P.E.R.C. NO. 94-118

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent/Petitioner,

-and-

Docket Nos. CO-H-94-125 and SN-94-45

NEWARK COUNCIL NO. 21, NJCSA, IFPTE, AFL-CIO,

Charging Party/Respondent.

SYNOPSIS

In an unfair practice charge filed by Newark Council No. 21, NJCSA, IFPTE, AFL-CIO and consolidated with a scope of negotiations determination filed by the City of Newark, the Public Employment Relations Commission finds that the City violated the New Jersey Employer-Employee Relations Act when it repudiated a contractual provision on work hours by reducing the work week of recreation leaders from 40 to 20 hours thereby reducing their compensation and benefits accordingly.

P.E.R.C. NO. 94-118

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent/Petitioner,

-and-

Docket Nos. CO-H-94-125 and SN-94-45

NEWARK COUNCIL NO. 21, NJCSA, IFPTE, AFL-CIO,

Charging Party/Respondent.

Appearances:

For the Respondent/Petitioner, Joanne Watson, Assistant Corporation Counsel

For the Charging Party/Respondent, Fox and Fox, attorneys (Dennis J. Alessi, of counsel)

DECISION AND ORDER

On October 25, 1993, Newark Council No. 21, NJCSA, IFPTE, AFL-CIO filed an unfair practice charge against the City of Newark. The charge alleges that the employer 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, in violation

---

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.

of the parties' collective negotiations agreement, it reduced the work week of recreation leaders from 40 to 20 hours and reduced their compensation and benefits accordingly.

Council 21 also filed a grievance and sought binding arbitration. On November 4, 1993, the City petitioned for a scope of negotiations determination, arguing that it had a managerial prerogative to lay off/demote the recreation leaders and reclassify them as part-time employees.

On November 10, 1993, the charging party's application for interim relief was denied. I.R. No. 94-6, 20 NJPER 15 (¶25008 1993). A Commission designee held that a claim that full-time hours must be maintained for particular positions should be resolved through the negotiated grievance procedure. He also stated that the contract language that Council 21 relies on was unclear.

On November 22, 1993, the parties were notified that the unfair practice charge and scope petition were being consolidated. On December 3, a Complaint and Notice of Hearing issued. There is no indication that the City ever filed an Answer, as required by N.J.A.C. 19:14-3.1.

On January 26, 1994, Hearing Examiner Edmund G. Gerber conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On March 28, 1994, the Hearing Examiner issued his report and recommendations. H.E. No. 94-22, 20 NJPER 204 (¶25098 1994).

He found that work hours is a mandatorily negotiable term and condition of employment and that a grievance under a work hours provision is legally arbitrable. He then found that the disputed work hours clause preserves the work week for all full-time employees, including recreation leaders. He concluded that the employer violated the Act when it unilaterally altered a term and condition of employment set by contract. He recommended an order requiring the employer to restore the work hours, make employees whole, and post a notice of the violation. Having resolved the dispute underlying the scope petition, he recommended that we find the demand for arbitration moot.

On April 15, 1994, the City filed exceptions and a brief. It claims that: it had no knowledge of an order consolidating the unfair practice charge and scope petition; we lack jurisdiction to decide whether the layoff was procedurally and substantively correct under Civil Service regulations; the Hearing Examiner supplanted the role of an arbitrator by interpreting the collective negotiations agreement; the Hearing Examiner improperly relied on parol evidence to interpret the contract; and ordering the City to compensate persons at an amount over and above their work levels could result in criminal charges against the City for misuse of public monies.

On April 27, 1994, Council 21 filed an answering brief. It claims that an employer must comply with the Act as well as Civil Service statutes and regulations whenever it reduces work hours or compensation. It also claims that the Notice of Hearing it received

had a Notice of Consolidation attached and that the fact of consolidation was noted at the beginning of the hearing. On May 20, Council 21 filed a letter contending that it is undisputed that the reduction in work week was effective September 13, 1993, not November 13, 1993 and that back pay should be ordered from that date.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-6) with one modification. The reduction in work hours was effective September 13, 1993.

We begin with the fact of consolidation. On November 22, 1993, the City was notified by letter that the scope of negotiations petition and the unfair practice charge were being consolidated for hearing. In addition, the Hearing Examiner opened the hearing with this statement:

> This is a hearing before the New Jersey Public Employment Relations Commission in the case of the City of Newark and Newark Council 21, NJCSA, IFPTE, Commission Docket Number CO-94-125. In addition, the City has submitted a Scope of Negotiations Petition SN-94-45, which has been consolidated with this matter. [T4]

Accordingly, the employer was on notice that the scope petition and the unfair practice charge had been consolidated.

We next address the impact of Civil Service statutes and regulations. It is not usually our place to decide whether a layoff is procedurally and substantively correct under Civil Service regulations. We will not do so here. Instead, for purposes of this decision, we will assume that the City did not violate any Civil Service proscriptions. It does not follow, however, that the City

had a managerial prerogative to reduce these employees' work hours unilaterally. That the reduction may have complied with one statutory scheme does not guarantee that it complied with other statutory schemes or the terms of a collective negotiations agreement. Our Act requires negotiations over mandatorily negotiable subjects and permits enforcement of agreements setting terms and conditions of employment. We must therefore determine whether the alleged agreement preserving work hours was mandatorily negotiable.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

First, work hours are, in general, mandatorily negotiable terms and conditions of employment. They intimately and directly affect the work and welfare of public employees. The number of hours worked

affects compensation and other benefits. In this case, for example, the reduction in work hours stripped employees of health benefits. Second, the City has not suggested that any statute or regulation sets the recreation leaders' work hours and therefore preempts negotiations. Finally, the City has not shown how abiding by an alleged agreement to preserve work hours would significantly interfere with the determination of governmental policy. Accordingly, the subject of the work hours grievance is mandatorily negotiable and the City did not have a managerial prerogative to reduce the work hours of recreation leaders unilaterally. We therefore deny the City's request for a restraint of binding arbitration.

The City's reliance on Klinger v. Cranbury Tp. Bd. of Ed., 190 N.J.Super. 354 (App. Div. 1982), is misplaced. In that case, a school board replaced its full-time physical education program taught by two full-time teachers with a 3 1/2 day program taught by the same teachers working 7/10 time. The Court held that the senior teacher's seniority rights under education law were not violated by employing him and another teacher part-time rather than employing him full-time. To explain why a reduction in hours triggered a need to examine whether there were any positions to which the senior teacher had a superior right under the education law, the Court cited a Commissioner of Education case for the proposition that a reduction in work hours is considered a reduction in force under

education law. Popovich v. Wharton Bd. of Ed., 1975 S.L.D. 737, 745. In Popovich, a tenured vocal music teacher had her work week and compensation reduced from five days to three, while an instrumental music teacher with less seniority remained full-time. The Commissioner of Education held that reducing the vocal teacher's employment to three days constituted a reduction of staff tantamount to abolishing a portion of its former full-time vocal music teacher position. Since both teachers were certificated as teachers of music, the senior teacher was entitled to the full-time position. Neither Klinger nor Popovich considered whether public employers in general have a prerogative to reduce work hours unilaterally. They considered the rights of tenured teaching staff members under education law only. Nor has the City cited any Civil Service case that suggests that an employer has a prerogative to reduce work hours unilaterally. Cf. Madison Bor. Bd. of Ed., P.E.R.C. No. 88-29, 14 NJPER 401 (¶19158 1988), citing In re Piscataway Tp. Bd. of Ed., 164 N.J. Super. 98 (App. Div. 1978)(reduction in workday is not a non-negotiable reduction in force).

In its exceptions, the City contends that the Hearing Examiner should have stopped after finding a preservation of work hours provision mandatorily negotiable and should not have gone on to decide that it repudiated this work hour provision. It argues that under State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), to the extent the contract language is unclear, the matter should be resolved by an arbitrator.

In Human Services, we explained 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. Instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures. Id. at 421. If the contract claim is sufficiently related to specific allegations that an employer has violated its duty to negotiate in good faith, we retain the authority to remedy that violation under subsection 5.4(a)(5). Thus, we will entertain an unfair practice proceeding where an employer has allegedly repudiated an established term and condition of employment: for example, where an employer abrogates a contractual clause based on its belief that the clause is outside the scope of negotiations, or where a contract clause is so clear that an inference of bad faith arises from a refusal to honor it. In the first situation, there is no separate dispute over whether the employer, in fact, refused to honor the agreement. Resolving the negotiability dispute thus resolves the unfair practice charge. In the second situation, there is no need to interpret the contract. Bad faith is evidenced by the refusal to honor a clear clause.

Here, the charging party claims that the employer repudiated the contractual provision on work hours. A brief negotiations history is helpful.

Recreation leaders have been employed by the City for decades and have traditionally worked 40 hours per week. In the

late 1960s and early 1970s, most other City employees worked 30 hours per week. Since at least 1972, the parties' contracts have always contained clauses preserving the work hours of current employees. During negotiations for the 1979-1982 contract, the parties agreed to an increase in work hours for 30 hour employees. They memorialized that agreement in this contract language that specifically increases the work hours of certain employees, but expressly preserves the work hours of others:

> Those employees covered by this Agreement for whom the current work week is thirty (30) hours per week, six (6) hours per day exclusive of the lunch period shall continue such work week until September 1, 1980. Effective September 1, 1980, the work week shall be thirty-five (35) hours per week, seven (7) hours per day exclusive of the lunch period. Those employees covered by this Agreement whose work week was thirty-five (35) hours or more prior to September 1, 1980, shall continue working the same number of hours as heretofore, during the life of this Agreement.

This same language has been carried forward through a series of contracts and has been retained in the current agreement. Council 21's president testified without contradiction that the last sentence of the clause was placed in the 1979-1982 contract to preserve the work hours of employees working 35 hours or more. She further testified without contradiction that continuing that same language in the 1992-1994 contract meant that everyone working either 35, 37 1/2, or 40 hours was guaranteed those hours. In its exceptions, the City appears to argue that the last sentence applies only to employees hired prior to September 1, 1980 and not to the

recreation leaders who were hired after 1980. But it presented no evidence to contradict the union's factual testimony. In addition, the City's interpretation would appear to leave the recreation leaders in the category of employees who, effective September 1, 1980, had a 35 hour work week. That assumption is not supported by the record. We conclude that the contract language, standing alone, is unclear, but that the language coupled with the parties' negotiations history establishes agreement to preserve the work hours of recreation leaders. The City's reducing those work hours unilaterally because it erroneously believed it had a managerial prerogative to do so repudiated the collective negotiations agreement.

We would have preferred the City's suggested avenue for resolving this dispute: Council 21 files a grievance and an unfair practice charge; the City seeks a restraint of binding arbitration claiming a managerial prerogative to reduce work hours; we deny the restraint; the grievance proceeds to arbitration; and the unfair practice charge is either dismissed or deferred to arbitration. Unfortunately, the City did not present its suggested avenue to the Hearing Examiner. It never filed an Answer asserting a managerial prerogative defense and requesting that the matter be arbitrated should its defense be rejected; it participated in the hearing and litigated the contract issues; and it filed a post-hearing brief

arguing the contract issues and never arguing that the matter should be arbitrated.[2/] Now, after getting an adverse decision from the Hearing Examiner on the merits of the contractual issue, the City argues that the matter properly belongs before an arbitrator. Under all the circumstances, we decline to exercise our discretion to refuse to entertain the merits of the charge. Accordingly, we adopt the Hearing Examiner's recommendation and order the City to restore all recreation leaders to full-time positions and make them whole for all salary and benefits lost retroactive to November 13, 1993.

The City claims that if Council 21 has a right not to negotiate over these employees' work hours during the life of the contract, the City might be forced to misuse public monies by compensating a person at a full-time rate for a half-day's work. First, we note that the City did not attempt to negotiate a reduction in hours for recreation leaders. It acted unilaterally and rejected any suggestions by Council 21 that tried to alleviate the City's concerns. Second, the City remains free to assign any employment duties related to the work of recreation leaders it wants. See Cherry Hill Bd. of Ed., P.E.R.C. No. 85-68, 11 NJPER 44 (¶16024 1984)(employer that unilaterally reduced work hours had to restore hours but could assign or not assign whatever related employment duties it saw fit during guaranteed work week). Third,

---

2/ The City suggests in its brief that it asked that this matter be deferred to arbitration when it filed its scope petition seeking to restrain arbitration. The record does not substantiate that assertion.

should the parties' be unable to reach a mid-contract accommodation, the City can place a work hours proposal on the table when the current contract expires on December 31, 1994.

ORDER

The City of Newark is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally reducing the work hours of its recreation leaders.

2. Refusing to negotiate in good faith with Newark Council No. 21, NJCSA, IFPTE, AFL-CIO concerning terms and conditions of employment of unit employees by unilaterally reducing the work hours of its recreation leaders.

B. Take this action:

1. Restore all recreation leaders to full-time positions requiring 40 hours of work per week and make them whole for all salary and benefits lost retroactive to September 13, 1993.

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

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Klagholz, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: June 30, 1994
Trenton, New Jersey
ISSUED: June 30, 1994

NOTICE TO 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 cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally reducing the work hours of recreation leaders.

WE WILL cease and desist from refusing to negotiate in good faith with Newark Council No. 21, NJCSA, IFPTE, AFL-CIO concerning terms and conditions of employment of unit employees by unilaterally reducing the work hours of recreation leaders.

WE WILL restore all recreation leaders to full-time positions requiring 40 hours of work per week and make them whole for all salary and benefits lost retroactive to September 13, 1993.

Docket No. CO-H-94-125

CITY OF NEWARK
(Public Employer)

Date: _____ By: _____

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 the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

d:\percdocs\notice 10/93

H.E. NO. 94-22

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

In the Matter of

CITY OF NEWARK,

Respondent/Petitioner,

-and-

Docket Nos. CO-H-94-125 and SN-94-45

NEWARK COUNCIL NO. 21, NJCSA,
IFPTE, AFL-CIO,

Charging Party/Respondent.

SYNOPSIS

A Hearing Examiner recommends that the Commission find the City of Newark committed an unfair practice when, in contravention of a contract clause preserving the work week, employees in the position of Recreation Leaders were reduced from 40 hours per week to 20 hours per week without negotiating this action with the Newark Council No. 21, NJCSA, IFPTE, AFL-CIO, the designated majority representative.

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. 94-22

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

In the Matter of

CITY OF NEWARK,

Respondent/Petitioner,

-and-

Docket Nos. CO-H-94-125 and SN-94-45

NEWARK COUNCIL NO. 21, NJCSA,
IFPTE, AFL-CIO,

Charging Party/Respondent.

Appearances:

For the Respondent, City of Newark,
Joanne Watson, Assistant Corporation Counsel

For the Charging Party, Newark Council No. 21,
Fox and Fox, attorneys
(Dennis J. Alessi, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On October 25, 1993, Newark Council No. 21, NJCSA, IFPTE, AFL-CIO filed an unfair practice charge with the Public Employment Relations Commission, alleging that the City of Newark committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act; specifically, N.J.S.A. 34:13A-5.4(a)(1) and (5)[1/] when on September 13, 1993 employees in

---

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

Footnote Continued on Next Page

the title Recreation Leader received notification that the City was reducing their work week from 40 hours to 20 hours. The charge alleged that the employees' loss of full-time status would also result in their loss of contractual health insurance coverage. The reduction in hours and insurance coverage was in contravention of the collective negotiations agreement.2/

The City denies it committed an unfair practice. It denies that work hours were reduced. Rather, employees were laid off pursuant to Department of Personnel regulations and the City purportedly had a managerial prerogative to take that employment action. The City also filed a Scope of Negotiations Petition on November 4, 1993, after Council 21 sought to arbitrate this matter. It argues the matter is a non-negotiable, managerial prerogative and it seeks to restrain arbitration. It further contends the contract was not violated.

A Complaint and Notice of Hearing and an Order Consolidating the Scope of Negotiations Petition with the unfair

---

1/ Footnote Continued From Previous Page

restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ The charging party also filed an Application for interim restraint of the City's action. That Application was denied. I.R. No. 94-6, 19 NJPER ___ (¶_____ 1993)

practice complaint were issued and a Hearing was held on January 26, 1994. Both parties submitted post-hearing briefs.[3/]

The City of Newark operates five recreation centers staffed by Recreation Leaders. In May 1993, the City employed 22 full-time Recreation Leaders; they worked 40 hours per week and were represented in collective negotiations by Council #21.

In May 1993, John D'Auria, the Personnel Director of the City, met with the President of Council 21, Evelyn Laccitiello and told her that the City was considering laying off the Recreation Leaders and rehiring them as 20 hour per week part-time employees. Laccitiello replied, "[the City] can't do that." D'Auria responded that it believed that it could. Laccitiello answered that, "[the union] will have to take you to court because we have a contract." Laccitiello did not advise that the union wanted to negotiate over the reduction in hours.

By letters dated July 27, 1993, each of the Recreation Leaders were notified that, effective September 10, 1993, he or she would be laid off from their full-time position, Recreation Leader, at 40 hours per week and retained as a part-time 20 hours per week, permanent Recreation Leader. The letters stated the Recreation Leaders were being laid off from their full-time position for reasons of economy and efficiency. The Recreation Leaders were also notified that pursuant to the collective negotiations agreement

---

3/ The record closed on March 7, 1994 with the receipt of the transcript.

between the City and Council 21, only full-time employees are entitled to health benefits. Accordingly, health benefits will cease (CP-14). The Recreation Leaders were ultimately reduced to 20 hour part-time employees on November 13, 1993 by a mayoral executive order and they were no longer covered by the City's health insurance plan.

Laccitiello testified as to the history of the Article VI work week. Her testimony was credible and not rebutted.

In the late 1960's and early 1970's, most City employees worked 9 a.m. to 4 p.m. or 30 hours a week. However, some employees worked 37.5 hours, and other, specifically, the Recreation Leaders, worked 40 hour weeks.

In 1968, the City attempted to unilaterally increase the workweek of 30 hour employees to 35 hours. Council #21 successfully brought suit and the City was ordered to return the affected employees to 30 hours per week (CP-1 and CP-2 in evidence).

At least as far back as 1972 and throughout the 1970's, the contracts between the City and Council #21 contained contract provisions which preserved the work week.

The 197273 contract (CP-3) provided:

Article VI - Work Week

> A. The present normal work week for individuals employed at the date of the signing of this Agreement shall be continued for the life of this Agreement.

The 1976-78 agreement (CP-4) provided:

Article VI - Work Week

> The present normal work week for individuals including number of hours per day per week employed at the date of signing of this Agreement shall be continued for the life of this Agreement.

In negotiations for the 1979 to 1982 contract, the City and Union agreed to increase the hours of 30 hour employees to 35 hours. The affected employees received a greater salary increase than those negotiated for the 37.5 and 40 hour employees. The change in the hours was memorialized in Article VI - Work Week in the 1979-82 Agreement. It states:

> Those employees covered by this Agreement for whom the current work week is thirty (30) hours per week, six (6) hours per day exclusive of the lunch period shall continue such work week until September 1, 1980. Effective September 1, 1980, the work week shall be thirty-five (35) hours per week, seven (7) hours per day exclusive of the lunch period. Those employees covered by this Agreement whose work week was thirty-five (35) hours or more prior to September 1, 1980, shall continue working the same number of hours as heretofore, during the life of this Agreement.

This contract language has been carried forward without change to the current collective negotiations agreement (CP-11).[4/]

D'Auria testified, and I credit his testimony, that the City initiated the lay-off because the recreation leaders had very little to do during the hours school was in session. The City had a budget crisis in 1990 and 1991 and it was compelled to lay-off employees. The City is sensitive to its expenses and a savings could be made if the hours of the personnel in question were cut.

4/ Part-time employees are also covered by this agreement having been listed in the appendices of previous agreements.

Accordingly, D'Auria filed the lay-off plan with the Department of Personnel. His meeting with Laccitiello complied with the Department of Personnel requirement that an employer meet and confer with the union representatives of the employees affected by a lay-off.

ANALYSIS

The City argues that it had no obligation to negotiate with Council 21; it had a managerial prerogative to make the lay-offs. The recreation leaders hours were not simply reduced; they were laid-off and re-hired as part-time employees. Lay-offs are a non-negotiable, managerial prerogative. Therefore, they had a non-negotiable, managerial right to take this action.

Alternatively, it argues that Article VI does not preserve a 40 hour work week for Recreation Leaders.

In Madison Borough Bd. of Ed., P.E.R.C. No. 88-29, 14 NJPER 401 (¶19158 1988), an employer argued that, when it reduced the hours of work and compensation of an employee, it made a reduction in force, i.e. a lay-off, pursuant to N.J.S.A. 18A:28-9, and therefore its actions were non-negotiable and not arbitrable. The Commission, citing Piscataway Twp. Bd. of Ed., 164 N.J. Super. 98 (App. Div. 1978), rejected this argument and found the Borough's action was not a true reduction in force; rather, it was simply a unilateral reduction in hours and compensation.

Madison is analogous to the facts here. The notification of lay-off included notice that the affected employees would continue to work part-time with reduced compensation and benefits. Although the City has the non-negotiable right to reduce the size of its work force through lay-offs, it only used the language of lay-offs to reduce the workweek of the Recreation Leaders.

Work hours are a mandatorily negotiable and arbitrable term and condition of employment. Although an employer has a prerogative to determine the number of part-time and full-time employees in its employ, a contractual provision addressing the work hours of employees is a legal, arbitrable contract provision. Gloucester Cty, P.E.R.C. No. 93-96, 19 NJPER 224 (¶24120 1993).[5/]

5/ Where an unfair practice charge alleges on an (a)(5) violation based upon contractually derived rights, it is Commission policy to defer such a charge to the contract's grievance resolution mechanism provided the employer agrees to allow that mechanism to resolve the underlying grievance. However, here, the employer claims that the contract clause in dispute is outside the scope of negotiations and refused to defer to arbitration. Therefore, the issue of negotiability must be resolved by the Commission. An employer's decision to abrogate a contractual clause, based on an erroneous belief that the clause is outside the scope of negotiations, constitutes a contract repudiation and therefore a potential unfair practice. State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1985).

Having found the issue here is negotiable and arbitrable, one might argue the meaning of the contract should now be deferred to arbitration. (Neither party has argued that this matter should be so deferred.) However, to defer now after a full hearing would be self-defeating; two major rationales of the deferral policy are economy and speed of dispute resolution. It would better serve both the legislative mandate of the Commission (to promptly resolve labor disputes) and judicial economy to interpret the contract in this decision to determine if the City unlawfully altered a term and condition of employment.

The City argues that the current contract should be read so only those employees who were hired prior to 1980 are covered by Article VI. It asks that the history of Article VI not be considered in deciding the unfair practice charge. It offers no legal theory as to why the history of the contract article should not be considered. However, it is entirely proper to consider oral testimony which gives meaning and sense to contract language so long as, "the intent of the parties as clearly expressed in the writing controls." Kearny PBA Local #21 v. Twp. of Kearny, 81 N.J. 208, 221-222 (1979); Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983); County of Burlington.

It is apparent that "September 1, 1980" negotiated into Article VI of the 1979-82 agreement refers to the work week change for 30 hour employees. The parties carried over this contract language into the current document without change.

Considering the history of Article VI, I am satisfied that its intent is to preserve the work week of all full-time employees, including Recreation Leaders, and the parties simply never sought to update its language after the 1979-82 modification. The interpretation urged by the City does not explain the contract language as a whole.

Furthermore, at their May 1993 meeting, D'Auria told Laccitiello that the reduction in hours was non-negotiable. He never indicated that the City had a contract right to make the change. When D'Auria testified at the hearing as to his rationale

for the reduction in hours, he did not testify he had a contractual right; rather, he testified he had a right under Department of Personnel regulations to lay-off these employees.

I disagree. Based upon the case law and my reading of Article VI, I find that the City unilaterally altered an existing term and condition of employment, the Recreation Leaders' work hours.

Finally, the City argued that Council #21 never demanded negotiations. When Laccitiello was informed of the impending City action, she replied, "you can't do this. We'll see you in court. We have a contract." The City argues that if there was an obligation to negotiate, it was waived by Council #21's failure to demand negotiations. However, the unfair practice occurred when the City unilaterally altered a term and condition of employment as memorialized in the contract. There was no obligation on the part of the union to demand negotiations here. In fact, a union may decline an invitation to re-negotiate an existing contract term. Under such circumstances, it is an unfair practice for an employer to alter the express terms of the contract. Middlesex Bd. of Ed., P.E.R.C. No. 94-31, 19 NJPER 544 (¶24256 1993).

Accordingly, I recommend the Commission find that the City of Newark violated 5.4(a)(5) and derivatively (a)(1) when it unilaterally reduced the workweek of Recreation Leaders without negotiations. However, having addressed the dispute which gave rise

to the demand for arbitration, I recommend the Commission find the demand is moot.[6/]

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent City of Newark cease and desist from:

1. Interfering, restraining or coercing its employees in the exercise of their rights by unilaterally reducing the hours of work of Recreation Leaders employed by the City.

2. Refusing to negotiate in good faith with a majority representative concerning terms and conditions of employment by unilaterally reducing the hours of work of Recreation Leaders employed by the City.

B. That the Respondent City of Newark take the following affirmative action:

1. Restore all Recreation Leaders to full-time 40 hours per week position and make them whole for all salary and benefits lost retroactive to November 13, 1993.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and

---

6/ There is no dispute that full-time employees are entitled to health benefits. The Recreation Leaders reinstatement to full-time status will resolve issues raised about health benefits.

maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

Edmund G. Gerber
Hearing Examiner

Dated: March 28, 1994
Trenton, New Jersey

Recommended Posting
Appendix "A"

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 interfere, restrain or coerce employees in the exercise of their rights by unilaterally reducing the hours of work of Recreation Leaders employed by the City.

WE WILL NOT refuse to negotiate in good faith with a majority representative concerning terms and conditions of employment by unilaterally reducing the hours of work of Recreation Leaders employed by the City.

WE WILL restore all Recreation Leaders to full-time 40 hours per week position and make them whole for all salary and benefits lost retroactive to November 13, 1993.

Docket No. CO-H-94-125
SN-94-45

City of Newark
(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 the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.