

P.E.R.C. NO. 97-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF DUNELLEN,

Respondent,

-and-

Docket No. CO-H-95-343

DUNELLEN PBA LOCAL 146,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies Dunellen PBA Local 146's request for special permission to appeal a Hearing Examiner's decision deferring to binding arbitration an unfair practice charge it filed against the Borough of Dunellen. The charge alleges that the Borough violated the New Jersey Employer-Employee Relations Act when it unilaterally recouped alleged overpayments of overtime compensation from the paychecks of unit employees. The Commission finds the request for deferral to have been timely filed. The Commission also finds that the proper contractual amount of overtime compensation is at the heart of this litigation and therefore deferral is appropriate.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Ruderman & Glickman, attorneys
(Mark S. Ruderman, of counsel)

For the Charging Party, Klausner & Hunter, attorneys
(Stephen B. Hunter, of counsel)

DECISION AND ORDER

On April 19, 1995, Dunellen PBA Local 146 filed an unfair practice charge against the Borough of Dunellen. The charge alleges that the Borough 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 recouped alleged overpayments of overtime compensation from the paychecks of unit employees. The charge alleges that the Borough ignored provisions in the parties'

^{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."

1992-1994 contract allegedly requiring it to pay one and one-half hours of overtime compensation for each hour of accumulated compensatory time off. The Borough asserts that these provisions require the payment of only one hour of overtime compensation for each hour of accumulated compensatory time off (which had already been calculated at the rate of time and one-half) so it was entitled to recoup payments above straight time rates. The charge also alleges that during successor contract negotiations the Borough did not seek to negotiate over the overpayment and recoupment issues. The PBA asks that employees be paid back money deducted from their paychecks.

The PBA sought interim relief and the Borough responded that the charge should be deferred to arbitration. The interim relief request was later withdrawn.

On August 2, 1995, a Complaint and Notice of Hearing issued.

On August 14, 1995, the Borough filed an Answer. It requested that the matter be deferred to arbitration since the contractual overtime provisions needed to be interpreted to resolve the case.

On October 11, 1995, the Borough moved to defer the charge to arbitration. The PBA opposed the motion, asserting that it was untimely and inappropriate.

On January 22, 1996, Hearing Examiner Jonathon Roth granted the motion. H.E. No. 96-13, 22 NJPER 98 (¶27049 1996). He found the motion timely since the Borough had sought deferral in its

interim relief papers and its Answer. He concluded that deferral was appropriate because the charge and the employer's defense turn on issues of contract interpretation. He finally stated that the Commission would retain jurisdiction pending arbitration so that it could later determine, if asked, whether the arbitration proceedings were fair and regular and whether the award was repugnant to the Act.

On February 20, 1996, the PBA filed exceptions. The PBA reasserts that the motion is untimely and that deferral is inappropriate because some of the issues in the charge may not be resolved through arbitration.

Deferral decisions are interlocutory so special permission to appeal must be sought. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 96-57, 22 NJPER 100 (¶27050 1996); N.J.A.C. 19:14-4.6. We will treat the PBA's exceptions as a request for special permission to appeal.

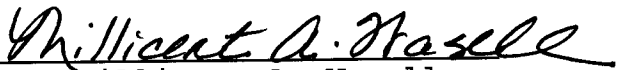
We deny special permission. The Borough's motion was timely since the Borough had pressed its deferral argument at all stages of this litigation and cases have been deferred after Complaints have been issued. See, e.g., Montclair Tp., P.E.R.C. NO. 93-28, 18 NJPER 492 (¶23225 1992); Stafford Tp. Bd. of Ed., P.E.R.C. No. 90-17, 15 NJPER 527 (¶20217 1989); Hudson Cty., P.E.R.C. No. 86-127, 12 NJPER 439 (¶17162 1986). Cf. City of Newark, P.E.R.C. No. 95-108, 21 NJPER 229 (¶26146 1995) (deferring post-hearing); Pennsauken Tp., P.E.R.C. No. 88-53, 14 NJPER 61, 63 n. 5 (¶19020 1987) (cases should ordinarily be deferred before

hearing). Moreover, deferral does not appear to be inappropriate. The proper contractual amount of overtime compensation is at the heart of this litigation and will determine whether employees are entitled to any monetary relief. We acknowledge that even if the arbitrator determines that the Borough had a contractual right to recoup overpayments, it may still have had a duty to negotiate over the timing and amounts of paycheck deductions; but the contractual issue is the dominant one and must be resolved first. We retain jurisdiction in the event that statutory issues under our Act are left unresolved or are resolved in a manner repugnant to the Act.

ORDER

Special permission to appeal is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Acting Chair

Acting Chair Wasell, Commissioners Boose, Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed.

DATED: September 26, 1996
Trenton, New Jersey
ISSUED: September 27, 1996

H.E. NO. 96-13

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SYNOPSIS

A Hearing Examiner recommends that an unfair practice charge be deferred to arbitration under Brookdale Comm. Coll., P.E.R.C. No. 83-131, 9 NJPER 266 (¶14122 1983), after a Complaint and Notice of Hearing issued.

The public employer filed a Motion to Defer to Arbitration. While agreeing that parts of the charge implicate statutory rights, the Hearing Examiner found that the substantive dispute is rooted in the parties' applicable collective agreement.

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HEARING EXAMINER'S DECISION ON MOTION
TO DEFER TO ARBITRATION

On April 19, 1995, Dunellen PBA Local 146 filed an unfair practice charge against the Borough of Dunellen. The charge alleges that on or about April 7, 1995, the Borough "started unilaterally debit[ing] money from the paychecks of unit employees represented by the PBA to purportedly recoup alleged overpayments" of compensation in lieu of accumulated compensatory time off. The charge also alleges that on March 24, 1995, the Borough advised the PBA of its "mistake" in paying; specifically, that it was not required to pay more than straight time rates "inasmuch as the accumulated comp[ensatory] time had already reflected time and one half adjustments"; and that it would start deducting on April 7, 1995. These actions allegedly "ignore prescriptions" of a 1992 interest

arbitration award and the parties' subsequent 1992-94 collective agreement and violate subsections 5.4(a)(5) and (1)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

The PBA also alleges that the parties have negotiated a 1994-98 successor agreement, but compensatory time overpayment was not discussed.

Accompanying the charge was an application for interim relief, which was later withdrawn.

On August 2, 1995, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On August 14, 1995, the Borough filed an Answer, denying it engaged in any unfair practice. It asserts that "...the issue at hand is one involving contract interpretation and not one involving an unfair practice." It asks that the matter be deferred to arbitration.

On October 11, 1995, the Borough filed a Motion to Defer the Charge to Arbitration.

On November 16, 1995, the PBA filed a response, urging that deferral is not appropriate, given the "unilateral change", i.e.,

^{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."

the Borough had paid "all compensation owed" in the early part of 1994 and then "unilaterally reduced" salaries over six pay periods. It maintains that the alleged reductions, occurring during collective negotiations, had a "chilling effect" on the rights of unit employees. Finally, it asserts that the Motion, filed after the Complaint has issued, is untimely.

On November 30, 1995, the Borough filed a letter, writing that it had sought deferral of the charge in May 1995, while opposing the application for interim relief.

On January 19, 1996, the Borough filed a letter, agreeing to waive procedural defenses and proceed to arbitration.

The motion is timely. The Borough sought to have the matter deferred in May 1995 and repeated the request in its Answer to the Complaint. The Commission favors deferral, if appropriate, before hearing. Pennsauken Tp., P.E.R.C. No. 88-53, 14 NJPER 61, 63 n. 5 (¶19020 1987). The Director's decision to issue a Complaint is not a legal determination that the matter is not deferrable. Nor is this a case in which a hearing examiner is asked to overrule the Director's determination that specificity requirements have been met for purposes of issuing a Complaint. Englewood Bd. of Ed., P.E.R.C. No. 93-119, 19 NJPER 355 (¶24160 1993).

The parties negotiated a 1992-94 collective agreement with a "compensatory time" provision (Article XVII [sic]). It states:

All compensatory time, either accumulated and/or obtained, must be utilized by December 31, 1993. The Borough, during the period up to December 31, 1993, may not unreasonably deny an Officer's

request to take compensatory time. If a request must be denied, the Officer shall be compensated at the rates then in existence, pursuant to current practice. If there is any compensatory time remaining on the books, as amended below, as of December 31, 1993, the Officers shall be paid for same, by the 2nd pay period in July, 1994, at the overtime rate in effect on December 31, 1993. However, the compensatory time required from personal days, either current or accumulated and unused as of December 31, 1993, shall not be paid at the overtime rate as set forth above.

The agreement includes a grievance procedure ending in "binding grievance arbitration" before a "mutually suitable" arbitrator (Article IV).

The compensatory time provision was purportedly based upon a recommendation in a July 20, 1992 Interest Arbitration Award. The arbitrator wrote:

....a change in the current system regarding compensatory time and personal days² is in order. Therefore, I shall direct that Police Officers must utilize all compensatory time by December 31, 1993. As a result, Police Officers will have a reasonable period (approximately seventeen months) to "draw down" their compensatory time accruals. Furthermore, to facilitate such usage, the Borough may not unreasonably deny an Officer's request to take compensatory time. If, however, a request must be denied, the Officer shall be compensated therefor at the rates then in existence, pursuant to current practice. Also, if there remains any compensatory time after December 31, 1993, Police Officers shall be paid for same at the overtime rate. Such payment shall not be applicable to personal days.

2. Personal days are granted in the form of compensatory time. (Emphasis supplied).

Article VI, Section 2A of the agreement ("wages, hours and overtime") states:

The first hour of overtime immediately following the completion of a shift shall be paid at time and one-half or shall be taken as compensatory time at the discretion of the officer in question. However, as of January 1, 1994, overtime shall be paid only in cash at time and one-half....

Brookdale Comm. Coll., P.E.R.C. No. 83-131, 9 NJPER 266 (¶14122 1983), articulates the Commission's deferral policy. Deferral to binding arbitration is the preferred mechanism when a charge essentially alleges a violation of subsection 5.4(a)(5) interrelated with an alleged breach of contract and no procedural barriers bar arbitration. The Commission retains jurisdiction over the charge so that, if the arbitrator's award is challenged, it can assure itself that the procedures were fair and regular and the result is not repugnant to the Act. Stafford Tp. Bd. of Ed., P.E.R.C. No. 90-17, 15 NJPER 527 (¶20217 1989); see also, Collyer Insulated Wire, 192 NLRB 834, 77 LRRM 1931 (1971); Spielberg Mfg. Co., 112 NLRB 1080, 36 LRRM 1152 (1955).

This case is deferrable. The gravamen of the charge is that the public employer's alleged "unilateral debiting" of paychecks "ignores prescriptions" of the applicable arbitration award and 1992-94 collective agreement. The public employer relies on the agreement as a defense. It contends that Article VI "directs that a rate of 1 1/2 be applied only one time in the calculation overtime payments...." It contends that it "erroneously failed to apply the proper overtime rate" by incorrectly recording "the number

of hours as 1 1/2 times the actual number of hours earned and then multiplied this incorrect figure with the 1 1/2 overtime rate." The primary source of the parties' rights and obligations in this dispute is the 1992-94 collective agreement, which prescribes an overtime rate, payment in lieu of compensatory time off, and a period for payments.

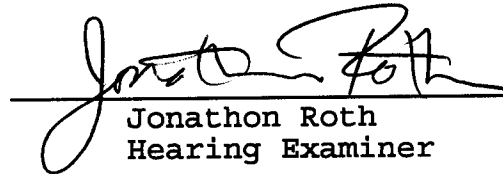
Other portions of the charge implicate statutory rights but are tangential to the contractual dispute. For example, recoupment of overcompensation is most likely a mandatorily negotiable term and condition of employment. See East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398, 400 n. 2 (¶10206 1979), aff'd in part, rev'd in part, App. Div. Dkt. No. A-280-79 (6/18/80). Recoupment during collective negotiations may have "chilled" the process, but did not prohibit these parties from reaching a successor agreement. The Commission has often held that successful completion of contract negotiations may make moot disputes over alleged misconduct during negotiations. Ramapo-Indian Hills Ed. Assn., P.E.R.C. No. 91-38, 16 NJPER 581 (¶21255 1990).

The validity of the Borough's contractual defense before an arbitrator may be decisive in further litigation over remaining portions of the charge. Retention of jurisdiction in this matter will permit the Commission to re-enter the dispute for a failure to promptly pursue the dispute to resolution under the contract, lack of fairness in the arbitration process or an arbitration determination repugnant to the Act. Brookdale.

H.E. NO. 96-13

7.

I recommend that this case be deferred to binding grievance arbitration.



Jonathon Roth
Hearing Examiner

DATED: January 22, 1996
Trenton, New Jersey