P.E.R.C. NO. 85-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF FREEHOLD,

Respondent,

-and-

Docket No. CO-83-348-144

FREEHOLD BOROUGH MUNICIPAL
EMPLOYEES ASSOCIATION,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, and in the absence of exceptions, dismisses a Complaint filed by the Freehold Borough Municipal Employees Association against the Borough of Freehold. The charge alleged that the Borough violated the New Jersey Employer-Employee Relations Act when it failed to grant wage increases allegedly due certain employees. The Chairman concluded, in agreement with the Hearing Examiner, that the Association did not prove by a preponderance of the evidence that the Borough interfered with any employees' rights, discriminated against any employees, refused to negotiate in good faith, or violated any Commission rules.

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Charging Party.

Appearances:
For the Respondent, Cassetta, Brandon & Taylor
(Raymond A. Cassetta, Consultant)

For the Charging Party, Edward S. Donini, Esquire

DECISION AND ORDER

On June 29, 1983, the Freehold Borough Municipal Employees Association ("Association") filed an unfair practice charge with the Public Employment Relations Commission. The charge, as amended on August 10, 1983, alleges that the Borough of Freehold ("Borough") violated subsections 5.4(a)(1), (3), (5) and (7) [1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it failed to grant wage increases allegedly due certain employees.

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; (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; and (7) Violating any of the rules and regulations established by the commission."

On May 18, 1984, the Administrator of Unfair Practice Proceedings issued a Complaint and Notice of Hearing. The Board then filed an Answer alleging that the employees had been paid in accordance with the parties' collective negotiations agreement.

On August 9 and 27, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs by September 27, 1984.

On October 10, 1984, the Hearing Examiner issued his report and recommended decision. H.E. No. 85-15, 10 NJPER ___ (¶_____ 1984). He recommended dismissal of the Complaint.

The Hearing Examiner served a copy of his report on the parties. He advised them that exceptions, if any, were due on or before October 23, 1984. Neither party filed exceptions or requested an extension of time.

Pursuant to N.J.S.A. 34:13A-6(f), the full Commission has delegated authority to me to decide this case in the absence of exceptions. I have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-6) are accurate. I adopt and incorporate them here. Under all the circumstances, I conclude that the Association has failed to prove by a preponderance of the evidence that the Borough interfered with any employees' rights, discriminated against any employees, refused to negotiate in good faith, or violated any Commission rules. Accordingly, the Complaint is dismissed.

ORDER

The Complaint is dismissed.

James W. Mastriani
Chairman

DATED: Trenton, New Jersey
December 13, 1984

H.E. No. 85-15

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

In the Matter of

BOROUGH OF FREEHOLD,

Respondent,

-and- Docket No. CO-83-348-144

FREEHOLD BOROUGH MUNICIPAL EMPLOYEES ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Borough did not violate Subsections 5.4(a)(1), (3), (5) and (7) of the New Jersey Employer-Employee Relations Act, when it failed to make payment of a two percent annual salary increment to employees moving from Step 3 to Step 4 or from Step 4 to Step 5 of the salary structure. The allegations in the Unfair Practice Charge and the proofs adduced at the hearing established that the dispute involved a mere breach of contract. The collective negotiations agreement contained a provision for final and binding arbitration. In so deciding, the Hearing Examiner relied on the Commission's recent decision in State of New Jersey, Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (1984) where the Commission restated and clarified its policy of litigating Subsection(a)(5) violations of the Act in cases of mere breach of contract where there exists a negotiated grievance procedure either with or without binding arbitration.

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. 85-15

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

In the Matter of

BOROUGH OF FREEHOLD,

Respondent,

-and- Docket No. CO-83-348-144

FREEHOLD BOROUGH MUNICIPAL EMPLOYEES ASSOCIATION,

Charging Party.

Appearances:

For the Respondent
Raymond A. Cassetta, Consultant

For the Charging Party
Edward S. Donini, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on June 29, 1983, and amended on August 10, 1983, by the Freehold Borough Municipal Employees Association (hereinafter the "Charging Party" or the "Association") alleging that the Borough of Freehold (hereinafter the "Respondent" or the "Borough") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent between the dates of March 1, 1983 and May 29, 1983 failed to grant certain employees a wage increase of 2% when the affected employees were promoted from either Step 3 to Step 4 or from Step 4 to Step 5 in accordance with the provisions of the applicable collective negotiations agreement, all of which is alleged to be a violation of N.J.S.A.

34:13A-5.4(a)(1), (3), (5) and (7) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on May 18, 1984. Pursuant to the Complaint and Notice of Hearing, hearings were held on August 9 and August 27, 1984 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by September 27, 1984.

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, 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 Borough of Freehold is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Freehold Borough Municipal Employees Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

1/ Although Subsection(a)(5) of the Act is not alleged, the pertinent facts were fully and fairly litigated: Commercial Twp. Board of Education, P.E.R.C. No. 83-25, 8 NJPER 550, 553 (1982), aff'd. App. Div. Docket No. A-1642-82T2 (1983).

The above 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.

"(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.

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

3. The Association is the exclusive representative of all white collar and blue collar employees of the Borough as set forth in Article I of the 1983-1983 collective negotiations agreement (J-3) where the covered employees are specifically enumerated therein by job title. Police, supervisors, and confidential and seasonal employees are excluded from the unit.[2/]

4. The 1980-1981 agreement (CP-1) provided in Article 7, Compensation, for an across-the-board wage increase of seven (7%) percent for the calendar year 1980 and a similar increase of seven (7%) percent for the calendar year 1981 (CP-1, pp. 7, 8). An addendum to the 1980-1981 agreement (CP-1, p. 19) provided a procedure for the promotion of employees from Step 1 through Step 5. An employee hired at Step 1 was thereafter promoted to Step 2 on his or her anniversary date and was again promoted on his or her next anniversary date to Step 3, provided, in each instance, that a favorable recommendation was made by the employee's supervisor. The addendum then provided that effective November 1, 1978, Steps 4 and 5 were created, and that in order to reach either Step 4 or Step 5 the employee must have remained at a lower step for at least a two-year period. Promotion to Step 4 or Step 5 was not to be automatic but was to be based upon an evaluation by the employee's supervisor. Finally, the addendum provided that both Steps 4 and 5 contained a two (2%) percent annual salary increase.

5. Consistent with the foregoing addendum, Steps 1 through 5 appeared in the salary ordinance for the calendar year 1981, which set forth the job titles and the annual salaries by steps (J-1).

6. Under date of December 9, 1981, prior to the expiration of the 1980-1981 agreement, the Borough submitted a proposed successor agreement to be effective during a five-year term from January 31, 1982 through December 31, 1987 (R-4). In an amended Article 7, Compensation, the Borough proposed a Section 5, which essentially embraced all of the provisions of the addendum to the 1980-1981 agreement

2/ See also Article I of the 1980-81 collective negotiations agreement (CP-1).

(CP-1, p. 19). In particular, the Borough proposed, "...Both Steps 4 and 5 contain a two percent (2%) annual salary increase..." (R-4, p. 5).

7. Negotiations took place between December 9, 1981 and the date that a Memorandum of Agreement was executed on February 5, 1982 (J-2). In paragraph 12 of the said Memorandum it is provided, "Salary increases of 8.3% and 9.2% per year, step progression included." The same Memorandum also provided in paragraph 13 that, "Movement to steps 4 and 5 is automatic after two years." The Memorandum of Agreement provided in paragraph 15 that it was to be effective for two years, 1982 through 1983.

8. The collective negotiations agreement for 1982-83 was thereafter reduced to writing and executed on April 12, 1982 (J-3). The agreement provided in Article 7, Compensation, an annual salary increase of 8.3% for 1982 and an increase of 9% for 1983. Further, Article 7, Section 6, incorporated basically what had been the addendum to the 1980-81 agreement (CP-1, p. 19) and the Borough's proposed agreement dated December 9, 1981 (R-4, pp. 5, 6). In point of fact the following identical language appears in the 1980-81 addendum (CP-1), the Borough's proposal of December 9, 1981 (R-4) and the 1982-83 agreement (J-3): "...Both Steps 4 and 5 contain a two percent (2%) annual salary increase(s)..."

9. Councilwoman Lynn Reich participated in negotiations and testified for the Respondent. Reich stated initially that for the first time in negotiations the Borough attempted to include the cost of step progression in the total cost of the contract settlement. However, Reich also testified that the Borough agreed to refrain from the effort to include the cost of step progression in the settlement if the Association lowered its wage demands. This latter testimony is confirmed by that portion of Reich's negotiations notes taken sometime prior to January 30, 1982 (R-2, p. 1). However, Reich's notes of the negotiations of January 30, 1982 indicate under an item immediately below paragraph 3 that, "8.3 to include steps" (R-2, p.1). Reich conceded that the 1982-83 agreement (J-3) by its terms did not

eliminate the steps and, further, she conceded that the agreement provided that "...the two percent step raise would be given to those who obtain Step 4 and Step 5..." (1 Tr. 63, 64). Reich testified further that during the term of the 1982-83 agreement no employee in the unit received a salary increase in excess of the 8.3% or 9% negotiated across-the-board increases, and that, additionally, this applied to employees moving between Steps 3 and 5 (1 Tr. 67, 68).

10. Jeffrey R. Hance, the President of the Association for the past four years, and a member of the negotiating committee for the 1982-83 agreement, acknowledged on cross-examination that in January 1982 he moved from Step 3 to Step 4 in his position of mechanic and received only the 8.3% increase for the year 1982 (1 Tr. 80). He did not receive an additional two percent increase (1 Tr. 80). Further, he did not file a grievance but insisted that he was covered by the Unfair Practice Charge, notwithstanding that he is more than 12 months out of time under the six-month limitation in Section 5.4(c) of the Act. Further, and importantly, Hance testified that he did not know of any employee who received an additional increase over the 8.3% in 1982 by virtue of moving from Steps 1 through 5 (1 Tr. 88). Finally, Hance conceded that the 1982-83 agreement terminated the "value" of Steps 4 and 5 while effectively eliminating Steps 1 through 3 (1 Tr. 89-91, 94).

11. Bruce Crossen, a former Vice-President of the Association who was on the negotiating committee for the 1982-83 agreement, testified on direct examination, in response to a question as to what steps were included within paragraph 12 of the Memorandum of Agreement (J-2), that he "guesses" that "...Steps 1 through 5... were included in that 8 percent raise..." (2 Tr. 9). Other than the annual across-the-board raises for 1982 and 1983, Crossen received no additional salary increment upon moving first to Step 3 and then to Step 4 in May 1982 and May 1983, respectively.

12. The two salary ordinances adopted by the Borough to implement the 1982-83

12. The two salary ordinances adopted by the Borough to implement the 1982-83 agreement provide for only one class or step for employees in the collective negotiations unit represented by the Association (R-5 and R-6).

13. The 1982-83 collective negotiations agreement (J-3) provides in Article VI a "Grievance Procedure," which terminates in final and binding arbitration of any grievance alleging "...a violation, misapplication or misinterpretation of the specific provisions of this Agreement" (J-3, p. 8).

THE ISSUE

Does the instant Unfair Practice Charge involve merely a breach of contract, involving conflicting claims of the parties, which must be dismissed under recent Commission precedent?

DISCUSSION AND ANALYSIS

The Charge Must Be Dismissed Since It Alleges A Mere Breach Of Contract, Involving Conflicting Claims Of The Parties, Which Is Plainly Subject To Binding Arbitration Under The Agreement

The Findings of Fact, supra, make clear that the dispute in the instant case is essentially one of the interpretation to be placed upon the provisions of Article VII, Compensation, Sections 1, 2 and 6 of the 1982-83 collective negotiations agreement (J-3, pp. 9-11). The failure of the Borough to have paid the two percent additional annual salary increase to employees who moved from Step 3 to Step 4 or from Step 4 to Step 5 involves the interpretation of Article VII, Section 6 of J-3 in relationship to Sections 1 and 2 of the same Article. In attempting to interpret the foregoing Sections of Article VII one would necessarily consider the collective negotiations history since 1980, which would involve a chronological examination of Exhibits CP-1, J-1, R-4, R-2, J-2, R-5 and R-6, supra. It appears evident that the documentary evidence in this case, together with the testimony, suggests clearly that the parties herein are engaged in a contractual dispute. Further, this dispute arises under an agreement containing a provision for final and binding arbitration

for any violation, misapplication or misinterpretation of specific provisions of the agreement such as Article VII, Sections 1, 2 and 6 of J-3.

In having determined that the instant dispute involves essentially a contract breach, the Hearing Examiner finds and concludes that the Complaint must be dismissed. The Hearing Examiner relies on a recent Commission decision in State of New Jersey, Department of Human Services, et al., P.E.R.C. No. 84-148, 10 NJPER 419 (June 26, 1984). In that case the Commission redefined the standards for the issuance of a Complaint where a breach of contract was involved under Subsection (a)(5) of the Act. The Commission said:

> "...We conclude that a mere breach of contract claim does not state a cause of action under Subsection 5.4(a)(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures..." (10 NJPER at 421).

In stating the underlying policy consideration for its conclusion, supra, the Commission said further: "...We believe that the parties should be encouraged to use their own negotiated grievance procedures for the resolution of contract disputes and should not be entitled to substitute this Commission for a grievance procedure which they have specifically agreed upon as the appropriate method for resolving a particular contractual dispute..." (10 NJPER at 422).

Having found and concluded that the instant dispute is essentially one of alleged breach of contract, and having set forth the basis for the contractual dispute in the above Findings of Fact, it remains only to observe that the Commission in Human Services, supra did indicate several example of when a Subsection(a)(5) violation might arise, notwithstanding that an alleged breach of contract was involved. For example, the Commission suggested that a specific claim that an employer has repudiated an established term and condition of employment might be litigated in an unfair practice proceeding. Also, a charge might be litigated where a contract clause is so clear that an inference of bad faith arises from a refusal to honor it, or where there are specific indicia of bad faith over and

above a mere breach of contract. Finally, the Commission indicated that it would entertain a charge which indicates that the policies of the Act, rather than a mere breach of contract, may be at stake. (10 NJPER at 422, 423).

It is clear to the Hearing Examiner that none of the foregoing examples have any application to the instant case. There has been no repudiation of an established term and condition of employment by the Borough nor has any independent evidence of bad faith on the part of the Borough been established by the Charging Party.

Finally, it must be stated that the Hearing Examiner has not deferred the dispute to arbitration since the Borough is unwilling to waive the procedural defense of timeliness under the grievance procedure.

Based on all of the foregoing, the Hearing Examiner will recommend that the alleged violation by the Borough of Subsection(a)(5) of the Act be dismissed. Further, there was no evidence adduced by the Charging Party that the Borough violated Subsections(a)(1), (3) or (7) of the Act. Accordingly, the Hearing Examiner must recommend dismissal of the Complaint in its entirety.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent Borough did not violate N.J.S.A. 34:13A-5.4(a)(1), (3), (5) and (7) by its conduct herein.

RECOMMENDED ORDER

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

Alan R. Howe
Hearing Examiner

Dated: October 10, 1984
Trenton, New Jersey