P.E.R.C. NO. 93-62

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PENNSAUKEN,

Respondent,

-and-

Docket No. CO-H-92-216

AFSCME, COUNCIL 71,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Township of Pennsauken violated the New Jersey Employer-Employee Relations Act by failing to negotiate with AFSCME Council 71 before changing the duty-free lunch period for public works employees. The Commission orders the Township to restore the practice whereby public works employees would return to the public works garage before punching out for their one hour, unrestricted lunch break.

P.E.R.C. NO. 93-62

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PENNSAUKEN,

Respondent,

-and- Docket No. CO-H-92-216

AFSCME, COUNCIL 71,

Charging Party.

Appearances:

For the Respondent, Toll, Sullivan & Luthman, attorneys (David A. Luthman, of counsel)

For the Charging Party, Szaferman, Lakind, Blumstein, Watter & Blader, attorneys (Sidney H. Lehmann, of counsel)

DECISION AND ORDER

On January 13, 1992, AFSCME, Council 71 filed an unfair practice charge against the Township of Pennsauken. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (5) and (7),[1/] by unilaterally changing the practice of

---

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

giving employees an unpaid and duty-free lunch period. Employees had been allowed to leave the job site and return to the Township garage before going to lunch. Now employees are required to eat lunch at their job site. The Association seeks an order restoring the prior practice.

On April 14, 1992, a Complaint and Notice of Hearing issued. The Township relied on previously submitted letters as its Answer. It denies violating the Act, argues that the change was not mandatorily negotiable, and raises the parties' contract as a defense.

On June 2, 1992, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument and the Township filed a post-hearing brief.

On August 31, 1992, the Hearing Examiner issued his report and recommendations. H.E. No. 93-9, 18 NJPER ___ (¶_____ 1992). He found that the Township violated its duty to negotiate in good faith when it unilaterally changed the duty-free lunch period. He recommended that the Township restore the original lunch procedure or implement a negotiated procedure within 30 days of a final decision.

On September 21, 1992, the Township filed exceptions. It contests certain findings of fact. It appears to claim that under the old practice, employees returned to the public works garage at 11:00 a.m., not 10:50 a.m. as found by the Hearing Examiner. The

Township also claims that it was concerned not only with equipment being removed from the field before the employee returned to the garage for lunch, but also with the wear and tear and extra fuel spent on equipment used to return employees to the garage for lunch. The Township also excepts to the Hearing Examiner's legal conclusion rejecting its claim that it has a managerial prerogative to make the lunch hour change. It does not except to the Hearing Examiner's rejection of its contract defense.

On October 13, 1992, AFSCME filed a reply and cross-exceptions. It does not dispute the Hearing Examiner's findings of fact or conclusions of law. It argues, however, that there should not be a 30-day delay in restoring the status quo. It further argues that compensation for time lost should be awarded. It contends that employees required to stay at their job site during lunch have lost their duty-free lunch and should be paid for their new duty time.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-8) are accurate. We incorporate them here. We specifically adopt his finding that employees usually returned to the garage by 10:50 a.m. and then punched out for lunch at 11:00 a.m. Public works employee Charles G. Overton testified to that fact (T60; T70), and we infer that fact from the testimony of public works employee Frederick Woytovitch who stated that employees returned to the garage prior to 11:00 a.m., but were asked not to come in before ten minutes before the hour (T99; T115).

N.J.S.A. 34:13A-5.3 requires public employers to negotiate before changing mandatorily negotiable terms and conditions of employment. Before this disputed change in the lunch policy, public works employees who were working in the field would return to the public works garage before 11:00 a.m., punch out for lunch at 11, punch back in at noon, and then return to their job sites. On January 7, 1992, the Township implemented a new policy requiring all public works employees to stop work at their job sites at 11:00 a.m. and remain there for the one-hour lunch break. At noon, employees would resume their work. The employer asserts that this change was not mandatorily negotiable and that, therefore, it had no obligation to negotiate under subsection 5.3. This case turns, then, on a determination of whether the change in the lunch policy 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]

Preemption has not been asserted so we focus on the competing interests of the employers and the employees.

The employees have an interest in preserving an unrestricted duty-free lunch period and the procedures the parties themselves have created to implement this benefit. The employer has an interest in avoiding the loss of time associated with setting up and knocking down equipment and transporting employees to and from the garage and avoiding any wear and tear on Township equipment used to transport employees to and from the garage.

This dispute centers on the employer's desire for greater productivity and efficiency and the employees' desire to maintain the existing lunch break, including the right to take their entire lunch hour away from the job site. We do not believe that negotiations over the past practice concerning lunch breaks would significantly interfere with any governmental policy determinations. We make no judgment on whether the practice should continue. We simply hold that since the parties' contract did not authorize a unilateral change in the lunch practice, the employer had an obligation under section 5.3 to negotiate before changing that practice.

We now address the appropriate remedy. The Hearing Examiner found that the employer has a right to determine that its equipment not be transported to the garage before the lunch hour and a right to require that an employee remain with the equipment at the job site. In its exceptions, the employer argues that it is concerned about wear and tear to the vehicles that will occur in

transporting employees to and from the garage, not the equipment at the job site. Either way, we cannot say on this record that such a concern is sufficient to prevent a traditional remedy of ordering restoration of the status quo and negotiations before any future changes are implemented. We occasionally delay restoration of the status quo where there would be severe disruption of the employer's operation. See, e.g., Upper Pittsgrove Bd. of Ed., P.E.R.C. No. 90-34, 15 NJPER 621 (¶20259 1989). That is not the case here. Any concerns the employer has can be raised during negotiations over any proposed changes in the lunch procedures.

As for AFSCME's claim for compensation for loss of duty-free lunch periods, the evidence concerning any encroachment on duty-free time is insufficient for us to order compensation as a remedy for the employer's unfair practice.

ORDER

The Township of Pennsauken is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with AFSCME Council 71 before changing the duty-free lunch period for public works employees.

2. Refusing to negotiate in good faith with AFSCME Council 71 concerning terms and conditions of employment of employees in AFSCME's unit, particularly by failing to negotiate with AFSCME before changing the duty-free lunch period for public works employees.

B. Take this action:

1. Immediately restore the practice whereby public works employees would return to the public works garage before punching out for their one hour, duty-free lunch break.

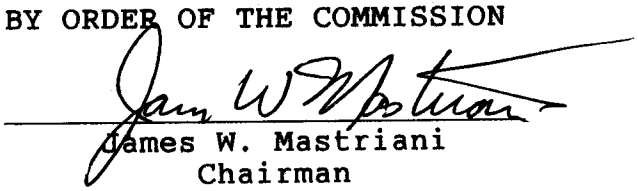
2. Negotiate in good faith with AFSCME, on demand, over compensation for employees who had their lunch break changed beginning January 7, 1992.

3. Negotiate in good faith with AFSCME before implementing any future changes in lunch break procedures.

4. 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.

5. 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, Regan, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Grandrimo was not present.

DATED: January 28, 1993
Trenton, New Jersey
ISSUED: January 29, 1993

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 NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with AFSCME Council 71 before changing the duty-free lunch period for public works employees.

WE WILL NOT refuse to negotiate in good faith with AFSCME Council 71 concerning terms and conditions of employment of employees in AFSCME's unit, particularly by failing to negotiate with AFSCME before changing the duty-free lunch period for public works employees.

WE WILL immediately restore the practice whereby public works employees would return to the public works garage before punching out for their one hour, duty-free lunch break.

WE WILL negotiate in good faith with AFSCME, on demand, over compensation for employees who had their lunch break changed beginning January 7, 1992.

WE WILL negotiate in good faith with AFSCME before implementing any future changes in lunch break procedures.

Docket No. CO-H-92-216

TOWNSHIP OF PENNSAUKEN

(Public Employer)

Dated: _____

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"

H.E. NO. 93-9

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

In the Matter of

TOWNSHIP OF PENNSAUKEN

Respondent,

-and- Docket No. CO-H-92-216

AFSCME COUNCIL 71

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the Township of Pennsauken violated the New Jersey Employer-Employee Relations Act when it unilaterally changed the one-hour duty-free lunch procedure for certain employees. The Hearing Examiner found that the benefit was an established past practice and not otherwise waived by the parties collective agreement. The Hearing Examiner found a 5.4(a)(5) violation, but crafted a remedy to allow the Township to determine how best to deploy and guard its equipment while preserving the employees duty-free lunch.

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

TOWNSHIP OF PENNSAUKEN

Respondent,

-and- Docket No. CO-H-92-216

AFSCME COUNCIL 71

Charging Party.

Appearances:

For the Respondent, Toll, Sullivan & Luthman, attorneys
(David A. Luthman, of counsel)

For the Charging Party, Szaferman, Lakind, Blumstein,
Watter & Blader, attorneys
(Sidney H. Lehmann, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An unfair practice charge was filed with the Public Employment Relations Commission on January 13, 1992 by AFSCME, Council 71, alleging the Township of Pennsauken violated subsections 5.4(a)(1), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A et seq.[1/] AFSCME alleged that on or about

---

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

Footnote Continued on Next Page

January 7, 1992 the Township unilaterally changed the prior practice of giving employees an unpaid and duty-free lunch period. Employees had been allowed to leave the work site and Township garage for lunch. Now employees were restricted to eating lunch at their work site. The Association seeks an order reinstating the past practice.

A Complaint and Notice of Hearing (C-1) was issued on April 14, 1992. As its Answer the Township relied upon letters of February 19 and 21, 1992 (C-2A and C-2B respectively) and on a memorandum of December 6, 1991 (C-2C). The Township denies violating the Act, argues that the change was not negotiable, and raised the parties' contract as a defense.

A hearing was conducted on June 2, 1992.[2/] The Township filed a brief by July 27, 1992.

Based upon the entire record I make the following:

FINDINGS OF FACT

1. AFSCME's unit includes approximately 27 employees working in the Township's Public Works Department such as equipment operator, laborer, truck driver, and mechanic. These employees have historically worked from 7 a.m. to 3 p.m. with a one-hour unpaid but

---

1/ Footnote Continued From Previous Page

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."

2/ The transcript will be referred to as "T."

duty-free lunch from 11 a.m. to noon (T21). Five mechanics work in the Township garage. The remaining twenty-two employees work on the roads or in the fields and parks (T62).

For many years prior to February 1991 the lunch procedure for those working in locations outside the garage was to stop work, pack up their equipment and return to the garage by 10:50 a.m. They washed up, punched out on the time clock at 11 a.m., went where they wanted for lunch, and returned to the garage by noon and punched in. They then went back to their work sites, unpacked their equipment and continued their work (T60, T70). If employees were required to work through their lunch hour they were paid for the hour (T62-T63).

On or about February 4, 1991 the Township unilaterally changed the lunch procedure. It required the twenty-two public works employees who worked outside the garage to wait until 11:00 a.m. to leave for the garage, then they punched out and went to lunch, but had to return to the garage early to punch in so they could return to the work site by noon. This procedure caused the affected employees to lose approximately 30 minutes of their lunch hour (T61).

On February 15, 1991 AFSCME filed an unfair practice charge (C-3, Docket No. CO-91-213) against the Township over the lunch hour change. At an exploratory conference with a Commission staff agent on April 20, 1991, the parties resolved that unfair practice charge (T23-T30). The Township agreed that employees were entitled to one

full hour for lunch and reinstated the original lunch procedure within one month after the conference (T30, T63, T101).[3/]

The formal written settlement and withdrawal of that charge, however, was not reached until the parties returned signed copies of a memorandum of agreement by December 12, 1991 (CP-4 and CP-5). The conformed copy of the memorandum of agreement, CP-1, includes the following pertinent sections:

> 1. The Township and AFSCME recognize that the lunch period for public works employees is one hour, exclusive of travel time. The Township's supervisory personnel retain the right to assign work, to supervise employees during work time and to ensure that travel time to and from the garage before and after lunch is reasonable and is not abused.
>
> 3. The terms of this agreement are expressly limited to settlement of the above-captioned unfair practice charge. This agreement does not prejudice the rights or positions of either party in negotiations for a successor agreement.

2. The Township and AFSCME were parties to a collective negotiations agreement (J-1) effective from July 1, 1988 through June 30, 1991. Article 7, the work schedules clause provides:

3/ Township Business Administrator Ken Carruth testified that as a result of a grievance over the February 1991 lunch hour change, he reinstated the former lunch procedure by March 4, 1991 (T142). He admitted, however, that he did not personally communicate that decision to the employees. The other witnesses thought the prior procedure was reinstated after the exploratory conference. In deciding the current charge it is unnecessary for me to determine when the original lunch procedure was reinstated with respect to the former charge. It is only necessary to find that it was reinstated.

A. 1. The regularly scheduled work week shall consist of five (5) consecutive work days for all employees.

2. These days shall be Monday through Friday for all employees except Dispatchers, who shall work their consecutive days on a rotational basis.

B. 1. The regular work days for all employees shall consist of seven (7) hours.

2. Dispatchers shall work seven (7) hours shifts on a rotational basis.

C. The regular starting time for work shifts shall not be changed without reasonable notice to the effected employees and without first having discussed the need for such changes with the Union at least two (2) weeks prior to the proposed date of implementation. The number of hours in the work day and/or work week shall not be changed during the life of this Agreement.

Article 31, the fully bargained clause provides:

> This Agreement represents and incorporates the complete and final understanding and settlement by the parties of all bargainable issues which were or could have been the subject of negotiations. During the term of this Agreement, neither party will be required to negotiate with respect to any such matter, whether or not covered by this Agreement, and whether or not within the knowledge or contemplation of either or both parties at the time they negotiated or signed this Agreement.

Article 2 Section B, the management rights clause provides:

> In the exercise of the foregoing powers, rights, authority, duties and responsibilities of the Township, the adoption of policies, rules, regulations, Code of Conduct and practices in the furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms of this Agreement and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of New Jersey and of the United States.

There is no specific clause covering the lunch break. The evidence shows that terms and conditions of employment are in effect for unit employees that may not be incorporated into the contract (T56).

Negotiations for a new collective agreement began on or about April 19, 1991 (T35-T36). The parties were unable to reach agreement and AFSCME filed a Notice of Impasse (CP-6) with the Commission in July 1991 (Docket No. I-92-42). During those negotiations neither party placed the lunch hour issue on the table (T65, T72-T73). The Commission assigned a mediator to assist the parties in September 1991 (CP-7). They remained at impasse, went to fact finding and reached a tentative agreement prior to this hearing (T36). The Township did not raise the lunch hour issue at any time during the negotiations process (T39).

3. On December 6, 1991 Carruth sent a memo (C-2C) to then AFSCME President, Tina Laird, advising her of another change in the lunch hour procedure. That memo provided in pertinent part that:

> ...[E]effective Monday, January 6, 1992,...the Township is establishing a new managerial directive concerning deployment of personnel and equipment and the use of that equipment during the lunch hour. All Public Works employees will cease work at their assigned job site at 11:00 A.M., and remain at that job site for the one hour period designated as a lunch break. At 12:00 noon, the employees will resume their work assignment.

The employees were not to return to the garage or punch in or out, and were no longer allowed to go where they wanted for lunch.

Exhibit C-2C provided that the new lunch policy would become effective Monday, January 6, 1992. The employees, however,

were not given a copy of C-2C, rather, it was posted above the time clock in the garage (T66, T119).

Carruth issued C-2C because of the time it took to travel to and from the garage, and to make better and more efficient use of Township equipment (T128). He did not offer to negotiate with AFSCME over the lunch procedure before C-2C was issued (T138). He believed the subject matter of that letter was a managerial prerogative (T139-T140).

Robert Little, AFSCME representative, became aware of C-2C on Monday, December 9, 1991 (T33-T34). That same day the parties had a mediation session concerning the collective agreement. After that session Little spoke to Carruth and requested that they either negotiate or exchange proposals over the lunch procedure. Carruth responded that the lunch procedure change was a managerial prerogative and he refused to negotiate (T40, T65).

Jeffrey O'Brick was a shop steward in December 1991 (T76). After he saw C-2C posted in the garage he prepared a letter dated December 19, 1991 to Superintendent James Scheffler (CP-8) informing him that the employees preferred no change to their lunch procedure. The employees did not want to eat lunch in their trucks. O'Brick was not allowed to give CP-8 directly to Scheffler, he gave it to his supervisor, Todd Adams, but he received no response (T79-T80).

Approximately one week before the January 6 scheduled implementation of the new lunch procedure AFSCME officials contacted

Carruth and requested a meeting to discuss the lunch matter (T129). The meeting was held on or about January 6, between Carruth for the Township, and Tina Laird, Jeff O'Brick, Charles Overton, and Anthony Feriozzi for AFSCME (T119, T130). The employees mostly expressed their preference that the lunch procedure remain the same. Apparently there were no discussions over alternatives to the new procedure (T130), but Carruth agreed to wait a day to implement the new procedure.

Little contacted Carruth on January 7, 1992, the same day the new procedure was implemented, but Carruth would not negotiate over the lunch procedure (T138-T139). That same day O'Brick received a disciplinary note (CP-9) from Superintendent Scheffler, allegedly for walking out of a meeting he was conducting.

4. The Charge was filed on January 13, 1992. By letters of February 19, 1992 (C-2A) and February 21, 1992 (C-2B), the Township attorney notified the Commission's staff agent of its legal position regarding this matter. As of the hearing the changed lunch procedure was still in effect (T102).

ANALYSIS

The Township violated the Act by unilaterally changing the employees lunch procedure including eliminating the employees' travel time to check in and out at the garage, eliminating wash-up time, and by unilaterally restricting the employees duty-free lunch. The Township failed to distinguish between its managerial right to determine how best to deploy its equipment, and AFSCME's

right to negotiate over the employees' access to - and use of - a duty-free lunch period.

A duty-free lunch period and the length of a lunch period is a mandatorily negotiable term and condition of employment. Neptune City Bd. of Ed. v. Neptune City Ed. Assn., 153 N.J. Super. 406 (App. Div. 1977 (App. Div. 1977); Wayne Tp. Bd. of Ed., P.E.R.C. No. 89-36, 14 NJPER 653 (¶19274 1988); Willingboro Tp. Bd. of Ed., P.E.R.C. No. 78-20, 3 NJPER 369 (1977). Similarly, a change or elimination of an established practice granting employees time to travel to their garage to clock in and out for lunch is a mandatorily negotiable term and condition of employment especially where employees are required to check in and out, or need access to their own vehicles to take their duty-free lunch. See Willingboro Bd. of Ed., P.E.R.C. No. 85-74, 11 NJPER 57 (¶16030 1984), affirming H.E. No. 84-63, 10 NJPER 382 (¶15177 1984).

In its Answer (C-2A) and post-hearing brief, the Township argued that the lunch hour procedure was not (mandatorily) negotiable; it asserted a contract defense apparently arguing, in part, that AFSCME waived any right to negotiate over the lunch procedure; and it argued that past practice should not apply. Those arguments lack merit.

The standard for determining the negotiability of a particular subject is the three-part test established by the Court in In re IFPTE Local 195 v. State, 88 N.J. 393 (1982) where it held:

> ...a subject is negotiable...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. Id. at 404.

Here there is no dispute that the lunch procedure directly affects employee welfare, and the subject has not been preempted. The only governmental policy concerns at issue involve the deployment and use of Township equipment and vehicles. But negotiations over the lunch procedure will not significantly interfere with the Township's ability to decide how to handle its equipment. The Township might, for example, hire part-time employees to guard its equipment during the lunch hour, it might assign some employees to eat lunch at the work site, negotiate over any additional compensation demands, and release the majority of the employees to take their duty-free lunch, or it might negotiate over the implementation of an overlapping or staggered lunch period. The Township has not demonstrated the necessity for unilaterally requiring all workers to stay at their work site. Thus, on balance, negotiations over the lunch procedure meets the Courts negotiability standards. See also, Bd. of Ed. Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Assn., 81 N.J. 582 (1980).

The Township's reliance on Caldwell-W. Caldwell v. Caldwell-W. Caldwell Bd., 180 N.J. Super. 440 (App. Div. 1981) to support its position is misplaced. The Township relied upon that part of Caldwell which concerned the substitution of thirty minutes of instructional time for thirty minutes of cafeteria supervision. The Commission in Caldwell, P.E.R.C. No. 80-64, 5 NJPER 536, 537

(¶10276 1979), found the Board did not violate the Act by assigning instructional time in place of supervisory time because it was the result of a reduction in force and cited In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div.), cert. den. 81 N.J. 292 (1979). The Appellate Division in Caldwell affirmed that part of the Commission's decision and held that a board of education had to have sufficient discretion to make that change.

The Township suggests that Caldwell entitled it to restructure the lunch procedure, and eliminate the duty-free lunch without any negotiations obligation. I disagree. The Township's need to better deploy its equipment does not equate with a board of educations' need to carry out its educational mission. There are several alternatives the Township could have employed to avoid packing up and moving its equipment each lunch hour, including the assignment of some employees to remain at the work site. But it does not justify the unilateral change of the lunch procedure for all twenty-two department employees working outside the garage.

The Township's contract defense and past practice argument are also unpersuasive. There is no language in J-1 to support an argument that AFSCME waived its right to negotiate over lunch-hour changes or procedures. Article 7, the work schedules article, defines a work day as 7 hours. But there is no language in that, or any other article defining what, if any, lunch break employees receive. In its post-hearing brief, the Township relied upon the following language in Article 2:

> ...the adoption of policies, rules, regulations, Code of Conduct and practices... and the use of judgment and discretion in connection therewith, shall be limited only the specific and express terms of this Agreement....

It argued, based upon that language, that it "has the right to change policies and procedures unless there is a specific term of the agreement which addresses that practice." That argument mistates the law. If it were accurate, the Township could simply eliminate the lunch hour because there is no language on it in J-1.

The law in this State, and the general law on contract interpretation of collective agreements, however, is that where a collective agreement is silent (or ambiguous) on an issue, past practice controls. County of Sussex, P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982); Rutgers, The State University, P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982). A past practice (or established practice) is a term and condition of employment not appearing in the parties' collective agreement, but arising as implied from their mutual conduct. Caldwell, 5 NJPER at 537. A past practice which defines a term and condition of employment is entitled to the same status as a term and condition of employment defined by statute or by the provisions of a collective agreement. Watchung Borough, P.E.R.C. No. 81-88, 7 NJPER 94 (¶12038 1981). An employer cannot change a past practice without first negotiating over the change with the majority representative.

Since there was no language on the lunch hour and procedure in J-1, past practice controls. The pertinent elements of that

practice where that employees were entitled to drive from their work site and to and from the garage, wash-up, and from the garage take a one-hour duty-free lunch.

In order for J-1 to operate as a waiver of AFSCME's right to negotiate over any changes to the lunch procedure past practice there must be clear and unequivocal language in the agreement on that subject. Red Bank Reg. Ed. Assn. v. Red Bank Reg. Bd. Ed., 78 N.J. 122, 140 (1978); State of N.J., P.E.R.C. No. 77-40, 3 NJPER 78 (1977); Deptford Bd. Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Dkt. No. A-1818-80T8 (5/24/82). Here there is none. The language relied upon by the Township is not a waiver, and there is no language in J-1 dealing with the lunch procedure or suggesting that changes in past practices need not be negotiated.

Finally, although Carruth asked for AFSCME's input, suggestions, thoughts and recommendations after C-2C was issued, it refused AFSCME's direct demands to negotiate over the lunch procedure before C-2C was implemented. The Township's invitation for input and the like, however, did not satisfy its negotiations obligation.

Accordingly, I find that the Township violated 5.4(a)(1) and (5) of the Act by changing the lunch procedure and restricting the duty-free lunch.[4/]

4/ There was no evidence that the Township violated 5.4(a)(7) of the Act, thus, that subsection should be dismissed.

REMEDY

Normally, the remedy in an (a)(5) violation would be to require the employer to implement the status quo ante, negotiate over any outstanding compensation issues, and negotiate prior to making any changes. But that does not completely apply here. While the Township violated the Act by restricting duty-free lunches, it had the right to determine that its equipment not be repacked and transported to the garage every lunch hour, and that someone needed to remain with the equipment at the work site. Thus, the interests of the Township must be balanced with AFSCME's right to negotiate over the lunch procedure in reaching the appropriate remedy.

First, the Township must engage in retroactive negotiations with AFSCME over any compensation demands it makes over the change in the duty-free lunch procedure from January 7, 1992 until the implementation of the prior or a newly negotiated procedure. Second, if some employees are assigned to remain with the equipment during the lunch hour, the Township must negotiate with AFSCME over compensation, seniority, and rotation issues regarding such assignments.[5/]

5/ Seniority and rotation issues are negotiable in relationship to such assignments provided qualifications for the assignment are generally equal. Compare, Town of Phillipsburg, P.E.R.C. No. 83-122, 9 NJPER 209 (¶14098 1983). Ultimately, any issue regarding the negotiability of seniority and rotation in this context should be raised to the Commission through a scope of negotiations, not an unfair practice, proceeding.

Third, within thirty (30) days of a Commission decision, the Township must restore the original lunch procedure, or a newly negotiated procedure. The Township, however, need not pack up and move its equipment. Fourth, the Township must negotiate with AFSCME prior to attempting to change or eliminate the duty-free lunch procedure.

Base upon the above findings and analysis, I make the following:

RECOMMENDED ORDER

I recommend the Commission ORDER:

A. That the Township cease and desist from:

Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to negotiate with AFSCME over changing the duty-free lunch procedure.

B. That the Township take the following action:

1. Negotiate with AFSCME over any retroactive compensation demands it has because of the unilateral change in the duty-free lunch procedure from January 7, 1992 until the prior or a newly negotiated procedure is implemented.

2. Negotiate with AFSCME over compensation, seniority, and rotation issues if some employees are required to remain with the equipment during the lunch hour.

3. Restore the original lunch procedure or a newly negotiated procedure within thirty (30) days of a Commission decision unless otherwise negotiated.

4. Negotiate with AFSCME prior to attempting to change or eliminate the duty-free lunch procedure.

5. 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.

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

C. That the 5.4(a)(7) allegation be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: August 31, 1992
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 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 failing to negotiate with AFSCME over changing the duty-free lunch procedure.

WE WILL negotiate with AFSCME over any retroactive compensation demands it has because of the unilateral change in the duty-free lunch procedure from January 7, 1992 until the prior or a newly negotiated procedure is implemented.

WE WILL negotiate with AFSCME over compensation, seniority, and rotation issues if some employees are required to remain with the equipment during the lunch hour.

WE WILL restore the original lunch procedure or a newly negotiated procedure within thirty (30) days of a Commission decision unless otherwise negotiated.

WE WILL negotiate with AFSCME prior to attempting to change or eliminate the duty-free lunch procedure.

Docket No. CO-H-92-216 TOWNSHIP OF PENNSAUKEN
(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.