P.E.R.C. NO. 84-116

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OLD BRIDGE MUNICIPAL
UTILITY AUTHORITY,

Respondent,

-and-

Docket No. CO-82-136-35

MIDDLESEX COUNCIL NO. 7,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission, adopting a recommendation of a Hearing Examiner, dismisses a Complaint based on an unfair practice charge that Middlesex Council No. 7 had filed against the Old Bridge Municipal Authority. The charge had alleged that the Authority violated the New Jersey Employer-Employee Relations Act when it changed the scheduling of a flushing program and paid a shift differential, rather than overtime, to employees working on that program. The Commission agrees with its Hearing Examiner that the Authority acted within its rights under the parties' collective negotiations agreement.

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Appearances:
For the Respondent, Antonio & Flynn, Esqs.
(William E. Flynn, of Counsel)

For the Charging Party, Borrus, Goldin & Foley, Esqs.
(James F. Clarkin, of Counsel)

DECISION AND ORDER

On December 8, 1981, Middlesex Council No. 7 ("Council No. 7") filed an unfair practice charge against the Old Bridge Municipal Utility Authority ("Authority") with the Public Employment Relations Commission. The charge alleged 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 unilaterally changed the working hours of certain Authority employees Council No. 7 represented and refused to pay overtime for the hours these employees worked.

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

On October 26, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. On November 23, 1982, the Authority filed its Answer, asserting, in part, that it had the contractual right to make the change in question and to pay the employees the amounts it did.

On October 13 and November 19, 1983, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses, introduced exhibits, and argued orally. Both parties filed post-hearing briefs.

On February 27, 1984, the Hearing Examiner issued his report and recommended decision, H.E. No. 84-46, 10 NJPER ___ (¶_____ 1984) (copy attached). He recommended dismissal of the Complaint. He specifically found, in part, that the Authority had a contractual right to make the work schedule changes and to pay the employees the amounts it did.

On March 12, 1984, Council No. 7 filed exceptions. It contends that the Hearing Examiner erred in (1) finding that the employees volunteered for the flushing duties; (2) concluding that the change in the scheduling of the flushing program did not modify an existing work rule; and (3) concluding that Council No. 7 waived its right to negotiate over the scheduling of personnel for the flushing program. It further contends that a backpay order is appropriate.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-7) are accurate. We adopt and incorporate them here.

We agree with the Hearing Examiner that the parties' collective negotiations agreement authorized the Authority's actions in this case. Therefore, the Authority did not violate subsections 5.4(a)(5) or (1).

Article V, (C) provides:

> Management shall reserve the right to maintain flexibility in the scheduling of personnel. In the event personnel are required to perform duties during hours not considered their regular shift, they will be properly notified except in an emergency situation. Proper notification shall consist of one week's notice in writing. If an individual is required to work in excess of 4 hours into a shift other than his regular day shift, he will be paid the shift differential consistent with the contract.2/

The change in the scheduling of personnel for the flushing program was entirely consistent with management's reserved contractual right to exercise flexibility in scheduling. Further, it is undisputed that employees received the advance notice and shift differential contractually required. Accordingly, we conclude that the contract sanctioned the Board's actions.

Council No. 7's claim of overtime for such work is equally without merit. Under Article VI, ¶J, the parties agreed that employees would receive overtime pay "for all hours worked in excess of their normal work week." The employees' work week is

2/ We disagree with the Hearing Examiner that the parol evidence rule applies. The application of Article V(C) to the change in the flushing program is not so crystal clear as to preclude further evidence -- including negotiations history and pre-agreement practice -- concerning what the parties intended this provision to mean. The Hearing Examiner's error, however, is harmless since he admitted the parol evidence the parties offered concerning Article V(C). We have considered this evidence and conclude that it is not inconsistent with our interpretation of the contract.

40 hours. No one worked more than 40 hours so no one was entitled to receive overtime pay.[3/]

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Newbaker, Suskin, Butch and Wenzler voted for this decision. None opposed. Commissioner Graves was not present.

DATED: Trenton, New Jersey
April 12, 1984
ISSUED: April 13, 1984

3/ Given our conclusion that the Authority had an affirmative contractual right to act as it did, we need not consider whether the Authority had an inherent, non-negotiable managerial prerogative to change the hours of the flushing program. We agree with the Hearing Examiner that Davis, Donatelli, and O'Connell volunteered to work on the flushing program and believe that their volunteer status would defeat any claim on their part to back pay, although it would not necessarily negate any negotiations obligation with the majority representative that might otherwise exist. We agree with the Hearing Examiner, however, that Article V(C) constitutes a specific waiver of any right Council No. 7 may have had to negotiate over the change in the hours of the flushing program.

H.E. No. 84-46

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

In the Matter of

OLD BRIDGE MUNICIPAL UTILITY
AUTHORITY,

Respondent,

-and-

DOCKET NO. CO-82-136-35

MIDDLESEX COUNCIL NO. 7,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Old Bridge Municipal Utilities Authority did not violate the New Jersey Employer-Employee Relations Act by changing the time to conduct its annual flushing program, or by refusing to pay time and one-half to employees who worked that program. The Hearing Examiner found that the decision as to when to hold the program involved managerial policy considerations and was therefore non-negotiable, and that no employee was required to work the program, rather, the employees volunteered to work the program and that the parties collective agreement did not require time and one-half pay for work under 40 hours per week. Finally, the Hearing Examiner found, even assuming the negotiability of the issue, that the Council had waived the right to negotiate the issue because of certain wording in the parties collective agreement.

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. 84-46

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

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HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on December 8, 1981, by Middlesex Council No. 7 ("Council") alleging that the Old Bridge Municipal Utility Authority ("Authority") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Council alleged that the Authority unilaterally changed the work hours of certain employees to enable them to complete flushing duties, and it alleged that the Authority unilaterally altered a past practice and failed to give the employees time and one-half pay for performing such duties, all of which was alleged to be in

violation of subsections 34:13A-5.4(a)(1) and (5) of the Act. [1/]

The Council alleged in particular that in September 1981 the Authority changed the working hours of employees, Robert Davis, Guy Donatelli, and John O'Connell from their normal daytime working hours to a midnight shift to perform flushing duties, and that it failed to give them time and one-half pay for such work. [2/] The Council further alleged that similar changes were made in 1982. The Council asserted that the Authority's actions unilaterally changed an established past practice and therefore violated the Act. The Authority denied committing any violation of the Act and asserted a contractual, and certain factual defenses to the Charge.

It appearing that the allegations of the Unfair Practice Charge may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 28, 1982. The Answer denying any violation was filed on November 24, 1982. Hearings were held in this matter on October 13 and November 9, 1983, in Trenton, New Jersey, at which time the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. The Council

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; (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 original Charge specifically named employees Davis and Donatelli. The Charge was amended at hearing on October 13, 1983 to include employee O'Connell.

submitted a post-hearing brief which was received on January 9, 1984. 3/

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violation of the Act exists, and after hearing, and after consideration of the post-hearing brief, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record the Hearing Examiner makes the following:

Findings of Fact

1. The Old Bridge MUA is a public employer within the meaning of the Act and is subject to its provisions and is the employer of the employees involved herein.

2. Middlesex Council No. 7 is an employee representative within the meaning of the Act and is subject ot its provisions.

3/ Several factors contributed to the length of time it took to process this matter through hearing. After the Charge was filed an exploratory conference was conducted on January 14, 1982, and the parties agreed to consider settlement and/or deferral to arbitration. There was no further communication from the Council until September 8, 1982 when it informed the Commission that settlement and deferral were not possible. The Complaint then issued on October 28, 1982, and a hearing was scheduled for December 15, 1982. However, the December hearing was cancelled by the parties request to enable them to consider settlement and the hearing was rescheduled for January 12 and 24, 1983. On January 6, 1983 the Council requested a cancellation of the January dates and the hearing was rescheduled for March 14 and 22, 1983. The March dates were cancelled on the Council's request to enable it to review numerous documents submitted by the Authority. On June 22, 1983 the Council advised the Hearing Examiner that it wanted to proceed to hearing, and it requested discovery. On July 15, 1983 the Council listed specific items for discovery, and on July 21, 1983 the undersigned Hearing Examiner issued an Order for discovery, and on August 25, 1983 the undersigned issued subpoena's, and subpoena's duces tecum and an Order Rescheduling Hearing for October 13 and 18, 1983. The hearing commenced on October 13.

3. During the conduct of the hearing the parties stipulated several facts herein. The Authority is apparently required to flush certain water pipes clear on a periodic basis. Flushing involves the opening of hydrants and letting them run until sediment and dirty water have been flushed clear. The flushing program takes 6 to 8 weeks to complete.

From 1975 through 1980 the Authority conducted the flushing program from 9:00 p.m. through 1:00 a.m. Employees who participated in the program during that time period first worked their normal work day which was 8:00 a.m. - 4:30 p.m. at straight time pay, then they worked the 9:00 p.m. - 1:00 a.m. flushing program at time and one-half pay. The employees 8:00 - 4:30 work day included one-half hour for lunch which resulted in their working 8 hours a day or 40 hours a week as a normal schedule. The evidence did not establish whether any breaks were allowed during the 9:00 p.m. - 1:00 a.m. overtime work. (Transcript "T" 1 pp 19-53, 70-71, 73-74).

4. On September 14, 1981, George Stone, Executive Director of the Authority, posted the following notice to employees represented by Council 7:

> Effective, Monday, September 21st, our flushing program will begin with two volunteers from the Waterman I category, between the hours of 12:01 A.M. and 6 A.M.
>
> However, if there are no volunteers, the bottom two men of said category will be assigned for these duties. This program will last approximately six to eight weeks. This is being posted with the requirements of the Contract in regard to the seven day notice that is necessitated.

> The 12 to 6 shift will be in lieu of a normal eight hour shift with an additional 25c per hour shift differential. (Exhibit J-5)

As a result of that notice the Authority, in the Fall of 1981, changed the time for flushing duties. Rather than conducting the flushing program at 9:00 p.m. - 1:00 a.m. after employees had already worked a full day, the Authority scheduled the program from 12:00 a.m. - 6:00 a.m. and requested volunteers who would work those hours instead of their regular work day.

The evidence shows that the 12:00 a.m. - 6:00 a.m. flushing program was in effect at least in the Fall of 1981 and 1982. Included in those 6 hours of flushing was a one-half hour eating break which resulted in specifically only 5 1/2 hours of work. (T 1 pp 73-74, 81, 94). The employees who performed the flushing work after the change did not work their regular 8:00 a.m. - 4:30 p.m. shift, instead, they worked the 12:00 a.m. - 6:00 a.m. flushing program and received 8 hours of straight time pay (for 5 1/2 hours of work), plus 25c per hour differential for 8 hours (also for 5 1/2 hours of work). (T 1 pp 54-55, 63-65, 72).

5. Executive Director Stone testified that the men had the option to volunteer for the midnight flushing program, but that if no volunteers were forthcoming, then the two most junior men would be required to perform the work. (T 1 p 107). He testified further that if the two most junior men refused to perform the work they would be laid off. (T 1 p 120). However, Stone indicated that senior men have always volunteered for the flushing program, and he testified that both Robert Davis and Guy Donatelli were two such volunteers. (T 1 pp 107, 118-120).

6. Robert Davis, one of the employees involved herein, testified that he has performed flushing duties every year since 1975. He admitted that in the Fall of 1981 the flushing work was posted as a volunteer action, and that he was the senior man on the crew, but that he took the work because it could not be refused because Stone allegedly said that if no one took the work he (Stone) would hire men off the street. (T 1 pp 55-56, 58). Davis testified further that he was not threatened to accept the flushing work in 1981, and he admitted that as senior man he could have refused the work. (T 1 pp 58, 80). He also admitted that the notice (Exhibit J-5) provided for 8 hours pay for 6 hours of work. (T 1 p 80).

After Davis accepted the flushing duties in 1981, he filed a grievance alleging that his hours had been changed without negotiations. (T 1 p 60). Once again in the Fall of 1982, after he accepted the flushing duties, Davis filed a grievance, Exhibit CP-4, alleging a violation of Article 13 Section N of the parties collective agreement, and he wrote that flushing had been paid at an overtime rate in the past, and he sought a return to the former flushing procedure including the receipt of overtime pay for flushing work. That grievance was never submitted to arbitration.

7. The parties collective agreement, Exhibit J-2, which was effective from October 1980 through September 1982, provides in Article 5 Section E as follows:

> Management shall reserve the right to maintain flexibility in the scheduling of personnel. In the event personnel are required to perform duties during hours not considered their regular shift,

> they shall be properly notified, except in an emergency situation. Proper notification shall consist of one week's notice in writing. If an individual is required to work in excess of 4 hours into a shift other than his or her regular day shift, he or she shall be paid the shift differential consistent with the Contract.

The collective agreement also includes an hours and overtime provision in Article 13.

Article 13 Section A said:

> Any employee working beyond his or her regularly scheduled work day shall be paid at the applicable overtime rate, spelled out in the following sections.

Section J of the Article then said:

> All employees shall be paid at time and one half for all hours worked in excess of their normal work week. All employees who work more than 8 hours per day shall receive time and one half pay for all time worked in excess of 8 hours.

Finally, Section N of that Article said:

> The regularly scheduled work period for the Authority is as follows, regarding Association members:
>
> > 40 hours per week, 8:00 a.m. to 4:30 p.m. with 1/2 hour lunch period (excepting Plant Operators who shall continue under the existing schedule and procedures).

The evidence showed that other than the negotiations for J-2, there were no separate or additional negotiations concerning flushing duties. (T 1 pp 86-87).

Analysis

Having reviewed the entire record the undersigned finds that the Authority did not unlawfully change the hours for flushing, nor did it unlawfully refuse to give time and one-half pay for the 1981 and 1982

flushing work. This case primarily involves the application of the instant facts and an interpretation of the parties collective agreement, and not a change or modification of an existing work rule or a failure to negotiate as alleged by the Council.

There are several factors involved in the instant decision. First, there is no question that in the years prior to 1981 the Authority conducted the flushing program from 9:00 p.m. to 1:00 a.m. after employees had already worked a full day. The Council, as part of its overall argument, apparently contests the Authority's unilateral decision to schedule flushing at some time other than 9:00 p.m. to 1:00 a.m. However, the decision as to when the flushing program shall be conducted is a managerial prerogative because it involves policy considerations concering the Authority's obligation to deliver government services efficiently and conveniently. Consequently, the Authority was under no obligation to negotiate its decision to conduct flushing from 12:00 a.m. to 6:00 a.m. See Local 195, IFPTE v. State, 88 N.J. 393, 8 NJPER 285 (¶ 13129 1982); Bd. of Ed. Woodstown-Pilesgrove Reg. School Dist. v. Woodstown-Pilesgrove Reg. Ed. Assoc., 81 N.J. 582 (1980); Ridgefield Park Ed. Assoc. v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 163 (1983); and, State v. State Supervisory Ees. Assoc., 78 N.J. 54 (1978). 4/

Second, even assuming the negotiability of any changes in the affected employees work schedules, the facts show that employees Davis, Donatelli, and apparently O'Connell, were not "assigned" to the flushing program, nor were their work hours and work schedules unilaterally

4/ See also In re City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶ 13211 1982) and In re Clementon Sewerage Authority, P.E.R.C. No. 84-49, 9 NJPER 669 (¶ 14291 1983).

changed. The evidence shows conclusively that those employees volunteered for the flushing program. Exhibit J-5 clearly indicates that volunteers were being sought to work from 12:00 a.m. - 6:00 a.m. instead of their normal shift. Although Davis alleged that the work coult not be turned down, he admitted that he was not threatened to accept the work, and that he could, in fact, refuse the work. 5/ Consequently, the Authority never actually assigned the three named employees to flushing or changed their schedules, rather, they volunteered to do the work, and thus, no obligation to negotiate existed. 6/

Third, there was no requirement that the Authority give time and one-half pay for the 12:00 a.m. - 6:00 a.m. flushing work. The collective agreement, J2, is silent on payment for flushing in particular, but does provide in Article 5 Section E that an employee shall receive a shift differential for working more than four hours into a shift other than his/her regular day shift.

The overtime provisions of the agreement provide in Article 13 Sections A and J that time and one-half shall be paid only if an employee

5/ The undersigned does not credit Davis' testimony that the work could not be refused. The only employees who may have been required to do the work were the junior employees, and none of the affected employees were in that category. Davis admitted he was a senior employee and could refuse the work.

6/ The undersigned is not speculating whether there would be a different result if the junior employees would have been required to perform the flushing work.

The Commission, however, has considered whether an employer can discipline employees for refusing to perform overtime work where it infringes on the employer's right to determine when such work must be performed. See In re Township of Readington, P.E.R.C. No. 84-7, 9 NJPER 533 (¶ 14218 1983).

works more than 8 hours per day, or for any hours worked in excess of his/her normal work week which was defined in Article 13 Section N as 40 hours per week. In this case none of the affected employees worked more than 8 hours a day or 40 hours a week, consequently, they were not entitled to time and one-half pay for the 1981 or 1982 flushing work. However, since those employees did work more than four hours into a shift other than their regular day shift, they were properly given differential pay.

It is important to point out, however, that the affected employees only performed 5 1/2 hours of work for 8 hours of pay and thus actually received almost time and one-half pay for the 5 1/2 hours of work. 7/ Therefore, even if the Authority were required to give time and one-half pay for the flushing work, it appears that the Authority has virtually paid that amount.

Fourth, contrary to the Council's allegation, this case does not involve the unilateral creation of a new work rule, nor the modification of an existing work rule. No rule, in fact, was cited as having been changed or created. Compare In re Borough of Mountainside, P.E.R.C. No. 83-94, 9 NJPER 81 (¶ 14044 1982); In re Township of Ocean, P.E.R.C. No. 81-133, 7 NJPER 333 (¶ 12149 1981); and, In re Township of Moorestown, H.E. No. 84-43, 10 NJPER ___ (¶ _____ 2/17/84).

Finally, even if the Authority were required to negotiate with the Council over any change in the flushing program, the undersigned finds that the Council waived its right to negotiate over the scheduling

7/ Time and one-half pay for 5 1/2 hours of work would result in an additional 2 3/4 hours of straight time for a total of 8 1/4 hours of straight time. Since the Authority unilaterally paid the employees for 8 hours in exchange for 5 1/2 hours of work the remaining 1/4 hour is de minimis in the context of this case.

of personnel. The undersigned agrees with the Council that the parol evidence rule applies in this case because the pertinent part of the agreement (Article 5 Section E of J-2) is clear on its face, and no outside evidence is permitted to otherwise change the meaning of that clause. 8/ That clause on its face gives the Authority the right to maintain flexible scheduling of personnel, and requires the Authority to give employees one week notification prior to requiring them to work during hours which are not their regular shift, and requires the payment of a differential as mentioned hereinabove. By posting J-5 on September 14, 1981, which was one week before the start of the 12:00 a.m. to 6:00 a.m. flushing program, and by paying the affected employees the 25c per hour differential, the Authority complied with Article 5 Section E and therfore committed no contractual violation in the instant matter.

The undersigned believes that Article 5 Section E represents a waiver of the Council's right to negotiate over work schedule changes and is similar to waivers in several other Commission decisions. See In re Randolph Twp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶ 13282 1982); In re Middlesex County College, P.E.R.C. No. 82-15, 7 NJPER 463

8/ The Courts and the Commission have frequently held that parol evidence is admissible only as an aid in interpreting an agreement, but not to change the clear meaning of the words. See Casriel v King, 2 N.J. 45 (1949); Atlantic Northern Airlines Inc. v. Schwimmer, 12 N.J. 293 (1953); In re Twp. of Vernon, P.E.R.C. No. 84-41, 9 NJPER 655 (¶ 14283 1983); In re Borough of Bergenfield, P.E.R.C. No. 82-1, 7 NJPER 431 (¶ 12191 1981); In re Delaware Valley Reg. Bd. of Ed., P.E.R.C. No. 81-77, 7 NJPER 34 (¶ 12014 1980) , and In re Raritan Twp. M.U.A., P.E.R.C. No. 84-94, 10 NJPER ___ (¶ _____ January 1984).

The Appellate Division recently upheld the Commission's rejection of an employer's attempt to invoke parol evidence in support of its position. See Cherry Hill Bd. of Ed. v Cherry Hill Assoc. School Admin., App. Div. Docket No. A-26-82T2, December 23, 1983.

7 NJPER 23 (¶ 12009 1980); In re Hanover Park Reg. H.S. Bd. of Ed., P.E.R.C. No. 80-105, 6 NJPER 104 (¶ 11054 1980); In re Jamesburg Bd. of Ed., P.E.R.C. No. 80-56, 5 NJPER 496 (¶ 10253 1979); and In re State of N.J., P.E.R.C. No. 79-33, 5 NJPER 27 (¶ 10018 1978). 9/

Accordingly, based upon the entire record and the above analysis, the Hearing Examiner makes the following:

Conclusions of Law

The Authority did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) by changing the time for the flushing program or by denying time and one-half pay to employees working that program.

Recommended Order

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

Arnold H. Zudick
Hearing Examiner

Dated: February 27, 1984
Trenton, New Jersey

9/ The undersigned does not agree with the Council's assertion that Article 5 Section E is too broad to be a waiver. Therefore, In re Wharton Bd. of Ed., P.E.R.C. No. 83-35, 8 NJPER 570 (¶ 13263 1982) is distinguished from the instant case.