D.U.P. NO. 2002-5

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

BOROUGH OF FRANKLIN,

Respondent,

-and-

Docket No. CO-2000-362

FRANKLIN BOROUGH DEPARTMENT OF
PUBLIC WORKS EMPLOYEES ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses a charge filed by the Franklin Borough Department of Public Works Association. The charge alleged that the Borough of Franklin violated 5.4a(1), (3) and (5) by unilaterally altering employees' work schedules from a five-day to a seven-day schedule to avoid paying overtime. The Director finds that where the employer reserved the contractual right to set the work schedule, it had no negotiations obligation prior to changing the schedule.

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Appearances:

For the Respondent
Laddey, Clark & Ryan, attorneys
(Thomas N. Ryan, of counsel)

For the Charging Party
Loccke & Correia, attorneys
(Merick H. Limsky, of counsel)

REFUSAL TO ISSUE COMPLAINT

On June 1, 2000, the Franklin Borough Department of Public Works Employees Association (Association) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Borough of Franklin (Borough) committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) by violating N.J.S.A. 34:13A-5.4a(1), (3) and (5).[1/] The

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

Footnote Continued on Next Page

Association alleges that the Borough unilaterally altered employees' work schedules from a five-day to a seven-day schedule to avoid paying overtime. The Association claims that the result of the revised schedule is a loss of overtime pay, assignment of additional responsibilities, and mandatory weekend shifts.

The Borough does not deny changing the work schedule, but asserts that it had a specific contractual right to do so. It also asserts that the revised workweek is more efficient and improves service to the Borough's water and sewer customers.

The charge was accompanied by an application for interim relief, which I denied on July 5, 2000. Bor. of Franklin, I.R. No. 2001-1, 26 NJPER 346 (¶31136 2000).

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the Complaint issuance standard has not been met, I may decline to issue a complaint.

1/ Footnote Continued From Previous Page

restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

N.J.A.C. 19:14-2.3. Based upon the following, I find that the complaint issuance standard has not been met.

The Borough and the Association are parties to a collective negotiations agreement covering the period January 1, 1998 through December 31, 2000. Article 5, Hours, Overtime and Call Out, states, in relevant part, the following:

> A. A work week shall be forty (40) hours per week, based on and approved as determined by management.

For at least twenty years, employees in the Borough's water and sewer division have been scheduled to work a forty-hour workweek, Monday through Friday. Each weekend one employee was required to work four hours on Saturday and four hours on Sunday. The employee who worked on the weekend tour received compensation at the overtime rate.

On or about April 10, 2000, the Borough announced that certain employees' work schedules would change from weekdays with occasional weekend overtime, to a Monday through Sunday schedule, wherein employees would be assigned a regular work day on a Saturday and/or Sunday and receive an alternative day off during the week. Employees so scheduled work a forty-hour workweek within the seven day period and receive no overtime compensation.

ANALYSIS

The Association argues that the Borough's alteration of the employees' work schedules constituted a unilateral change in a mandatory subject of negotiations. The Association asserts that the

underlying reason for the work schedule change was to allow the Borough to avoid paying weekend overtime. The Borough concedes that the work schedule change reduced its overtime expense, but contends that the change was prompted by its efforts to improve the delivery of essential services to municipal residents. Moreover, it claims that the language contained in Article 5, paragraph A, of the collective agreement gives the Borough the express right to change employees' work schedules.

N.J.S.A. 34:13A-5.3 requires public employers to negotiate over employees terms and conditions of employment with the majority representative. This section of the Act further states, in relevant part:

> Proposed new rules or modification of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

An employer may not unilaterally change an existing, negotiable working condition of employment unless the employee representative has waived its right to negotiate. See Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 25 N.J. 357 (1999); Barnegat Tp. Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990), aff'd NJPER Supp.2d 268 (¶221 App. Div. 1992). Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978). A waiver will be found if the employee representative has expressly agreed to a contractual provision authorizing the change, or it

impliedly accepted an established past practice permitting similar actions without prior negotiations. In re Maywood Bd. of Ed., 168 N.J. Super. 45, 60 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987). If the employer proves that the employee representative has waived its right to negotiate, it has the right to make the change unilaterally. Middletown, 24 NJPER at 30.

The Borough here asserts that pursuant to Article 5 of the 1998-2000 collective agreement, the Association has waived its right to negotiate over the specific workweek for the life of the agreement. A contract waiver of section 5.3 rights will only be found where the contract clearly, unequivocally and specifically authorizes the change. Red Bank; Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985); Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983). The Association disagrees that the language contained in Article 5, paragraph A, of the agreement is so clear and unambiguous as to constitute a waiver of its right to negotiate with respect to schedule changes.

I find that the language is clear and unequivocal. The language provides that the work schedule is "as determined by management." Thus, the employer has expressly and completely

reserved its right to set the work schedule.[2/] Therefore, on the basis of the unambiguous language contained in the agreement, I find that the Borough had no negotiations obligation before changing the employees' work schedule from a five-day schedule to a seven-day schedule. Thus, the Association's unfair practice charge does not meet the Complaint issuance standard and must be dismissed.

The Association also argues that the twenty-year practice of five-day work schedules takes precedence over the contract language. I disagree. The express language in a collective agreement negates any contrary past practice. Kittatinny Reg. Bd. of Ed., P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991); Passaic Cty Reg. H.S. Dist. No. 1, P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990); New Jersey Sports and Expo. Auth., P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987).

Alternatively, even if the contract language was not sufficiently clear to establish the Borough's right to make the schedule change, we generally do not invoke our unfair practice jurisdiction over issues of pure contract dispute. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Therefore, I find that the Commission's complaint

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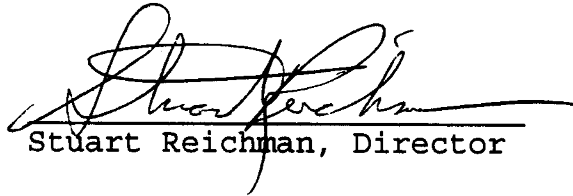
2/ See also New Jersey Sports and Expo. Auth., P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987); State of New Jersey and CWA, P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1986); and Old Bridge Municipal Utilities Auth., P.E.R.C. No. 84-116, 10 NJPER 261 (¶15126 1984), where the Commission has found similar contract language permitting an employer to establish and/or modify the work schedule.

issuance standard has not been met and I decline to issue a complaint on the allegations of this charge. N.J.A.C. 19:14-2.3.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Stuart Reichman, Director

DATED: October 2, 2001
Trenton, New Jersey