

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF HARRISON,

Respondent,

-and-

Docket No. CO-80-326-148

HARRISON FIREMEN'S BENEVOLENT
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint issued on a charge filed by the Harrison Firemen's Benevolent Association ("Association") against the Town of Harrison ("Town"). The Association had alleged that the Town violated subsections N.J.S.A. 34:13A-5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when, after an arbitrator had declared a sick leave provision in a collective agreement void on July 10, 1979, it refused to reopen negotiations for the years 1976 through 1979, submit to interest arbitration, or renegotiate the sick leave provision declared void. The Commission determines that an arbitrator had properly ruled that under the Savings and Separability clause of the parties' contract, no obligation to renegotiate the entire 1976-1979 agreements existed. Further, the Town had not refused to negotiate in good faith over a replacement sick leave provision.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF HARRISON,

Respondent,

-and-

Docket No. CO-80-326-148

HARRISON FIREMEN'S BENEVOLENT
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Murray, Granello & Kenney, Esqs.
(James P. Granello, of Counsel)

For the Charging Party, Schneider, Cohen, Solomon &
DiMarzio, Esqs.
(David Solomon, of Counsel)

DECISION AND ORDER

On May 1, 1980, the Harrison Firemen's Benevolent Association (the "Association") filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the Town of Harrison (the "Town") had violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1, et seq. (the "Act"). The Association specifically alleges that the Town violated subsections 5.4(a)(1) and (5)^{1/} of the Act when, after an arbitrator had declared the sick leave provision 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."

collective agreement void on July 10, 1979, it refused to reopen negotiations for the years 1976 through 1979 or to submit to interest arbitration.

On May 21, 1980, the Association filed an amended charge. This charge asserted that the Town violated subsections 5.4(a)(1) and (5) when it refused to renegotiate the entire 1976-1979 agreements or, in the alternative, to renegotiate the sick leave provision which the arbitrator declared void.

On May 7, 1981, the Town filed an Answer in which it asserted, inter alia, that the Town had no obligation to renegotiate the 1976-1979 agreements and no obligation to agree to interest arbitration for these years.^{2/} The Town specifically averred that the entire 1976-1979 agreements, with the exception of the void sick leave provision, remained in effect under the Savings and Separability clause. The Town further pleaded that the statute of limitations precluded any claim of an unfair practice arising more than six months before May 1, 1980 and that a December 27, 1980 interest arbitration award made the case moot.

On August 10, 1981, Commission Hearing Examiner Alan R. Howe conducted a hearing and afforded the parties an opportunity to examine witnesses, present evidence, and argue orally. No witnesses testified. Both parties presented documentary evidence. A chronological summary of this evidence follows.

The parties had a two year collective agreement effective from January 1, 1976 - December 31, 1977 (CP-1).

^{2/} The Complaint and Notice of Hearing in this matter was issued on April 30, 1981. Also note that references to CP-__ in the body of this decision refers to the Association's exhibits and R-__ to the Town's exhibits before the Hearing Examiner.

Article X, entitled Sick Leave, provided:

Sick leave shall be provided for illness to the extent provided by State law. 3/

Article XXIII, entitled Savings and Separability Clauses, provided:

In the event any provision or provisions of this Agreement is declared illegal or null and void, then said provision or provisions shall be deleted from this Agreement and the remainder of this Agreement shall continue in effect. If a direct economic benefit provision is declared illegal or null and void, then the parties shall renegotiate the sum of such provision.

After the 1976-1977 agreement expired, the parties reached an impasse in negotiating a successor contract, and the Association filed a Petition to Initiate Compulsory Interest Arbitration. On July 10, 1978, two interest arbitrators rendered an award for a two year contract effective January 1, 1978 (CP-2). The award did not change the previous provisions on sick leave and savings and separability.

In 1979, the parties submitted a dispute involving the sick leave provision to grievance arbitrator David M. Beckerman, Esq. The Association maintained that the provision required the Town to grant all disabled or sick employees a mandatory one year sick leave with pay. Recognizing that the written provision did not contain such a requirement, the Association presented

3/ N.J.S.A. 40A:14-16 provides:

The governing body of any municipality, by ordinance, may provide for granting leaves of absence with pay not exceeding one year, to members and officers of its paid or part-paid fire department and force who shall be injured, ill, or disabled from any cause, provided that the examining physician appointed by said governing body, shall certify to such injury, illness or disability.

testimony from its negotiator that the Town orally agreed to the requirement, but refused to put it in writing. The Town took the position that the contract merely incorporated pertinent sick leave statutes, and under these statutes the Town had discretion to determine the length of any sick leave granted. The Town's negotiator testified that the clause precisely reflected the parties' agreement on sick leave.

On July 10, 1979, the arbitrator rendered his award (CP-3). He held that the Town did not violate Article X by refusing to give the grievants sick leave pay for one year. Finding all witnesses credible, he reasoned that the parties had not reached a meeting of the minds on the sick leave provision and therefore it was void.^{4/} In the award, the arbitrator expressly retained jurisdiction for 30 days in the event either party requested clarification.

The Association, with the assent of the Town, requested clarification. It asked Arbitrator Beckerman to rule that since the sick leave provision was void, the entire contract was void, and, therefore, contract negotiations for 1976-1979 had to be reopened. Although the Association requested a hearing, there is no basis in the record for determining that its request for clarification was conditioned upon the holding of a hearing.

On September 4, 1979, Arbitrator Beckerman issued the desired clarification and denied the request for a hearing (CP-4). He ruled that he had only voided the sick leave provision, not the entire contract. Article XXIII specifically severed the void provision and preserved the agreement.

^{4/} Of course, this ruling did not displace the protections which N.J.S.A. 40A:14-16 gives employees.

On September 7, 1979, the Association's attorney wrote a letter to the Town's attorney (R-3). The letter contained a demand to reopen contract negotiations for 1976-1979 on two grounds: (1) no contract ever existed because there was a lack of mutuality with respect to all provisions of these contracts, and (2) Article XXIII applied.

The Town then attempted to submit to Arbitrator Beckerman the question of whether the voiding of the sick leave provision resulted in the reduction of a "direct economic benefit" within the meaning of Article XXIII, thus requiring negotiation of a compensatory sum. The Association opposed this submission. On December 4, 1979, Arbitrator Beckerman notified the parties that he had not retained jurisdiction after his September 4, 1979 clarification and would not consider other issues without a joint submission (CP-5, 6, 8; R-1, 2).

On February 5, 1980, the Association filed a Petition for Compulsory Interest Arbitration of the 1978-1979 contract with the Commission (CP-7). The Association alleged that the entire 1976-1979 contracts were void and that the Town had refused to renegotiate these contracts. The Town opposed the petition (CP-7a).

On April 11, 1980, the Director of Arbitration, observing that a substantial question of law existed concerning the obligation to negotiate, denied the Association's request to commence compulsory interest arbitration proceedings (CP-7c). He recognized the Association's right to pursue the alleged obligation to renegotiate the previous agreements in a different forum.

After the parties' 1978-1979 agreement expired, the parties were unable to negotiate a successor agreement, and

interest arbitration proceedings on a contract for 1980-81 commenced. On December 27, 1980, Arbitrator Robert L. Mitrani rendered an award (CP-9). The Association submitted a "non-economic" proposal that paid sick leave be extended to a maximum of one year from the date of disability. Stating his belief that this proposal was economic in nature, the arbitrator nevertheless treated it separately, as the Association requested, and rejected it because "...there was no persuasive evidence or testimony" to support it.

After the presentation of the above documentary evidence, the Association, but not the Town, argued orally. Both parties submitted post-hearing briefs.

On September 30, 1981, the Hearing Examiner issued his Recommended Report and Decision, H.E. No. 82-13, 7 NJPER 624 (¶12279 1981), a copy of which is attached and incorporated. Although he found that the charge was timely, he recommended that the Commission defer to the grievance and interest arbitration awards and dismiss the Complaint in its entirety.

On October 27, 1981, the Association filed exceptions, an accompanying brief, and a request for oral argument. The Association challenged the following findings and recommendations: (1) the Commission should defer to the clarification of the grievance arbitration award, (2) the Savings and Separability clause saved the entire contract from being null and void, and (3) the Commission should defer to the interest arbitration awards. A fourth exception alleged that the Hearing Examiner had failed to rule on the Association's contention that the Town had not

discharged its obligation to negotiate in good faith over a replacement for the voided sick leave provision. On November 10, 1981, the Town filed its brief. On January 12, 1982, the Commission heard oral argument.

We have carefully considered the entire record and the parties' oral argument. We find no merit in the Association's exceptions.

We first consider whether the Town had an obligation to renegotiate the entire 1978-1979 contract as a result of the grievance arbitration award voiding the sick leave provision.^{5/} In his clarification of the original award, Arbitrator Beckerman answered this question in the negative. We agree with his answer, both as a result of our deferral policy and our independent reading of the parties' contract.

In re State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977) establishes the criteria for determining when deferral to an arbitration award is appropriate: (1) the arbitrator must have had authority to consider the issues of contractual interpretation underlying the unfair practice charge, (2) the proceedings were fair and regular, and (3) the award is not repugnant to the Act. See also In re Englewood Board of Ed., E.D. No. 76-34, 2 NJPER 175 (1976); In re Kean College, D.U.P. No. 80-3, 5 NJPER 332 (¶10178 1979); In re Jersey City Bd.

^{5/} Although the Association speaks of an obligation to renegotiate covering the years 1976 through 1979, it is clear that the 1976-1977 contract had expired before the 1979 grievance arbitration proceedings, and thus was not affected by that award.

of Ed., D.U.P. No. 80-5, 5 NJPER 405 (¶10211 1979)^{6/} When these criteria have been satisfied, recognition of an arbitrator's award furthers the desirable objective of encouraging the voluntary settlement of labor disputes.

In the instant case, the grievance arbitration award, specifically including the clarification letter of September 4, 1979, satisfies these criteria. Both parties agreed to be bound when they submitted to the arbitrator, who had expressly retained jurisdiction, the question of whether the entire contract survived the voiding of the sick leave provision. Indeed, it appears that the Association initiated the request for clarification in hopes of obtaining a declaration mandating renegotiation of the entire contract. Having submitted that issue for determination, the Association cannot now complain solely because the result is displeasing. Stockton State College, supra, at p. 65. There is no reason to believe that the proceedings were not fair and regular, or that the clarification was repugnant to our Act.^{7/}

^{6/} In accordance with the New Jersey Supreme Court's suggestion that precedents and policies under the federal Labor-Management Relations Act may be helpful in interpreting and implementing our Act, Lullo v. Int'l Ass'n of Fire Fighters, 55 N.J. 409 (1970), we have based our deferral policy on Spielberg Mfg. Co., 112 NLRB 1081, 36 LRRM 1152 (1955). See also Dreis v. Krump Mfg. Co. v. NLRB, 544 F.2d 320 (7th Cir. 1975); Hawaiian Hauling Services Ltd. v. NLRB, 545 F.2d 674 (9th Cir. 1976), cert. den., 431 U.S. 965 (1977); R. Gorman, Basic Text on Labor Law, p. 734 (1976).

^{7/} In particular, the record does not reveal that the Association conditioned its request for clarification on the holding of a hearing. Further, we do not perceive why a hearing would have been necessary to a resolution of the issue submitted for clarification, and the Association has not informed us what evidence, if any, it was unable to present that would have changed the result.

Assuming arguendo that deferral would not be appropriate in this instance, we would still reach the same result. The Savings and Separability clause plainly governs a case in which one particular clause is ruled either "illegal" or, as here, "null and void"; in either event, the provision in question is deleted and "...the remainder of this Agreement [is to] continue in effect." The parties quite clearly rejected renegotiation of an entire contract every time the deletion of one particular clause arguably upset the parties' original balance of trade-offs. Instead, they opted for renegotiation of only those specific clauses invalidated and then only if the clause carried a direct economic benefit.^{8/}

We next consider whether the Town had an obligation to renegotiate over a replacement sick leave provision after Arbitrator Beckerman voided the clause in the 1978-1979 agreement. We agree that the Hearing Examiner failed to consider this question, perhaps because the Association did not brief it, but determine that the Town did not at any time improperly refuse to negotiate in good faith over sick leave provisions.

After the arbitrator issued his clarification refusing to void the entire contract, the Association sent the Town a demand to negotiate. The demand reiterated the Association's contention that the entire agreements covering 1976-1979 were void for lack of mutuality, but also cited the Savings and

^{8/} We have also considered and rejected the Association's contention that since there was no meeting of the minds concerning the sick leave provision, there was no meeting of the minds concerning any of the provisions including the Savings and Separability clause. There is no evidence that the parties failed to reach agreement on any other clauses besides the sick leave provision.

Separability clause. The Town, while declining to renegotiate the entire agreements, was willing to submit to Arbitrator Beckerman the question of whether a limited obligation to renegotiate over the sick leave provisions existed under the Savings and Separability clause. The Association refused this invitation, and the arbitrator refused to consider it absent a joint submission. The Association, by filing a petition to initiate compulsory interest arbitration proceedings, then sought to press ahead with its contention that the entire agreement was void.

On this record, we find that the Town made a good faith attempt to secure a ruling on the existence of an obligation to negotiate a replacement sick leave provision, rather than a bad faith effort to avoid negotiations. The Savings and Separability clause does not establish an unconditional obligation to renegotiate all provisions declared illegal or null and void; instead, the parties must only renegotiate the "sum" of an invalid "direct economic benefit provision." There was a serious threshold question whether the sick leave provision declared invalid fell within these conditions since on its face it provided for only those benefits already afforded by statute and since the arbitrator had already determined that the parties had not agreed upon greater benefits. Seeking to have this serious threshold question answered was not an act of bad faith.

Further, the thrust of the Association's demand and efforts at all times, including the course of this litigation, was to secure renegotiation of the entire collective agreement. While the Association was not obligated to agree with the Town's proposal

to arbitrate the aforementioned threshold issue, it has not established by a preponderance of the evidence that the Town's conduct constituted a refusal to negotiate in good faith.

Finally, placing this case in a larger framework, we stress that the parties have negotiated on sick leave many times. The Town has never avoided its duty to negotiate on this subject during successor contract negotiations. On two occasions, 1978-79 and 1980-1981, the parties reached impasse, and an interest arbitrator rendered an award; on the latter occasion the arbitrator, in accordance with the Association's request, even treated sick leave as a separate non-economic issue, yet rejected the Association's proposal.^{9/} The Association's problem has not been getting the Town to negotiate with it over sick leave, but instead failing to persuade either the Town or an interest arbitrator to adopt its position. Indeed, the 1980-1981 interest arbitration award suggests that this case may be moot since the award was the culmination of a negotiations process in which the parties negotiated over the very issue -- sick leave -- the Association now seeks to renegotiate.

Under all the foregoing circumstances, we hold that the Town did not refuse to negotiate in good faith over replacement sick leave provisions.

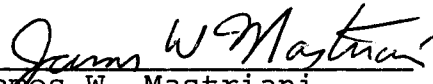
^{9/} We specifically approve the Hearing Examiner's invocation of the two interest arbitration awards. These awards are both relevant to a determination of the Town's continued willingness to negotiate on all terms and conditions of employment, specifically including sick leave provisions. In addition, the 1978-1979 award is germane because of the contention that the arbitrator's initial decision made the entire contract a nullity, while the 1980-1981 contract is relevant because of the Town's mootness argument.

For the reasons stated above, we hereby adopt the Hearing Examiner's recommendation that the Respondent did not commit unfair practices violative of N.J.S.A. 34:13A-5.4(a)(1) or (5).

ORDER

The Commission orders that the Complaint in this matter be dismissed in its entirety.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
February 9, 1982
ISSUED: February 10, 1982

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

In the Matter of

TOWN OF HARRISON,

Respondent,

-and-

Docket No. C0-80-326-148

HARRISON FIREMEN'S BENEVOLENT ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Town did not violate Subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it refused the demand of the Association to commence negotiations for the years 1976 through 1979 and thereafter refused to proceed to Interest Arbitration for the said years. The Hearing Examiner recommended that the Commission defer to a grievance arbitration award, which held that a certain "Sick Leave" provision of the 1976-77 collective negotiations agreement between the parties was null and void, and which did not effect the remainder of the agreement.

The Commission adopted a deferral to arbitration award policy in State of New Jersey (Stockton State College) P.E.R.C. 77-31, 3 NJPER 62 (1977) and the Hearing Examiner recommended that this was an appropriate case for deferral under that policy. The Hearing Examiner also found that the Association's unfair Practice Charge was timely filed under the six-month limitation of 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.

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

In the Matter of

TOWN OF HARRISON,

Respondent,

-and-

Docket No. CO-80-326-148

HARRISON FIREMEN'S BENEVOLENT ASSOCIATION,

Charging Party.

Appearances:

For the Town of Harrison
Murray, Granello & Kenney, Esqs.
(James P. Granello, Esq.)

For the Harrison Firemen's Benevolent Association
Schneider, Cohen, Solomon & DiMarzio, Esqs.
(David Solomon, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on May 1, 1980, and amended on May 21, 1980, by the Harrison Firemen's Benevolent Association (hereinafter the "Charging Party" or the "Association") alleging that the Town of Harrison (hereinafter the "Respondent" of the "Town") 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, under the circumstances of an arbitrator having declared a sick leave provision in the parties' collective negotiations agreement void on July 10, 1979 the Charging Party, on the assumption that the entire agreement was void, demanded that the Respondent commence negotiations for the years 1976 through 1979, and when the Respondent refused the said demand to negotiate the Charging Party on February 1, 1980 filed a petition with the Commission to initiate interest arbitration, to which the Respondent objected, all of which is alleged to be a violation of N.J.S.A.

34:13A-5.4(a)(1) and (5) 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 April 30, 1981. Pursuant to the Complaint and Notice of Hearing, a hearing was held on August 10, 1981, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. By agreement the parties stipulated a complete record consisting of documentary exhibits, but did not waive a Hearing Examiner's Recommended Report and Decision. The Charging Party argued orally. The parties filed post-hearing briefs by September 25, 1981.

An Unfair Practice Charge, as amended, having filed with the Commission, a question concerning alleged violation of the Act, as amended, exists and, after hearing, and after consideration of the oral argument of the Charging Party and 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 Town of Harrison is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Harrison Firemen's Benevolent Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

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."

3. The last collectively negotiated agreement between the parties was effective during the term January 1, 1976 through December 31, 1977 (CP-1). The said agreement provided an Article X, "Sick Leave," that: "Sick leave shall be provided for illness to the extent provided by State Law."^{2/}

4. The applicable State Law, N.J.S.A. 40A:14-16, "Leaves of absence with pay to certain members and officers," provides as follows:

"The governing body of any municipality, by ordinance, may provide for granting leaves of absence with pay not exceeding one year, to members and officers of its paid or part-paid fire department and force who shall be injured, ill or disabled from any cause, provided that the examining physician appointed by said governing body, shall certify to such injury, illness or disability."

The Town herein has adopted an ordinance providing for the allowance of sick leave in accordance with State Law, i.e., N.J.S.A. 40A:14-16.

5. The collective agreements between the parties subsequent to 1977 have resulted from Interest Arbitration awards, namely for the years 1978-1979 (CP-2) and for the years 1980-1981 (CP-9). The said Interest Arbitration awards, supra, in no way altered or modified the "Sick Leave" provisions of Article X (CP-1, supra).

6. Early in 1979 the Association submitted to grievance arbitration a sick leave dispute involving two of its members, which required the Arbitrator to construe the sick leave provision (Article X, CP-1, supra). The Association contended, inter alia, that the Town was obligated to grant the two grievants a mandatory one year sick leave, provided they qualified as being sick. Under the facts involved the Association was seeking one month sick leave pay for each of the two grievants. The Association contended before the Arbitrator that the sick leave provision proposed in negotiations (see footnote 2, supra)

^{2/} The Charging Party, in the negotiations preceding CP-1, had proposed a Sick Leave clause, which read as follows:

"A member shall be granted sick leave without loss of pay for one year from date of such illness or injury even though he is unable to perform his duties. Said member shall continue to accumulate vacation until he returns to duty." (CP-3, p.2).

was approved by the Town's chief negotiator with the proviso that the Town's chief negotiator did not want the mandatory one year sick leave to be expressed in writing. The Town, on the other hand, insisted that sick leave under N.J.S.A. 40A:14-16, supra, is discretionary on the part of the Town as to length of sick leave up to one year. The Town's chief negotiator denied that the Town had agreed to eliminate its discretion in the length of sick leave and thereby obligate itself to a mandatory one year of sick leave. Under date of July 10, 1979 the Arbitrator issued an award (CP-3) denying the Association's grievance for the reason that there was such a wide divergence in the testimony of the parties' chief negotiators as to what was intended by the language of Article X, "Sick Leave" (CP-1, supra). Thus, the Arbitrator held that there was no "mutuality" or "meeting of the minds" and that Article X was null and void and of no effect. Therefore "Sick Leave" under the agreement was governed solely by N.J.S.A. 40A:14-16, supra, "... as implemented by the Town ordinance, namely granting them leave, at the Town's discretion, up to one year ..." (CP-3, p.5). The Arbitrator retained jurisdiction for thirty days in the event "clarification, amplification or implementation is requested by either party." (CP-3 p.5).

7. The parties subsequently sought clarification of the foregoing award (CP-3), namely, as to what effect the Arbitrator's declaration that Article X was null and void had on the remainder of the agreement (CP-1). Under date of September 4, 1979 the Arbitrator ruled that only Article X was null and void and that it had no effect on the remainder of the agreement, particularly in view of Article XXIII, "Savings and Separability," which provides as follows: "In the event any provision or provisions of this Agreement is declared illegal or null and void, then said provision or provisions shall be deleted from this Agreement and the remainder of this Agreement shall continue in effect. If a direct economic benefit provision is declared illegal or null and void, then

the parties shall renegotiate sum of such provision." The Arbitrator stated that under the foregoing "Savings and Separability" clause the balance of the agreement remained in full force and effect. Finally, the Arbitrator rejected: (1) the request of the Association to reopen contract negotiations for the past years of 1976 through 1979 and (2) its request for an additional hearing to resolve the "conflict" in the testimony between the Association's and the Town's chief negotiators. (See CP-4).

8. Thereafter, under date of September 7, 1979, the attorney for the Association sent a letter to the Town's attorney demanding negotiations for the years 1976 through 1979 since the Arbitrator had found that there was no "mutuality" with respect to "Sick Leave" then there could not have been any "mutuality" with respect to the entire agreement, citing also the "Savings and Separability" provision of the agreement (R-3).

9. Correspondence continued between the attorneys for the parties, the grievance Arbitrator and the American Arbitration Association through early February, 1980 (CP-5, CP-6, CP-8, R-1 and R-2).

10. Under date of February 1, 1980 the attorney for the Association sent to the Commission an Interest Arbitration Petition, which was docketed under Docket No. IA-80-172 on February 5, 1980 (CP-7). In this Interest Arbitration Petition the Association specifically sought to include the years 1976 through 1979.

11. Under date of February 15, 1980 the attorney for the Town requested dismissal of the Interest Arbitration Petition on the ground that a valid collective negotiations agreement existed and that two years of the period raised by the Association (1978 and 1979) were covered by an Interest Arbitration Award (CP-2, supra). Finally, the attorney for the Town pointed to the grievance arbitration award (CP-3, supra) and the rejection by the grievance Arbitrator of the Association's request to reopen negotiations for the years 1976 through

1979 (CP-4, supra). (See CP-7A).

12. Following the response of the Association's attorney under the date of February 19, 1980 (CP-7B), James W. Mastriani, on behalf of the Commission, sent a letter to the attorney for the Association under the date of April 11, 1980 declining to process the Interest Arbitration Petition: "Inasmuch as a substantial question of law has been raised concerning the Association's rights to negotiate or arbitrate ..." (CP-7C).

13. The instant Unfair Practice Charge was filed on May 1, 1980 and amended on May 21, 1980 (C-1).

THE ISSUES

1. Should not the Commission defer to the grievance arbitration award rendered under the 1976-77 collective negotiations agreement wherein Article X, "Sick Leave," was held to be null and void for want of mutuality?

2. Should not the Commission further defer to the arbitrator's clarification of his initial award wherein he noted the existence of a "Savings and Separability" clause in the agreement and held that only Article X was null and void and held that this had no effect on the remainder of the 1976-77 collective negotiations agreement?

3. Could the Respondent Town have violated the Act by its conduct herein under the circumstances of the collective negotiations agreements between the parties for the years 1978-79 and 1980-81 having resulted from Interest Arbitration awards, which in no way altered or modified the "Sick Leave" provisions of Article X of the 1976-77 collective negotiations agreement?

4. Should the Unfair Practice Charge be dismissed as untimely filed within the six-month limitation of N.J.S.A. 34:13A-5.4(c)?

DISCUSSION AND ANALYSIS

The Commission Should Defer To The
Grievance Arbitration Award And The
Clarification Thereof Which Was Rendered
Under The 1976-77 Collective Negotiations
Agreement Wherein Article X, "Sick Leave,"
Was Held To Be Null And Void And That This
Had No Effect On The Remainder Of The Agreement

The Hearing Examiner finds and concludes that the Commission, under its deferral to arbitration policy, should give effect to the grievance arbitration award, and the subsequent clarification, both of which were rendered under the 1976-77 collective negotiations agreement, wherein Article X, "Sick Leave," was held to be null and void and, under the "Savings and Separability" clause, was deemed to have no effect on the remainder of the agreement.

The Commission adopted the National Labor Relation Board's ^{3/} Spielberg rationale in State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977). The Board in Spielberg held that it should defer to an arbitration award where it found that the proceedings were fair and regular, that the unfair labor practice was fully litigated and, finally, that the award was not repugnant to the National Labor Relations Act.

Following Stockton and Spielberg, supra, the Hearing Examiner has no difficulty in deciding that the three criteria of Spielberg have been met in the instant case. There was no evidence that the proceeding before the grievance arbitrator was other than fair and regular. The opinion and award indicate that the subject matter of the instant unfair practice was fully litigated before the arbitrator. Finally, the Hearing Examiner finds and concludes that the award was not repugnant in any way to the Act.

Thus, the Hearing Examiner has no hesitation in recommending to the Commission that it defer to the grievance arbitration award, which declared that Article X,

3/ Spielberg Mfg. Co., 112 NLRB 1080, 36 LRRM 1152 (1955).

"Sick Leave," in the 1976-77 collective negotiations agreement was null and void for want of mutuality, and that this had no effect on the remainder of the agreement in view of the "Savings and Separability" clause of the agreement.

The Hearing Examiner categorically rejects the argument of counsel for the Charging Party that the arbitrator's award declaring Article X null and void operated to void the entire agreement. This argument might have been made if there were not a clearly delineated "Savings and Separability" clause. The instant clause states clearly in the first sentence that where "any provision or provisions" of the agreement are declared "null and void, then said provision or provisions shall be deleted from this Agreement and the remainder of this Agreement shall continue in effect." The only consequence of a declaration that a provision or provisions is null and void is that any provision involving a "direct economic benefit" is subject to renegotiation by the parties (see Finding of Fact No. 7, supra). In so concluding, the Hearing Examiner has considered fully the authorities cited by the Charging Party in its post-hearing Brief at pages 5 & 6.

Accordingly, for these reasons the Hearing Examiner will recommend dismissal of the Complaint.

The Respondent Town Could Not Have Violated
The Act By Its Conduct Herein Under The
Circumstances Of Interest Arbitration Awards
Which Established The Terms And Conditions
Of The 1978-79 And 1980-81 Collective Negoti-
ations Agreements Which In No Way Altered Or
Modified The "Sick Leave" Provisions Of Article
X Of The 1976-77 Collective Negotiations Agreement

The above finding and conclusion of the Hearing Examiner that the Respondent Town did not violate the Act by its conduct herein becomes clearer when one considers that the terms and conditions of employment of the unit members of the Charging Party for the years 1978 through 1981 were fixed by two Interest Arbitration awards, which in no way altered or modified the "Sick Leave" provisions of Article X of the 1976-77 collective negotiations agreement. The 1980-81 award (CP-9) clearly indicates that the Charging Party raised the "Sick Leave" issue and the Arbitrator

rejected any modification of Article X (CP-9, p.13).

The Hearing Examiner notes that the Charging Party has completely ignored and has made no reference to the effect of the 1978-79 and 1981 Interest Arbitration awards on the result which should be reached by the Hearing Examiner in the instant case.

Thus, the Hearing Examiner recommends to the Commission that it defer also to the Interest Arbitration awards for the years 1978 through 1981 inasmuch as they are clearly not repugnant to the Act herein. For these additional reasons, the Hearing Examiner will recommend that the Complaint be dismissed.

The Unfair Practice Charge Should Not Be Dismissed As Untimely Filed Within the Six-Month Limitation Of N.J.S.A. 34:13A-5.4(c)

The Respondent Town urges that the instant Unfair Practice Charge be dismissed as untimely filed within the six-month limitation of N.J.S.A. 34:13A-5.4(c). Although the Hearing Examiner has some doubt as to the timeliness of the filing of the instant Unfair Practice Charge he is satisfied that a valid argument can be made that the Charge was timely filed in view of the action of the Charging Party in filing an Interest Arbitration petition with the Commission on February 5, 1980. The Unfair Practice Charge was filed on May 1, 1980, which falls within the six-month limitation period. Accordingly, the Hearing Examiner will not recommend dismissal on the ground that the instant Unfair Practice Charge was untimely filed.

* * * *

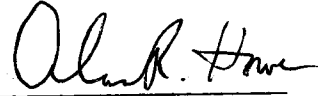
Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Respondent Town did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) when it refused the demand of the Harrison Firemen's Benevolent Association to commence negotiations for the years 1976 through 1979 and thereafter refused to proceed to Interest Arbitration for the said years.

RECOMMENDED ORDER

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



Alan R. Howe
Hearing Examiner

Dated: September 30, 1981
Trenton, New Jersey