (TA38, TB34, TB95). A meeting was held on January 16, 1987 between Feketie, Tishuk and Lio (and another assistant manager) for the Authority, and George Wilkens and Steve Rozic for Local 734 (TA38,

TB34, TB95). Feketie presented the Authority's plan to Local 734 and sought their agreement to that plan or invited them to develop an alternative plan (TB34-TB35, TB96). Wilkins responded that he could not agree to a plan that would reduce his membership's salary by 23% (TA39, TB35, TB96). Tishuk explained that eliminating the sixth day of work which was paid at overtime, effectively reduced the employees' salaries by approximately 23% (TB66-TB67). Wilkins did not offer his own plan or work schedule alternative on January 16, and Feketie indicated he would wait approximately a week for him to respond (TB35).

On January 21, 1987 Feketie sent J-4 to Wilkins emphasizing the Authority's readiness to negotiate over which employees would be off on Mondays, Tuesdays and Wednesdays. Wilkins responded with J-5 on January 27, 1987 and agreed to meet, but indicated that the contract did not permit the kind of schedule sought by the Authority. Wilkins in J-5 did not propose any alternative to the Authority's plan. On February 9, 1987 the Authority posted J-6 announcing to the employees that the new work schedule would be implemented on February 16, and advising them that a list would be posted for them to choose a day off Monday, Tuesday or Wednesday. The list, J-7, was posted on February 12, 1987. By notice of February 13, J-8, the Authority temporarily cancelled J-6 and announced that the new schedule would not be implemented on February 16.

On February 23, 1987 the parties had another meeting over the work schedule. Feketie, Lio, Wilkins and Rozic attended (TA41-TA42). The meeting lasted just over an hour (TA42). Wilkins could not agree to the Authority's proposal and proposed that the Authority either lay off one-third of the employees on Mondays, Tuesdays and Wednesdays and recall them on Thursdays, Fridays and Saturdays, or increase all of the full-time employees' pay by $1.83 per hour (TA42-TA44, TB97, TB121). The Authority did not make any proposal other than the new work schedule (TA72, TB118).

Feketie, Lio and Tishuk explained that under Local 734's layoff proposal it would still be necessary to pay overtime on Saturday because a percentage of the work force would be working six days a week (TA45, TB77, TB98). Tishuk also explained that the layoff proposal would not work because there is additional paperwork to be completed each time an employee is laid off (TB77, TB84).

After hearing Wilkins proposals on February 23, Feketie felt that the parties were at impasse and that there was no value in any further negotiations (TA45-TA47). Feketie explained on cross-examination that he had known Wilkins for ten years and had never seen Wilkins take a position "cast in stone," but that here Wilkins' position was firm because he (Wilkins) had earlier told Feketie he (Wilkins) had to take a firm position because he (Wilkins) ran the risk of losing the unit (TA71-TA72). Feketie believed Wilkins and thus felt further negotiations were pointless

(TA72).[11/] Feketie did not seek mediation or fact finding regarding that issue (TA72). On February 24, 1987 the Authority posted a notice (J-9) advising the employees of the implementation of the new 40-hour work week schedule for March 16, 1987.

9. The new work schedule was implemented on March 16, 1987. It resulted in full-time employees working either Tuesday through Saturday and off Sunday and Monday; Monday, Wednesday through Saturday off Sunday and Tuesday; or Monday and Tuesday and Thursday through Saturday off Sunday and Wednesday. There is no planned overtime, and the Authority does not regularly replace absent full-timers with part-timers (TA47). Part-timers have been used to replace full-timers on vacation or those who are disabled (TB104), but they are not normally used to replace employees during the work week (TA47, TA73).

Tishuk and Lio indicated that under the new schedule the cleaning service is below standard on Monday through Wednesday, but is brought back to the proper standard Thursday through Saturday (TB38, TB104). Both men also testified that if the new schedule could not have been implemented the Racetrack would have had to RIF its staff below its manning levels to meet its budget (TB40-TB41,

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11/ I credit Feketie's testimony as to why he believed Wilkins' negotiations position was "cast in stone." Feketie's testimony held up despite a vigorous cross-examination, and Wilkins testified at this hearing but did not deny that he told Feketie that he had to take the negotiations position because he thought he might lose the unit.

TB100). In fact, both Tishuk and Lio testified that the main reason for the work schedule change was money--the need to reduce their budget (TB71, TB105, TB109). Tishuk explained that under the new schedule there was a reduction of overtime hours from 1000 hours to 36 hours in one week saving between $8,000 and $10,000 per week (TB37). Finally, Tishuk testified that from August 1986 through the present no full-timers at the Racetrack had been RIFed (TB74).

Stadium

10. Joseph McCormick has been the maintenance and cleaning supervisor at the stadium since 1980 (TB123). He testified that in 1980 full-time employees worked six days a week, but by 1981 and to the present, full-time employees have normally worked five days a week (TB125-TB126).

The Stadium is an eight-month operation from May through December (TB124). When the Stadium shuts down most full-timers are laid off and recalled in the Spring (TB147). There are twelve full-time employees, thirteen regular or "book" part-time employees, and eighty temporary or "non-book" part-timers employed at the Stadium (TB128). All of these employees are represented by Local 734 (TB127-TB128). The full-timers work at least 40 hours a week, the book part-timers work from one to five days a week and receive contract benefits, and the non-book part-timers are not scheduled on a regular basis and do not receive benefits (TB127, TB138).

McCormick is responsible for scheduling the cleaning employees. He testified that the work week and days off varied from

week to week depending upon scheduled events (TB136-TB137, TB147). He explained that he has a calendar of events and sets the work week schedule four weeks in advance (TB138). McCormick gave the following examples of a scheduled work week for full-timers.

a. When there are no events scheduled the work week is Monday through Friday, off Saturday and Sunday (TB136, TB141).

b. When there is a Saturday but no Sunday event the work week is Monday through Friday, off Saturday and Sunday, but the full-timers have the option to work Saturday at overtime (TB135-TB136, TB141-TB142). McCormick explained that he prefers to give the employees two days off in a row; thus, when there is a Saturday event the full-time employees have the option to work overtime (TB135-TB136). He also testified that prior to July 1986 if there was a need to work a sixth day he would first ask the full-timers if they wanted to work overtime (TB138-TB139).

c. When there is a Sunday but no Saturday event the work week is Sunday through Thursday, off Friday and Saturday (TB128, TB135, TB141).[12/] Sunday would be paid at straight time (TB129).

12/ Although McCormick did not testify about how the work week schedule would look over a period of time, it appears that, for example, where there are no events one weekend, and then Sunday events the next several weekends, the work week would start as a Monday through Friday week, then Monday through Thursday, then Sunday through Thursday, and stay Sunday through Thursday.

d. When there are events both Saturday and Sunday, McCormick would give the full-timers off on Monday and Tuesday, or whatever days best fit his schedule (TB146).

e. When there are three events in a row he would devise a work week schedule based upon the type and size of the events, and the amount of the building that was used (TB146-TB147).

The hours of work for full-timers also varies depending upon whether there are events, and the time of the events. On post-event cleanup and non-event days the full-timers work from 7:00 a.m.-3:30 p.m. (TB129). On an event day the work hours are adjusted based upon the time of the event. If the event is 4:00 p.m., for example, the workhours are from noon to 8:30 p.m. (TB129).

Arena

11. Robert Praggy has been the maintenance and cleaning supervisor of the Arena since 1981. The Arena operates evenings and weekends, mostly October through April (TB150).

There are 25 full-time employees, 16 book part-time employees who are also known as "event" cleaners, and three non-book part-time employees employed at the Arena (TB152). All of the employees are represented by Local 734. The full-timers work a minimum of 40 hours a week and do the clean up work (TB161-TB162). They do not work the events (TB174). The book part-timers work all of the events and may be used to assist in cleanup (TB163-TB165). The non-book part-timers assist in cleanup (TB165).

Praggy is responsible for scheduling the cleanup employees. He testified that the full-timers work week varied from week to week depending upon the schedule of events (TB154, TB171). He explained that full-timers do not necessarily work five consecutive days (TB171); that he does not necessarily schedule all full-timers for work on the same day (TB172); that Saturday and Sunday are often part of the regular work week (TB172); and that full-timers get any two consecutive days off but those days vary depending upon the schedule of events (TB154), and some full-time employees are off while others are working (TB162). Praggy can only schedule days off two days in advance (TB154).

The workhours for full-time employees is normally 6:00 a.m.-2:30 p.m. (TB150-TB151). Although full-timers do not all work the same day, they do work the same hours (TB162). Occasionally the full-timers' shift is changed from the morning shift to a night shift, 11:00 p.m. to 7:00 a.m. in order to prepare for a morning event (TB151). The book part-timers work all of the events and are guaranteed a minimum of four hours for each event (TB150; TB163-TB165; J-2, Art. 3, Sec. 1).

ANALYSIS

Local 734 argued that the Authority unlawfully changed the work week because it deviated from the prior practice and did not negotiate a change through lawful impasse procedures. The Authority presented three arguments in support of its actions. First, the

Authority argued that in the context of this case, it had a managerial right to change the work week. It maintained that since it has the managerial right to determine its manning needs on any particular day, and since it has the managerial right to determine whether to have employees work on overtime, and since it was allegedly necessary to revise the work schedule to meet its manning needs, that it had a managerial right to change the work week. Second, the Authority argued a contractual defense. It maintained that the contract language permitted the kind of work week that was implemented on March 16, 1987. A public employer meets its negotiations obligation when it acts pursuant to its collective agreement. Pascack Valley Bd. Ed., P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980); Randolph Tp. Bd. Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Bound Brook Bd. Ed., P.E.R.C. No. 83-11, 8 NJPER 439 (¶13207 1982). Third, the Authority argued that although it was not required to negotiate over changing the work week (because of its above defenses), it did, in fact, negotiate with Local 734 to impasse over the change in the work week.

Having considered the parties positions, I find that the Authority did not violate the Act, but not because the issue involved a managerial prerogative. Rather, I find that the Authority had a contractual right to implement the work week that became effective on March 16, 1987.

The Managerial Defense

The Authority correctly argued that it has a managerial

prerogative to determine its manning levels, Irvington PBA Local 29 v. Town of Irvington, 170 N.J. Super 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1982); City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982), and that it has a managerial prerogative to determine whether overtime work is necessary. Town of Harrison, P.E.R.C. No. 83-114, 9 NJPER 160 (¶14074 1983); City of Long Branch, supra. But those rights do not necessarily correspond to a right to alter clear terms and conditions of employment, employee work hours. The Authority confuses its right to determine how many employees should be working at any given time with the majority representatives right to negotiate over work hours.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 403-404]

In applying these tests, I am convinced that, apart from the Authority's other defenses, the instant work schedule change was

negotiable. The Supreme Court and the Commission have held that work hours is one of the most fundamental terms and conditions of employment and is generally mandatorily negotiable. Local 195; Woodstown-Pilesgrove Reg. Sch. Dist. Bd. Ed. v. Woodstown-Pilesgrove Reg. Ed. Assn., 81 N.J. 583 (1980)(Woodstown); Township of Mt. Laurel, P.E.R.C. No. 86-72, 12 NJPER 23 (¶17008 1985), aff'd App. Div. Dkt. No. A-2408-85T6 (2/11/87); Township of Hamilton, P.E.R.C. No. 86-106, 12 NJPER 338 (¶17129 1986), aff'd App. Div. Dkt. No. A-4801-85T7 (4/2/87)(Hamilton). Thus, the instant change in the work week clearly directly affected Local 734's members.

The second part of the Local 195 case does not apply because there are no statutes or regulations preempting negotiations over the work days or work hours at the Racetrack.

In application of the third test under Local 195, I am persuaded that negotiations over the work schedule would not significantly interfere with the Authority's determination of governmental policy.

Mt. Laurel involved the negotiability of work schedules for police employees. The Township argued that the establishment of police work schedules was a managerial prerogative to determine governmental policy. The Court held that the government's interest to determine policy must be balanced against the interests of the public employees. The Court held that:

> In striking the balance, it is not enough to say either that the subject at issue involves a managerial prerogative or that it intimately affects the employees' work and welfare. These things can be said

> of nearly every employment related subject. The critical issue is whether a negotiated agreement will "significantly interfere" with the managerial prerogative to determine government "policy." If so, then the government interest will be "dominant" over that of the employees and the issue will not be negotiable. This is a fact intensive determination which must be fine tuned to the details of each case. App. Div. Dk. No. A-2408-85T6 at slip op. p.7.

The Court found the work schedule negotiable and concluded that no significant managerial prerogative had been placed on the scale to counterbalance the effect work schedules had on employees. See also Hamilton.

The result here is the same. There is no significant managerial prerogative to counterbalance Local 734's right to negotiate over work schedule changes. If the Authority wants to eliminate overtime it has the managerial right to do so. Harrison; Long Branch. If the Authority wants to reduce its work force on certain days and increase its work force on other days, it has the managerial right to do so. Maywood Ed. Assn. v. Maywood Bd. Ed., 168 N.J. Super 45 (App. Div. 1979), pet. for certif. den. 81 N.J. 292 (1979); Long Branch. If the Authority wishes to close down part of its operations or grandstand to save money it has the managerial right to do so.

Here, the Authority admitted that the issue was economic. It was paying too much for overtime therefore it changed the work week schedule in order to save money by eliminating overtime. While it had the right to eliminate overtime to save money, it did not have the right, absent its other defenses, to unilaterally change

the work schedule in order to achieve that. Public employers generally do not have the right to cure economic problems by unilaterally changing hours of work. Piscataway Twp. Bd. Ed. v. Piscataway Twp. Principals Assoc., 164 N.J. Super. 98 (App. Div. 1978); Sayreville Bd. Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983).

The Authority argued that the new work schedule was managerial because it was the only way to accomplish its goal of eliminating overtime. That argument lacks merit. The Authority's goal was to save money. The Authority's desire to save money does not counterbalance Local 734's right, absent the other defenses, to negotiate over employee work schedules.

The Authority could have closed down a significant portion of the grandstand on certain days or on a more permanent basis commensurately reducing its employee complement, without significantly jeopordizing any public health, safety or educational concerns, and saved a considerable sum of money. The public policy considerations inherent in this case, do not, particularly in application of the Woodstown balancing test, sufficiently counterbalance the employees right to negotiate over work hours.

The Contractual Defense

The Authority argues that since the work week is defined as Monday through Sunday (Art. 3, Sec. 1), 8 hours a day, 40 hours a week (Art. 3, Sec. 2), and since there is no premium pay for Saturday and Sunday and no guarantee for any particular days off,

that it had the right to set the work week schedule and require the employees to work any given day. I agree. The language in Article 3 operates as a waiver of Local 734's right to otherwise negotiate over changes in the work week schedule.

The Commission will find a contractual waiver of a majority representatives right to negotiate if the parties collective agreement clearly and unequivocally authorizes the employer to make the pertinent changes. Red Bank Reg. Ed. Assn. v. Red Bank Reg. Bd. Ed., 78 N.J. 122, 140 (1978); State of N.J., P.E.R.C. No. 77-40, 3 NJPER 78 (1977); Deptford Bd. Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Dkt. No. A-1818-80T8 (5/24/82); Ramapo State College, P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985).

In application of the clear and unequivocal rule, the Commission has found waivers in numerous cases in which a collective agreement permitted the employer to make certain changes in hours of work or workload. Hamilton; Sussex-Wantage Reg. Bd. Ed., P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985); Old Bridge M.U.A., P.E.R.C. No. 84-116, 10 NJPER 261 (¶15126 1984); Randolph Twp. Bd. Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Randolph Twp. School Bd., P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980); Pascack Valley, supra.

The result here is the same. Article 3 clearly and unequivocally sets the work week as being 7 days, Monday through Sunday, and it does not require any particular days off or two days

off in a row. Within the context of the 7 day work week, Article 3 defines the normal work day as 8 hours a day and the normal work week as being 40 hours a week. Standing alone - without any other facts, Article 3 gives the Authority the right to assign its employees represented by Local 734, to work 8 hours a day any day of the week for a total of 40 hours for the week between Monday and Sunday without incurring any overtime expense. Nothing in Article 3 requires that an employees 40 hours be compiled Monday through Friday, and nothing prevents Saturday and Sunday from being used as a regular work day. The work schedule that was implemented on March 16, 1987 falls squarely within the parameters of Article 3.

In its post hearing brief, Local 734 argued that the Monday through Sunday work week definition did little to explain the work week actually worked by employees and it argued that the past practice must be considered. Local 734 maintained that since the past practice at the Racetrack was that Monday through Friday had always been how the normal 40 hour work week was implemented, that the Authority was required to negotiate over any changes.

Local 734's argument lacks merit. Although Article 3 certainly does not explain how the work week had actually been implemented at the Racetrack, that does not correspond to a right to negotiate over changes for that work week which otherwise fall within the language in Article 3. The parties have already negotiated over the work week and it resulted in the language in Article 3. The parties recently renewed there desire to abide by

that language by once again agreeing to that language in J-2.

Although, prior to March 16, 1987, the Authority had always implemented the normal 40 hour week at the Racetrack during the Monday through Friday portion of the Monday through Sunday work week, that does not mean that the work week at the Racetrack permanently evolved into a Monday through Friday schedule, or that the Authority somehow waived its negotiated right to reschedule the 40 hour portion of the work week into a different schedule that also complies with Article 3.

First, Local 734's reliance on past practice is not controlling. Past practice considerations which are construed contrary to the express provisions of a collective agreement cannot be relied upon to change the clear meaning of the agreement. In Randolph Twp. School Bd., supra., the Commission held:

> It is not necessary to address any past practice...since the provision of the collective agreement controls over past practices where, as here, the mutual intent of the parties concerning work hours "can be discerned with no other guide than a simple reading of the pertinent language," citing New Brunswick Board of Education, 4 NJPER 84 (¶4040 1978), motion for reconsideration denied, 4 NJPER 156 (¶4073 1978). 7 NJPER at 24.

Second, Local 734 apparently overlooks just how the work week provisions of Article 3 were implemented at the Stadium and the Arena. In both locations, the Authority set the 40 hour work week within the seven day work week to best fit its needs. At the Arena in particular, Saturday and Sunday were used as regular work days, and days off often fell during Monday through Friday.

Since Article 3 of J-2 equally applies to the Stadium and Arena, as well as the Racetrack, and since the Authority has the right, pursuant to Article 3, to set and change the work week, including Saturday and Sunday, in accordance with its needs at the Stadium and Arena, then it must have that same contractual right at the Racetrack.

Since the Authority acted pursuant to its collective agreement (J-2) in changing the work week, it satisfied its negotiations obligation and the 5.4(a)(5) allegation should therefore be dismissed. Pascack Valley; Randolph; Bound Brook.

Mid-Contract Negotiations and Impasse

Due to its contractual rights, the Authority was not required to negotiate with Local 734 over the work schedule change, but it, nevertheless, negotiated in good faith with Local 734 over that change and reached a lawful impasse.

Local 734 argued that based upon only one relatively short negotiations session, the parties could not have legitimately reached an impasse. It also argued that the Authority did not have the right to implement its last best offer because it did not comply with the rule established in City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977).

Local 734's impasse argument is not persuasive. Beginning with Tishuk's recommendation to Feketie in January 1987 to change the work week schedule, Feketie insisted on negotiating over the change with Local 734 before implementing any changes. He offered

such negotiations to Wilkins and gave Wilkins the opportunity to respond. When Wilkins failed to propose an alternative within a reasonable time, the Authority announced the implementation of the new plan. But in consideration of Local 734's insistence, the Authority rescinded the implementation of the new schedule and met with Local 734 on February 23, 1987 to negotiate over the proposed change. Local 734 presented the Authority with two proposals, but the parties could not agree. At that point, the parties reached impasse. I credited Feketie's testimony that Wilkins had earlier told him that he had to take a firm position, and I credited his testimony that further negotiations were pointless.

I note that Local 734's first proposal, that the Authority layoff one-third of the work force on Monday through Wednesday and recall them Thursday through Saturday was not realistic. First, by making that "proposal", Local 734 was doing nothing more than suggesting that the Authority exercise its managerial prerogative to RIF employees. Maywood. Since RIFfing is a managerial prerogative, it is not a proper subject for negotiations. Second, the Authority had a reasonable basis for concluding that a Monday through Wednesday RIF was not a workable solution to its problem.

Local 734's second proposal, increase the employees salary by $1.83 an hour, obviously could not have been an acceptable solution to the Authority because Local 734 knew that the Authority's goal was to save money, thus it had to know that a salary increase would be unacceptable. I am not suggesting that the

$1.83 proposal was improper. I am merely finding that the Authority acted reasonably and in good faith in concluding that the proposal was unacceptable.

Thus, given the unacceptable nature of Local 734's proposals, it was reasonable for Feketie to conclude that the parties had reached an impasse.

Although I do not believe that the Jersey City rule should be completely applied in mid-contract modifications as in the instant case, there may be merit to mediation in some mid-contract modifications, but not in this case. In Jersey City, the Commission held that it was not an unfair practice for a public employer to implement its last best offer after having reached impasse, and gone through both mediation and factfinding. Local 734 argued here that since the Authority did not seek mediation and factfinding before implementing the new work week schedule, it violated the Act. I don't agree.

Jersey City involved negotiations for a new collective agreement. Since there is an overriding public policy in this State to achieve labor peace by encouraging the voluntary resolution of disputes, particularly the reaching of collective agreements, the use of mediation and factfinding to achieve that goal is considered to be a meaningful and necessary part of the overall negotiations process.

But in Jersey City note 8 the Commission left room for the possibility that a last best offer proposal might be properly

implemented without all of the same elements as existed in that case.

> We do not necessarily mean to imply that all of the factual considerations or elements which we have identified herein must always be present before an employer can implement the last best offer. 3 NJPER at 124.

I do not believe that factfinding should be required prior to the implementation of a last best offer in a mid-contract modification situation. Since a contract is already in place, the delay inherent in the factfinding process, and the likelihood that the results might be rejected, mitigate against any harm that might result from avoiding that process during such mid-contract modifications.

I do believe, however, that mediation might be useful in resolving mid-contract modifications and that procedure should be encouraged. It should not be automatically required, however. In a case such as this where the Authority advanced a viable contractual defense, and where the parties positions were firm, mediation would not necessarily have helped the process. The Commission should consider all of the circumstances of a particular mid-contract modification case to determine whether the implementation of the last best offer without mediation was a violation. I am satisfied that in this case, given the contractual defense, and given the apparent inalterability of the parties positions, mediation on the

single work hours issue would not have been fruitful.[13/]

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

CONCLUSION OF LAW

The Authority did not violate N.J.S.A. 34:13A-5.4(a)(5) or derivatively a(1), by changing the work week schedules of its Racetrack employees represented by Local 734.

RECOMMENDATION

I recommend that the Commission ORDER that the Complaint be dismissed.

Arnold Zudick
Hearing Examiner

DATED: June 2, 1987
Trenton, New Jersey

13/ It is necessary to note that the Commission has not distinguished Jersey City or found that a different standard applies to mid-contract modifications. If the Commission here finds that the Authority had a contractual defense for changing the work week it would most likely not consider my distinguishing analysis to Jersey City. In that event, the opinions regarding the application of Jersey City to mid-contract modifications would be my own, and not necessarily those of the Commission.