

H.E. NO. 2011-7

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

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-2009-160

FOP LODGE 174 NEW JERSEY  
INVESTIGATORS ASSOCIATION,

Charging Party.

SYNOPSIS

The Hearing Examiner denies the Union's Motion for Summary Judgment, grants the Employer's Cross-Motion for Summary Judgment. The Hearing Examiner found no facts to support that the State either refused to bargain or that it bargained in bad faith. The Complaint is dismissed.

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Appearances:

For the Respondent  
Paula T. Dow, Attorney General  
(Brady Montalbano Connaughton, Deputy Attorney General)

For the Charging Party  
Loccke, Correia, Limsky, Bukosky, attorneys  
(Marcia Tapia, of counsel)

**HEARING EXAMINER'S REPORT**  
**AND RECOMMENDED DECISION**

On November 5, 2008, the Fraternal Order of Police New Jersey Investigators Association (Association) filed an unfair practice charge against the State of New Jersey (State). The charge alleges that the State violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-5.4a(1), (2), (3)

and (5)<sup>1/</sup> when it failed to negotiate over the impact of the loss of use of vehicles to unit members.

A Complaint and Notice of Hearing issued on September 21, 2009, on the allegations of N.J.S.A. 34:13A-5.4a(1) and (5) only. The State filed an answer on October 2, 2009, asserting that it had negotiated in good faith with the Association. A pre-hearing conference was held on November 12, 2009. A hearing was not scheduled in light of the parties' ongoing attempt to amicably resolve the matter.

On March 4, 2010, the Association filed a motion for summary judgment together with an affidavit and brief. The Commission referred the motion to me on March 16, 2010. N.J.A.C. 19:14-4.8(a). On June 28, 2010, the State filed a cross motion for summary judgment, including affidavits and a supporting brief. On October 27, 2010, the Association filed a responsive brief to the State's cross motion.

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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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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."

Based upon the parties' submissions, I deny the Association's motion and grant the State's cross-motion for summary judgment.

The following facts are gleaned from the pleadings, the briefs and affidavits.

The State and the Association are, respectively, a public employer and a public employee representative within the meaning of the Act. The Association represents all regularly employed Investigators of the State, Juvenile Justice Commission (JJC).<sup>2/</sup> For many years, JJC investigators were permitted to use the State's vehicles to commute to and from work because they would frequently report directly to an assignment or be called to report to a scene on a moment's notice. These investigators were informed upon applying for the position that a vehicle would be provided for their commute.

On September 8, 2008, the JJC issued a directive that stated, in pertinent part, that effective October 1, 2008, State vehicles would no longer be provided to JJC investigators to use for their commute. On September 19, 2008, the Association forwarded a letter to the Office of Employee Relations (OER) requesting negotiations over offsetting compensation for the loss

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<sup>2/</sup> There are approximately 111 members of the Association in the titles of investigator, senior investigator and principal investigator employed by the Department of Corrections, the Juvenile Justice Commission and the State Parole Board.

of the economic benefit, i.e., the loss of the cars for commuting to and from work assignments. The letter does not specify which State agency changed its vehicle policy. The Association maintains that the employer did not respond to the request, and has continuously refused to negotiate the impact of the loss of the use of the vehicles for commuting to and from work assignments.<sup>3/</sup>

On November 5, 2008, shortly after OER determined that the JJC had altered its vehicle policy, the Association filed the within unfair practice charge. Scheduled exploratory conferences on January 28, 2009 and February 26, 2009, were adjourned pending settlement discussions. The parties met on February 17, 2009, to discuss settlement of the matter. Marie Kraus, Manager of Employee Relations for the JJC, Camille Warner, Employee Relations Coordinator for OER, and Deputy Attorney General Brady Montalbano-Connaughton appeared at the meeting for the State. Neil Layden, President of the Association, Bryant Warner, Investigator, and Marcia Tapia, counsel for the Association, appeared on behalf of the Association. In the meeting, the parties set forth proposals and explored settlement options to offset compensation for the loss of the economic benefit of using State vehicles for commutation purposes. A second meeting was

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<sup>3/</sup> The Association does not proffer facts that would support its assertion that the State has continuously refused to negotiate.

held on April 9, 2009. At the request of the Association it was conducted by telephone. The parties again explored options in an attempt to resolve the issue. The State proposed that the parties explore non-monetary alternatives, such as changing the language in the vehicle policy. On May 12, 2009, the Association informed the State that it did not believe a change in policy language would properly offset the value of the lost benefit.

Thereafter, on July 13, 2009, the parties appeared at PERC and, at that time, considered whether to include the issue of offsetting compensation as part of the parties' pending interest arbitration. By letter of July 17, 2009, the Association advised the State it did not want to negotiate the matter as part of the pending interest arbitration.

On September 21, 2009, PERC issued a Complaint and Notice of Hearing. The parties appeared at a pre-hearing conference on November 12, 2009.

On May 3, 2010, the State made an offer of monetary compensation to the Association in an effort to settle the unfair practice charge. On May 14, 2010, the Association rejected the State's offer.

#### ANALYSIS

N.J.A.C. 19:14-4.8(d) provides that a motion for summary judgment will be granted:

If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law.

In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), the New Jersey Supreme Court enunciated the standard to determine whether a genuine issue of material fact precludes summary judgment. The factfinder must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540. "While 'genuine' issues of material fact preclude the granting of summary judgment, . . . those that are 'of an insubstantial nature' do not." Id. at 540. If the disputed issue of fact can be resolved in only one way, it is not a "genuine issue" of material fact. Id. at 540.

Nevertheless, a motion for summary judgment should be granted cautiously. The procedure should not be used as a substitute for plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981) and N.J. Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988).

It is well settled that the use of State vehicles for commuting purposes is not mandatorily negotiable and a public employer has a prerogative to control how its vehicles are

deployed. Therefore, an employer's directive that the vehicles may not be used for commuting to and from work assignments in and of itself is not a violation of the Act. However, use of employer vehicles for commuting purposes is an economic benefit and a modification by an employer of an existing working condition requires negotiating "over offsetting compensation for those employees who have lost the economic benefit. . . ."

Morris Cty. and Morris Cty. Park Comm., P.E.R.C. No. 83-31, 8 NJPER (¶13259 1982), aff'd 10 NJPER 103 (¶15052 App. Div. 1984), certif. den. 97 N.J. 672 (1984).

In the case sub judice, there is no question that the State had a managerial prerogative to issue a directive regarding use of its vehicles or that the State had an obligation upon the Association's request to negotiate over offsetting compensation for those who lost vehicles for commuting. The only issue is whether the State has continuously refused to negotiate, thus, constituting bad faith and a violation of N.J.S.A. 34:13A-5.4a(1) and (5).

In deciding whether an employer has engaged in good or bad faith negotiations, the Commission has consistently held that the totality of the employer's conduct and/or attitude throughout the dispute resolution process must be analyzed to determine whether the employer came to negotiations: ". . . with an open mind and a sincere desire to reach an agreement, as opposed to a pre-



determined intention to go through the motions, seeking to avoid, rather than reach, an agreement." State of New Jersey and Council of New Jersey State College Locals, E.D. No. 79, 1 NJPER 39, 40 (1975), aff'd. P.E.R.C. No.76-8 (1975), aff'd 141 N.J. Super. 470 (App. Div. 1976). See also, Bayonne Bd. Of Ed., H.E. 90-032, 16 NJPER 84, 90 (¶21034 1990); Ocean County College, P.E.R.C. No. 84-99, 10 NJPER 172 (¶15084 1984); Mt. Olive Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER 34, 35-36 (¶15020 1983). Negotiations do not require that the parties reach an agreement. City of Newark and FOP Lodge 12, H.E. No. 2009-2, 34 NJPER 307 (¶113 2008).

The Association does not set forth any facts that demonstrate bad faith on behalf of the State. The State did not refuse to meet, discuss, or respond to the Association as evidenced by the discussions on February 17, 2009, April 9, 2009, July 13, 2009 or May 3, 2010.<sup>4/</sup> The parties met on several occasions in an attempt to negotiate offsetting compensation for the loss of the use of the State vehicles for commuting to and from work assignments. Furthermore, the facts indicate that the

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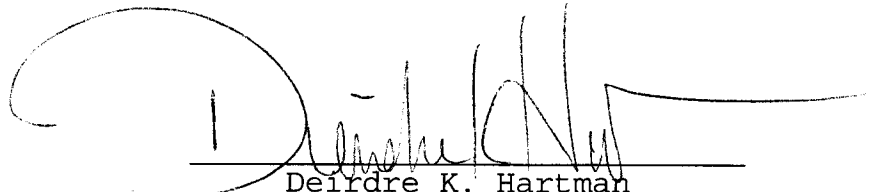
<sup>4/</sup> The Association's demand for negotiations was sent to OER on September 19, 2008 and the charge was filed on November 5, 2008. Because the demand for negotiations did not specify which state agency had altered its use of vehicle policy and OER was attempting to determine same during that time, I do not find that the parties failure to negotiate until after the unfair practice charge was filed to be a violation of the Act.

Association did not wish to continue to meet, and declined to have the issue included as part of the parties pending interest arbitration. It rejected the State's offer of monetary compensation at the parties' last meeting. The Association did not make a counter-proposal, thus, ending negotiations in order to pursue its unfair practice charge.

The only possible favorable outcome for the Association in this litigation would be an order to negotiate. The State has demonstrated through its actions its willingness to and, indeed, has negotiated. To continue this litigation, therefore, is contrary to the policies of our Act that encourage prompt settlement of labor disputes. Based upon the totality of the parties' conduct, I do not find that the State refused to negotiate or negotiated in bad faith without a desire to reach an agreement. Under these circumstances, there are no material facts in dispute and the State is entitled to relief as a matter of law.

ORDER

Accordingly, the Association's motion for summary judgment is denied. The State's cross-motion for summary judgment is granted. The complaint is dismissed.<sup>5/</sup>



Deirdre K. Hartman  
Hearing Examiner

DATED: January 28, 2011  
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by February 8, 2011.

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<sup>5/</sup> The parties should continue to meet and to negotiate in good faith until resolution or impasse is reached.