

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF ORADELL,

Respondent,

-and-

Docket Nos. CO-83-87-71
and SN-83-49

PBA LOCAL 206,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on a charge which PBA Local 206 filed against the Borough of Oradell. The charge alleged that the Borough refused to negotiate over a replacements clause. The Commission also dismisses a Petition for Scope of Negotiations Determination which the Borough filed questioning the negotiability of the replacements clause. The Commission, noting that an interest arbitrator has already considered and denied the request for the replacements clause, finds that the dispute is now essentially over and that finding an unfair practice or issuing a remedial order would not effectuate the purposes of the New Jersey Employer-Employee Relations Act.

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DOCKET NOS. CO-83-87-71
SN-83-49

PBA LOCAL 206,

Charging Party.

Appearances:

For the Respondent, Grotta, Glassman & Hoffman, Esqs.
(M. Joan Foster of counsel)

For the Charging Party, Loccke & Correia, Esqs.
(Richard D. Loccke of counsel)

DECISION AND ORDER

On October 7, 1982, PBA Local 206 ("PBA") filed an unfair practice charge with the Public Employment Relations Commission. The charge alleged that the Borough of Oradell ("Borough") violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(5) and (7), ^{1/} when it refused to negotiate over the following contractual proposal:

1/ These subsections prohibit public employers, their representatives or agents from: "(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."

No full time employee covered by this Agreement shall be replaced by any non-police officer, part time or other personnel.

No post presently filled by a full time employee covered by this Agreement shall be covered by any non-police officer, part time or other personnel.

On December 20, 1982, the Borough filed a Petition for Scope of Negotiations Determination. It sought a determination whether the above proposal was mandatorily negotiable.

On March 14, 1983, the Acting Director of Unfair Practices consolidated the two cases and issued a Complaint and Notice of Hearing. The Borough filed an Answer denying that the clause was negotiable and that it acted in bad faith when it refused to negotiate over this clause.

On June 13, 1983, Commission Hearing Examiner Alan R. Howe conducted a hearing at which the parties examined witnesses and presented evidence. The parties waived oral argument and filed post-hearing briefs.

On July 19, 1983, the Hearing Examiner issued his report and recommendations, H.E. No. 84-6, 9 NJPER _____ (¶ _____ 1983) (copy attached) He found that the Borough violated subsection 5.4(a)(5) when it refused to negotiate over the proposal; as a remedy, he recommended an order requiring the Borough to negotiate, upon demand, over the proposal and to post a notice. He also recommended dismissal of the allegations pertaining to subsection 5.4(a)(7) and the scope of negotiations petition.

On August 1, 1983, the Borough filed Exceptions. It contends that the Hearing Examiner erred in dismissing the scope petition and in finding that the Borough refused to negotiate in good faith. In particular, it asserts that at the time the PBA proposed its replacements clause, the negotiability of that clause was unclear in light of IFPTE, Local 195 v. State of New Jersey, 88 N.J. 393 (1982) and that the mandatory negotiability of the clause did not become clear until the Commission decided In re Twp. of Washington, P.E.R.C. No. 83-166, 9 NJPER 402 (¶14183 1983), long after the instant charge and scope petition were filed. In addition, it contends that it acted in good faith when it filed a timely scope petition pursuant to N.J.A.C. 19:16-5.5 in order to resolve the then unsettled question of negotiability.

We have reviewed the record. The Hearing Examiner's findings of fact are supported by substantial evidence. We adopt and incorporate them here. We add, however, a significant fact which was not brought to the Hearing Examiner's attention: the PBA's proposal was, in fact, submitted to the interest arbitrator and decided in an award issued on July 11, 1983.^{2/} Given this fact, we believe the instant dispute is now essentially over and that finding an unfair practice or issuing a remedial order would not effectuate the purposes of the Act. Galloway Twp. Bd.

^{2/} We take administrative notice of this award since it constitutes part of the Commission's file on the interest arbitration proceedings (Docket No. IA-83-56). The arbitrator selected the PBA's final offer with respect to the economic package, but denied its final offer with respect to the non-economic issue which was the subject of the litigation before us.

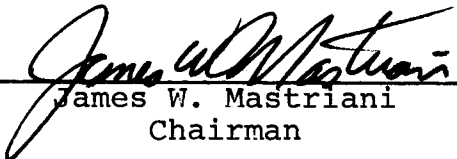
of Ed. v. Galloway Twp. Ed. Ass'n, 78 N.J. 25 (1978); In re Twp. of Rockaway, P.E.R.C. No. 82-72, 8 NJPER 177 (¶13040 1982).

The parties have, of course, the guidance of our Washington Township decision should the PBA seek to negotiate over the same proposal when the present contract expires.

ORDER

The Complaint and Petition for Scope of Negotiations Determination are dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
September 15, 1983
ISSUED: September 16, 1983

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

In the Matter of

BOROUGH OF ORADELL

Respondent,

-and-

Docket No. CO-83-87-71
SN-83-49

PBA LOCAL 206,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent violated Subsection 5.4(a)(5) of the New Jersey Employer-Employee Relations Act when it refused to negotiate with the Charging Party regarding the Charging Party's contract language proposal for a "Replacements" clause, the purpose of which was to preserve unit work. The Commission and the courts have found in series of cases that identical language is mandatorily negotiable and does not constitute subcontracting within the meaning of IFPTE, Local 195 v. State of New Jersey, 88 N.J. 393 (1982). See, for example, County of Middlesex, P.E.R.C. No. 79-80, 5 NJPER 194 (1979), aff'd in part, rev'd. in part App. Div. Docket No. A-3564-78 (1980).

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.

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Appearances:

For the Borough of Oradell
Grotta, Glassman & Hoffman, Esqs.
(M. Joan Foster, Esq.)

For PBA Local 206
Loccke & Correia, Esqs.
(Richard D. Loccke, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on October 7, 1982 by PBA Local 206 (hereinafter the "Charging Party" or the "PBA") alleging that the Borough of Oradell (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 on September 16, 1983 the Respondent refused to negotiate a "Replacements" clause, which would prohibit the Respondent from replacing full-time police officers with non-police personnel, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(5) and (7) of the Act. ^{1/}

1/ These Subsections prohibit public employers, their representatives or agents from:

"(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."

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 14, 1983. The Complaint consolidated both the Unfair Practice Charge, supra, and a Petition for Scope of Negotiations Determination, the latter having been filed by the Respondent on December 20, 1982. Pursuant to the Complaint and Notice of Hearing, a hearing was held on June 13, 1982 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 July 8, 1983.

An Unfair Practice Charge and a Petition for Scope of Negotiations Determination having been filed with the Commission, a question concerning alleged violations of the Act exists, and, after hearing, and after consideration of 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 Oradell is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. PBA Local 206 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. On August 10, 1982 the PBA presented its proposals for a successor collective negotiations agreement to the Respondent, among which was the following proposal, "Replacements:"

"No full time employee covered by this Agreement shall be replaced by any non-police officer, part time or other personnel.

"No post presently filled by a full time employee covered by this Agreement shall be covered by any non-police officer, part time or other personnel."

4. At a negotiations meeting of the parties on September 16, 1982 the Respondent refused to negotiate with respect to the "Replacements" proposal, supra, on the ground that it was a non-mandatory, illegal subject, i.e., a non-negotiable managerial prerogative.

5. The parties met again in collective negotiations on November 9, 1982 where no matters material to the instant Unfair Practice Charge were discussed.

6. After the filing of the instant Unfair Practice Charge on October 7, 1982 the Respondent filed its response on October 26.

7. On November 17, 1982 the Charging Party filed a Petition for Interest Arbitration and on December 7, 1982 the Commission appointed an Interest Arbitrator, J. J. Pierson, who scheduled a date for interest arbitration on January 13, 1983.

8. On December 20, 1982 the Respondent filed its Petition for Scope of Negotiations Determination.

9. The Charging Party rested on the foregoing essentially procedural findings of fact and the Respondent offered as its sole witness Chief of Police, William R. Ennis.

10. The Respondent's Police Department consists of 22 employees, including the Chief, two of whom are Captains, five of whom are Sergeants and fourteen of whom are Patrolmen. The Borough is largely residential and the complement of the police force has essentially been the same for the past few years.

11. The Chief testified credibly that the impact of the "Replacements" clause, supra, would occur in the event that there was a reduction-in-force and that he was required to dispense with his "traffic" Patrolman, Rhynie Emmanuel. In the event of such a RIF, Emmanuel would have to be put back on patrol and, according to the Chief, his replacement would be a meter maid who would perform no police functions but would be involved solely in "traffic." Various police functions, presently being performed by Emmanuel, would not be performed by the meter maid and would have to be delegated to other members of the Police Department.

12. On cross-examination the Chief acknowledged that his basic philosophy was not to replace police officers with non-police personnel, except in the case of the traffic patrolman (Emmanuel) in the case of a reduction-in-force, supra. The Chief acknowledged that he did not see the "Replacements" clause as going beyond the efforts of the PBA to protect unit work.

DISCUSSION AND ANALYSIS

The Respondent argues that there is something unique about the Borough of Oradell's Police Department, which sets it apart from other Police Departments and law enforcement agencies in the State. Thus, Respondent contends that it does not have to negotiate with respect to the PBA's proposed contract language denominated as "Replacements" (see Finding of Fact No. 3, supra). Notwithstanding a series of decisions of the Commission and the courts to the contrary, the Respondent would have the Hearing Examiner distinguish these decisions and recommend dismissal of the Complaint. The Hearing Examiner finds nothing unique about Oradell's Police Department. As the Commission and the courts have held before, the Hearing Examiner finds that the contract language sought in Finding of Fact No. 3, supra, is not the language of subcontracting but rather the language of preservation of unit work.

The first case in which identical language was construed by the Commission is County of Middlesex, P.E.R.C. No. 79-80, 5 NJPER 194 (1979), aff'd. in part, rev'd. in part App. Div. Docket No. A-3564-78 (1980). There, the Appellate Division noted that the contract proposal dealt "...with the subject of protecting unit work from encroachment by nonunit employees... (The proposal) ...does not 'in any way inhibit the County from exercising its managerial right to assign PBA members to various tasks within their function as correction officers or to assign other employees to noncorrectional duties (but) ... merely protects the legitimate interest of the PBA that unit work is not assigned to nonunit employees.'..."

The Commission reached a similar decision in Rutgers, The State University, P.E.R.C. No. 82-20, 7 NJPER 505 (1981), aff'd. App. Div. Docket No. A-468-81T1 (1983) where the union sought to arbitrate a grievance challenging the assignment by Rutgers of work performed by members of the collective negotiations unit to employees in another negotiations unit of Rutgers' employees. The Commission held that this was not subcontracting within the meaning of IFPTE, Local 195 v. State of New Jersey, 88 N.J. 393 (1982) but involved a reassignment of work from members of one

collective negotiations unit to another unit of the same employer. The Appellate Division squarely affirmed the Commission, noting that the Supreme Court in Local 195, supra, clearly distinguished subcontracting from reassigning and found that Rutgers' suggestion that there was no distinction is "...clearly without merit..."

Finally, the Commission, as recently as June 27, 1983, issued a decision in Township of Washington, P.E.R.C. No. 83-166, 9 NJPER _____ (1983), which again confirmed that the identical language sought herein is mandatorily negotiable. The Commission cited County of Middlesex, supra, Rutgers, supra, and again distinguished Local 195, supra. Additionally, the Commission distinguished Belmar PBA Local No. 50 v. Belmar, 89 N.J. 255 (1982), which recognized that special police officers may be hired on a full-time or part-time basis up to a year in order supplement the regular police force during periods of unusual demand for police services. The Commission noted that Belmar also holds that special police employees may not be employed on full-time basis as a subterfuge to avoid hiring regular police officers. The Commission also noted that the PBA's proposal in Washington, which is identical to the instant proposal, does not prevent the Township from hiring and using special police officers when appropriate under Belmar.

For all of the foregoing reasons, the Hearing Examiner finds and concludes that the Respondent has violated Subsection(a)(5) of the Act as alleged. However, the Hearing Examiner finds and concludes that the Charging Party has failed to adduce by a preponderance of the evidence proof that the Respondent violated Subsection(a)(7) of the Act and, accordingly will recommend dismissal as to this allegation. Finally, the Hearing Examiner will recommend dismissal of the Petition for Scope of Negotiations Determination.

* * * *

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

CONCLUSIONS OF LAW

1. The Respondent violated N.J.S.A. 34:13A-5.4(a)(5) when it refused to

negotiate in good faith with the Charging Party its proposal for contract language pertaining to "Replacements."

2. The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(7) by its conduct herein.

3. The Petition for Scope of Negotiations Determination must be dismissed.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent cease and desist from:

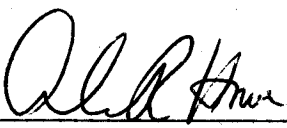
1. Refusing to negotiate with the Charging Party, upon demand, with respect to the Charging Party's proposal for contract language with respect to "Replacements" (See Finding of Fact No. 3, supra).

B. That the Respondent take the following affirmative action:

1. Post in all places where notices are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by other materials.

C. That the allegations ~~that the~~ Respondent violated N.J.S.A. 34:13A-5.4(a)(7) be dismissed in their entirety.

D. That the Petition for Scope of Negotiations Determination by dismissed.



Alan R. Howe
Hearing Examiner

Dated: July 19, 1983
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT refuse to negotiate in good faith with PBA Local 206, upon demand, with respect to its proposal for contract language pertaining to the preservation of unit work, i.e., the proposed "Replacements" clause.

BOROUGH OF ORADELL

(Public Employer)

Dated _____

By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James Mastriani, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780