P.E.R.C. NO. 87-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HUNTERDON COUNTY BOARD OF CHOSEN FREEHOLDERS,

Respondent,

-and-

Docket No. CO-85-335-9

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Hunterdon County Board of Chosen Freeholders violated the New Jersey Employer-Employee Relations Act when it unilaterally instituted a "Safety Incentive Demonstration Program" which provided for, among other things, cash awards for employees represented by the Communications Workers of America, AFL-CIO. The Commission further holds that the CWA established a *prima facie* case that the unilateral discontinuance of the program violated the Act, but that the case should be remanded to the Hearing Examiner to permit the County to present its defense.

P.E.R.C. NO. 87-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HUNTERDON COUNTY BOARD OF CHOSEN FREEHOLDERS,

Respondent,

-and-

Docket No. CO-85-335-94

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

Appearances:
For the Respondent, Gaetano M. DeSapio, Esquire

For the Charging Party, Steven P. Weissman, Esquire

DECISION AND ORDER

On June 21, 1985, the Communications Workers of America, AFL-CIO ("CWA") filed an unfair practice charge against the Hunterdon County Board of Chosen Freeholders ("County"). The charge alleged that the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. ("Act"), specifically subsections 5.4(a)(1), (3) and (5),[1/] when it unilaterally

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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; (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; and (5) Refusing to negotiate in good faith with a majority

Footnote Continued on Next Page

instituted a "Safety Incentive Demonstration Program" which provided, in part, for cash awards for employees represented by CWA.

On December 13, 1985, CWA amended its charge. It alleges the County also violated subsection 5.4(a)(4),[2/] when it terminated the program in retaliation for CWA's filing the first unfair practice charge and stating at a Commission exploratory conference that it wanted the existing incentive program to remain in effect until a new program for 1986 could be negotiated.

On January 10, 1986, a Complaint and Notice of Hearing issued. On February 5, 1986, the County filed its Answer. It admits instituting and discontinuing the awards program, but denies violating the Act. As separate defenses, it contends that: (1) the County has the statutory authority to institute the awards program; (2) CWA did not request negotiations; and (3) the County discontinued the program after CWA alleged that its establishment was an unfair practice.

1/ Footnote Continued From Previous Page

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/ This subsections prohibit public employers, their representatives or agents from: " (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

On May 5, 1986, Hearing Examiner Alan R. Howe conducted hearings. The parties stipulated facts, examined witnesses, introduced exhibits and argued orally. They also filed post-hearing briefs.

On June 19, the Hearing Examiner issued his report and recommended decision. H.E. No. 86-62, 12 NJPER 500 (¶17188 1986). He found that the Board violated the Act when it unilaterally established the economic component of the Safety Incentive Demonstration Program. He recommended that employees receive pro rata payments that would have been due had the program not been discontinued. However, he found that the County did not violate the Act when it discontinued the program.

On June 23, the County requested the hearing be reopened to permit testimony concerning statements made at the Commission exploratory conference. On June 30, Hearing Examiner Howe denied this request and referred it to the Commission.

On June 24, the County filed its exceptions.[3/] It contends the Hearing Examiner erred in finding a violation because: (1) the County withdrew the program before any cash awards were issued; (2) CWA did not request negotiations before filing the charge; (3) the program did not change any employee's working conditions; (4) CWA sought negotiations over the entire program; (5)

3/ The County also requested oral argument. We deny that request.

the County had the statutory authority, pursuant to N.J.S.A. 40A:5-31 and 40A:9-18, to establish the program; and (6) he considered evidence of what occurred at a Commission exploratory conference. The County also objects to the proposed monetary remedy because: (1) no employees incurred economic injury; (2) no employees qualified to receive payment under the program; (3) the County had the discretion to terminate the program; and (4) the award of interest was arbitrary and capricious.

On June 25, 1986, CWA filed its exceptions. It contends the Hearing Examiner erred in recommending dismissal of that portion of the Complaint, at the conclusion of its case, alleging that the County violated the Act when it unilaterally discontinued the Safety Incentive Program. It contends that it established a *prima facie* case that the program was discontinued in retaliation for filing an unfair practice and that the Safety Incentive Program could not be discontinued unilaterally.

On July 7, 1986, CWA responded to the County's exceptions. It asserts that the County's allegations regarding CWA's purported "overbroad" demand for negotiations and the County's reasons for eliminating the program refer to facts not in evidence and should not be considered. It further contends that the County's alleged good faith is irrelevant and that it violated the Act when it implemented the program unilaterally. Finally, it contends the recommended remedy is appropriate.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-5) are accurate. We adopt and incorporate them here.

We first consider whether the County's implementation of the Safety Incentive Demonstration Program violated the Act. The parties have stipulated that the County instituted the program unilaterally and it is undisputed that the program provides for cash payments ranging from fifty to one hundred dollars for employees who avoid or reduce on-the-job injuries for a one-year period. The issue is whether the program is mandatorily negotiable.

In Local 195, IFPTE v. State, 88 N.J. 393 (1982) ("Local 195"), our Supreme Court set forth the tests for determining whether a subject is mandatorily negotiable. The Court stated:

> 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]

The County's principal defense is under the second part of the Local 195 test: it asserts negotiations are preempted by N.J.S.A. 40A:5-31 and 40A:9-18. In Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n., 91 N.J. 38 (1982) our Supreme Court set forth the rules for determining when a statute or regulation preempts negotiation:

> As a general rule, an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation. However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations. Negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively." Council, 91 N.J. at 30,449 A.2d 1244. The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." In re IFPTE Local 195 v. State 88 N.J. 393, 403-04, 443 A.2d 187 (1982), quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80, 393 A.2d 233 (1978). If the legislation, which encompasses agency regulations, contemplates discretionary limits or sets a minimum or maximum term or condition, then negotiation will be confined within these limits. Id. at 80-82, 393 A.2d 233. See N.J.S.A. 34:13A-8.1. Thus, the rule established is that legislation "which expressly set[s] terms and conditions of employment...for public employees may not be contravened by negotiated agreement." State Supervisory, 78 N.J. at 80, 393 A.2d 233.
> [Id. at 44]

N.J.S.A. 40A:5-31 and 40A:9-18 provide, respectively:

> Any local unit may establish and maintain plans for award programs for employees, designed to promote efficiency and economy in government functions, to reward individual employees for meritorious performances and suggestions. Award programs may include any or all of the following:
>
> A suggestion award program;
> Awards for heroism;
> An efficiency and incentive award program;
> Awards for professional accomplishments;
> Awards for service.
>
> Any local unit shall have power and authority to make appropriations of money therefor, establish

and make awards in the form of cash, medals, citation certificates, insignia or other appropriate devices to employees selected as recipients of awards by it or its committee appointed in accordance with programs established pursuant to this act. Such committee shall be known as the "Public Employees' Awards Committee" and shall consist of 5 persons who shall be officers or employees of the local unit, or members of the governing body, and no 2 of such officers or employees shall be employed in the same department of the local unit. Of the members first appointed to the committee, 2 shall be appointed for terms of 3 years, 2 for 2 years and 1 for 1 year, and thereafter appointments shall be made for terms of 3 years. Members shall serve for the terms for which they are appointed and until their successors have been appointed and qualified; a vacancy occurring by reason other than expiration of term shall be filled for the unexpired term. Members of the committee shall serve without compensation. The committee shall meet and organize as soon as practicable after the first appointment of members and annually, thereafter, on the call of the chief executive officer, and select a chairman from among its members. The committee shall hold regular meetings at least once each month during the year, except during July and August, at the call of the chairman or the chief executive officer of the local unit.

The committee is authorized to request, and shall receive, such assistance as it may require from any department, official or agency.

The committee shall be responsible for the formulation of programs and shall have the power to adopt and promulgate rules and regulations for the conduct and operation of awards programs.

The committee shall make an annual report to the governing body concerning the operation of awards programs established pursuant to this act.

* * *

The board of chosen freeholders of any county or the governing body of any municipality may, by

> resolution, establish an awards program or programs for county or municipal officers and employees, as the case may be, designed to promote efficiency and economy in governmental functions of the county or municipality and to reward individual officers and employees for heroism, efficiency, meritorious suggestions, professional accomplishments, performance of duty and for service. The board or governing body shall by such resolution provide for the administration of its awards program or programs by an officer or officers named therein and may provide for such advisory committee or committees to assist in the formulation and administration of such programs as they shall determine.
>
> Awards, within available appropriations therefor, may be in the form of cash, medals, certificates, insignia, or other appropriate devices or tokens of appreciation as shall be provided for under an established awards program.
>
> The board of chosen freeholders or governing body may appropriate funds necessary to carry out any program or programs established hereunder.

Applying the requisite Bethlehem test, we do not believe that these statutes preempt negotiations. Nothing contained in these statutes even remotely "fixes a term and condition of employment expressly, specifically and comprehensively. [Nor does it] speak in the imperative and leave nothing to the discretion of the public employer." Ibid. Rather than specifically fixing a term and condition of employment, these statutes leave the enactment of such a program, and especially its monetary components, to the public employer's discretion. Given this factor, we hold that the relied upon statutes do not preempt negotiations. Bethlehem; State Supervisory Employees.

Applying Local 195's first and third tests to the facts of this case satisfies us that the program is mandatorily negotiable. The program, by its very terms, is akin to payment for meritorious service. Just recently, we were faced with a similar issue in County of Essex, P.E.R.C. No. 86-149, 12 NJPER 536 (¶17201 1986), involving the negotiability of merit increments. In pertinent part, we said:

> In sum, we recognize that public employers may have an interest in determining economic benefits unilaterally and in improving the quality of employee performance by the carrots and sticks of monetary incentives and withholdings. As stated by the Hearing Examiner:
>
>> It would be easier to pay those employees it wants to reward and not pay those it wants to penalize without the constraints of negotiations and binding arbitration, if it had so agreed. Sl. Opinion at 16.
>
> But the Legislature has determined that the public interest requires collective negotiations over terms and conditions of employment such as compensation, and these employer interests have not prevailed in the balancing test for negotiability of these kinds of economic benefits. Lullo; UMDNJ.
>
> The employees' interest in negotiating compensation as part of a viable negotiations process outweighs the employer's interest in deciding unilaterally who should receive merit/increments under the circumstances of this case. It is not disputed that the establishment of the merit/increment plan is negotiable. The County points out that both parties agreed to a potential delay in movement along the step guide by agreeing to a merit/increment program. But if an employer has a right to determine unilaterally who will get the merit/increments, the perverse effect will be to discourage

> negotiations over any merit/increment programs and to discourage employee representatives and employers from working together to improve work performance. Additionally, the suspicion of favoritism and divisiveness stressed in Lullo might be heightened. Collective negotiations with respect to wages might be disrupted if control over wages of individual employees is removed from the negotiations arena. Berkeley. On balance, therefore, we find that the County's agreement to submit disputes over denials of increments under this negotiated merit/increment plan is legal.

These principles are applicable here and warrant a finding that the program is mandatorily negotiable. We reject, under the circumstances of this case, the County's argument that it need not negotiate because it only involves a "token award." We are not prepared to say that annual payments of between $50 to $100 are only tokens. Rather, such payments intimately and directly affect the work and welfare of public employees and do not significantly interfere with the determination of governmental policy. Therefore, the County was obligated to negotiate before unilaterally setting a payment schedule for safety performance. Accordingly, we hold that the unilateral institution of the Safety Incentive Demonstration Program violated subsections 5.4(a)(1) and (5) of the Act.[4/]

4/ The County's other exceptions on this issue are without merit. CWA was not required to request negotiations: it was the County that unilaterally changed a term and condition of employment. Under N.J.S.A. 34:13A-5.3, the obligation is on the public employer to negotiate, prior to implementation, a proposed change in a term and condition of employment. E.g., New Brunswick Bd. of Ed., P.E.R.C. NO. 78-47, 4 NJPER

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We next consider the November 12, 1985 cessation of the Safety Incentive Demonstration Program. The Hearing Examiner concluded that the CWA failed to establish a prima facie case that the County violated subsections 5.4(a)(3) or 5.4(a)(4) when it discontinued the Program. CWA has excepted to this determination. It contends that from the evidence it submitted "it could reasonably be concluded that the County intended to discourage Union membership and retaliate against CWA for filing the original unfair practice charge." Thus, we must consider whether the County retaliated against CWA for filing the charge.

To establish a prima facie case that subsection 5.4(a)(3) has been violated, the charging party must make a showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. A prima facie case can be established by showing (1) that the employee engaged in protected activity; (2) that the employer knew of this activity and (3) that the employer was hostile toward the exercise of the protected rights. In re Bridgewater Tp., 95

4/ Footnote Continued From Previous Page

84, 85 (¶4040 1978). Further, the County violated the Act when it announced and implemented the incentive program since that circumvents its statutory duty to negotiate prior to implementation. Finally, the unilateral cessation of the program does not, under the circumstances of this case, constitute a defense to the first unilateral action. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n. of Ed. Sec., 78 N.J. 25 (1978). See discussion, infra.

N.J. 235, 242, 246 (1984). Here, by the Act's very terms, the filing of the charge is protected. The employer knew of the filing. The issue in this case is whether the employer was hostile toward the filing of the unfair practice. The Hearing Examiner dismissed the charge because he determined CWA did not establish a connection between the filing of the charge and the discontinuance of the program. We believe, however, that his ruling was erroneous given the posture of the case. We first note that both this Commission and the courts have recognized and approved that it is rare that direct evidence of hostility exists and therefore a prima facie case can be inferred by certain employer conduct. Bridgewater; Sayreville Bd. of Ed., P.E.R.C. No. 86-120, 12 NJPER 375 (¶17145 1986). Further, we are mindful that the standard to grant a motion to dismiss is, as set forth in New Jersey Turnpike, P.E.R.C. No. 79-81, 5 NJPER 197 (1979):

> the Commission utilizes the standard set forth by the New Jersey Supreme Court in Dolson v. Anastasia, 55 N.J. 2 (1959). Therein the Court declared that when ruling on a motion for involuntary dismissal the trial court "is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion" (emphasis added). Unlike a number of other jurisdictions, New Jersey Courts have consistently held that before a motion for involuntary dismissal will be granted the moving party must demonstrate that not even a scintilla of evidence exists to support plaintiff's case. Thus, while the process does not involve the actual weighing of evidence (as that concept is traditionally understood) some consideration of the worth of the evidence presented may be necessary. [Id. at 198]

We believe that sufficient evidence exists, when we view the evidence in the light most favorable to the charging party, to find that it established a *prima facie* case to survive the motion to dismiss. The program was designed for an important employer interest: "reduce on-the-job incidents which result in employee injuries, medical expenses and lost man hours." If successful, the County planned to continue it in future years and perhaps expand it. There is nothing in the record that would show that the County was not pleased with the program. Nevertheless, it terminated the program just before it was to be concluded and shortly after the filing of the charge and just after, according to the CWA's evidence, CWA stated that it wanted the program to be continued until a new program could be negotiated for the next year. Given all this, it could be found that the employer terminated the program, not for any legitimate business reason or even to settle the charge, but rather to punish CWA for filing the charge. This is especially true given the timing: the program was terminated when CWA stated it wanted it to continue.

We also believe that the evidence submitted by CWA is sufficient to establish a *prima facie* violation of subsection 5.4(a)(4). That subsection prohibits discrimination because of the filing of "an affidavit, petition or complaint or giving any information or testimony under the Act." The evidence submitted by the CWA, construed in its most favorable light, falls squarely within this proscription: CWA filed an unfair practice charge

contesting the unilateral action of the County and gave the following information at a Commission exploratory conference: notwithstanding this initial unilateral action by the County, the CWA's position was that it sought only to negotiate concerning the program at its conclusion and specifically requested that the initial program be continued. It was after that conference that the County, which had not before indicated any dissatisfaction with the program, summarily and unilaterally discontinued it. Based on this record, it can be inferred that the program was discontinued because of CWA's filing the charge and stating its position at the exploratory conference.[5/]

We also believe that the CWA presented sufficient evidence to establish a prima facie case that the November 12, 1985 program

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5/ In reaching this result, we have considered statements of CWA's representatives. We disagree with the County's contention that they are inadmissible because they pertain to a settlement discussion. In our State, evidence that a party has, in an attempt to compromise, offered or promised to accept a settlement proposal is inadmissible to establish either a defendant's liability or the invalidity of a plaintiff's claim. We adopted this evidentiary principle in Township of Mantua, P.E.R.C. No. 82-99, 8 NJPER 302, 303 (¶13133 1982) and stated that, "the evidence of the settlement efforts was irrelevent to the merits of the unfair practice charge." In this case, however, this principle is simply not applicable. Even if we were to assume that Kaufman's statements were pursuant to settlement efforts, they were not introduced to establish either plaintiff's or defendant's case on the merits of the original charge. Rather, it was introduced, as is apparent from the record, to establish a retaliatory motive for the County's subsequent decision to terminate the program. Given this, we believe the statements were properly admitted for such purpose.

termination violated subsection 5.4(a)(5) of the Act. The Hearing Examiner did not consider this issue. We believe, however, it was properly before him. The original charge alleged a violation of that subsection and at the hearing, CWA specifically noted that it alleged the November 12 termination also involved that subsection. (T-58) Just as the County's unilateral institution of the program violated the Act, CWA has presented sufficient evidence to establish a *prima facie* case that its unilateral termination may have violated the Act. We reject the County's defense that it simply returned to the *status quo* -- and, in short, did what it was required to do. The essential point is that the County, both when it instituted and terminated the program, did so unilaterally. That is the antithesis of its statutory duty to negotiate. In a similar situation, in *Borough of Metuchen*, P.E.R.C. No. 84-91, 10 *NJPER* 127 (¶15065 1984), we relied on National Labor Relations Board precedent and quoted from a Court of Appeals decision affirming a Board order:

> When the [employer] unilaterally changed insurance plans, its action resulted in some favorable and some unfavorable changes to the employees. The Board's policy in cases of combined favorable and unfavorable unilateral changes is to order a return to the status quo ante with regard to the unfavorable changes, but to not penalize employees by ordering revocation of the favorable changes We endorse the Board's policy. *In effect, the favorable change becomes the established condition of employment. An employer can change this condition only as it can change any condition -- by giving notice of the proposed change and by successfully bargaining with the union to secure the union's approval.*
> [107 *LRRM* at 3146-47; emphasis added]

Accordingly, we hold that an employer which unilaterally grants favorable benefits contrary to its statutory duty to negotiate may not unilaterally terminate such benefits absent a request to do so by the union; rather, it is obligated to negotiate with the union before again unilaterally changing such benefits. This has long been the law under the National Labor Relations Act. E.g., Gardena Buena Ventura, Inc., d/b/a Alondra Nursing Home and Convalescent Hospital, 242 NLRB 595, n. 1, 101 LRRM 1248 (1979); Bellingham Frozen Foods, a Division of San Juan Paciers, 237 NLRB 1450, 1467, n. 30, 99 LRRM 1270 (1978); Steel-Fab, Inc., 212 NLRB 363, n. 1, 86 LRRM 1474 (1974); Great Western Broadcasting Corp., d/b/a KXTV, 139 NLRB 93, 96, 51 LRRM 1266 (1962). There are good reasons for this holding. First, one unilateral action does not justify a second unilateral action. Both actions violate the Act. Second, it is evident that the union would otherwise be blamed for the rescission of the favorable benefit. But the employer was the wrongdoer and the union should not suffer for the employer's wrongful action.

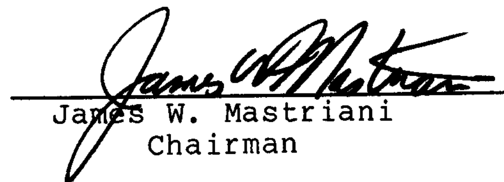
In sum, we hold that the CWA established a prima facie case that the November 12, 1985 cessation of the Safety Incentive Demonstration Program violated the Act. Accordingly, we remand this portion of the case to the Hearing Examiner for further proceedings. We have held only that a prima facie case was established. The County must be given the opportunity to present evidence which, under Bridgewater would rebut a prima facie case and/or establish that the action occurred for legitimate reasons.

Further, we agree that it should have the opportunity to present evidence to rebut CWA's version of what occurred at the exploratory conference and why the Safety Incentive Program was discontinued.[6/] In particular, we note that it contests the assertion that the CWA wanted the program to continue. The County would have legally terminated the program if CWA had so requested.

ORDER

The matter is remanded to the Hearing Examiner for further proceedings consistent with this opinion.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Reid was not present.

DATED: Trenton, New Jersey
September 25, 1986
ISSUED: September 26, 1986

6/ Because we remand this matter, we need not decide at this juncture the appropriateness of the Hearing Examiner's recommended relief.

H.E. NO. 86-62

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

In the Matter of

HUNTERDON COUNTY BOARD OF
CHOSEN FREEHOLDERS,

Respondent,

-and-

Docket No. CO-85-335-94

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent County violated §§5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when, effective January 1, 1985, it unilaterally and without negotiations with CWA established a Safety Incentive Demonstration Program for employees in the Road and Bridge Department, which Program provided for cash awards of between $50 and $100 for employees with exemplary safety records during the calendar year 1985. The Hearing Examiner found that the statute authorizing the creation of such a program was not preempted from negotiations and relied upon the Commission's decision in Twp. of Middletown, P.E.R.C. No. 85-122, 11 NJPER 377 (¶16136 1985).

By way of remedy, the Hearing Examiner ordered payment with interest of the pro rata amount of the cash awards which would have been due to eligible employees had the Program not been unilaterally discontinued on November 12, 1985. The Hearing Examiner found no violation of the Act in the County's decision to discontinue the Program unilaterally, it being deemed a managerial prerogative.

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. 86-62

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

In the Matter of

HUNTERDON COUNTY BOARD OF
CHOSEN FREEHOLDERS,

Respondent,

-and-

Docket No. CO-85-335-94

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

Appearances:

For the Respondent
Gaetano M. DeSapio, Esq.

For the Charging Party
Steven P. Weissman, Esq.

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on June 21, 1985, and amended December 13, 1985, by the Communications Workers of America, AFL-CIO (hereinafter the "Charging Party" or the "CWA") alleging that the Hunterdon County Board of Chosen Freeholders (hereinafter the "Respondent" or the "County") has 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 December 28, 1984, the County Engineer established a Safety Incentive Program for all employees of the County's Road and Bridge Department, which provided for cash awards to employees represented by the CWA; further the said Program was not negotiated with the CWA; following a Commission-conducted conference on October 28, 1985 where the CWA proposed that the existing Program be maintained in effect until December 31, 1985 and that a new Program be negotiated with the CWA, effective January 1, 1986, the County terminated the Program on November 12, 1985 in retaliation for CWA having filed the initial Unfair Practice Charge, all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (3), (4) and (5) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 10, 1986. Pursuant to the Complaint and Notice of

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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; (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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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."

Hearing, a hearing was held on May 5, 1986 in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. At the conclusion of the Charging Party's case, the Respondent moved to dismiss the allegations in the Unfair Practice Charge, as amended, which allege a violation by the County of N.J.S.A. 34:13A-5.4(a)(4) only. The Hearing Examiner reserved decision on the Respondent's Motion to Dismiss, stating that the Respondent need not adduce any evidence by way of defense, the parties having previously stipulated the necessary facts for adjudication by the Hearing Examiner of CWA's charge of a violation by the Respondent of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5). The parties filed post-hearing briefs by June 2, 1986.

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire stipulated record and the evidence adduced additionally by CWA, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Hunterdon County Board of Chosen Freeholders is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Communications Workers of America, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. CWA is the collective negotiations representative for a unit of blue and white collar employees employed by the County, including employees in the Road and Bridge Department. A copy of Article 1, the recognition clause in the 1984-85 collective negotiations agreement, was received in evidence as Exhibit J-1.

4. Pursuant to N.J.S.A. 40A:5-31 and 9-18 the County established on December 28, 1984, a Safety Incentive Demonstration Program ("Program") for employees of the County's Road and Bridge Department, effective January 1, 1985. The objective and terms of the Program were set forth in a memo to all employees of the Road and Bridge Department by the County Engineer, David W. Stem, on December 28, 1984 (J-2). CWA received notice of the establishment of the Program in the same manner as all other employees of the Road and Bridge Department.[2/]

5. The Program was established and implemented by the County without negotiations with CWA and CWA at no time demanded negotiations after implementation of the Program.

2/ The CWA regularly receives minutes of the meetings of the Board of Chosen Freeholders and sometime during January 1985, CWA received the minutes of the meeting of December 28, 1984 where the Program was established, supra.

6. CWA filed the initial Unfair Practice Charge on June 21, 1985 and on October 28, 1985, a Commission designee conducted an exploratory conference with respect to the said initial Charge. At this conference Alan B. Kaufman of CWA requested that the County continue the Program for the remainder of the year since the eligible employees had relied on its continuance for the receipt of cash awards; that the County negotiate a new program with CWA, effective January 1, 1986; and that there be no new program without negotiations with CWA.

7. There were no other intervening events until a meeting of the Board of Chosen Freeholders on November 12, 1985, where, after discussion, the County voted to "scrap the Safety Incentive Program effective immediately" (J-3).

8. No eligible employees in the Program received any compensation before the Program was discontinued.

DISCUSSION AND ANALYSIS

The Respondent County Violated §§5.4(a)(1) And (5) Of The Act When It Unilaterally Created A Safety Incentive Demonstration Program For Certain Of Its Employees, Effective January 1, 1985, Without Having Negotiated The Economic Component With CWA.3/

The Hearing Examiner has no doubt that the County may unilaterally establish a program such as was done here on

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3/ There was no evidence stipulated to or adduced which would support a conclusion that the County violated §5.4(a)(3) of the Act and, accordingly, dismissal of this allegation will be recommended.

December 28, 1984, for the purpose of encouraging safety or, as provided in N.J.S.A. 40A:5-31, a program recognizing employees on the basis of suggestions made, heroism, professional accomplishments or service.

The problem arises, however, when there is a collective negotiations representative in place and an employer decides to add an economic component to the program sought to be established.

The County has taken the position that it had the right to establish unilaterally the Safety Incentive Demonstration Program, providing cash awards, without notice to or negotiations with CWA. It claims a managerial prerogative so to do.

However, CWA in its post-hearing brief argues that neither N.J.S.A. 40A:5-31 or 9-18 preempts negotiations within the meaning of the decision of our Supreme Court in State v. State Supervisory Employees Assn., 78 N.J. 54 (1978). CWA correctly points out that a term and condition of employment which is "set" by a statute may not be contravened by a negotiated agreement. As the Supreme Court said:

> ...specific statutes or regulations which expressly set particular terms and conditions of employment...for public employees may not be contravened by negotiated agreement. For that reason, negotiation over matters so set by statutes or regulations is not permissible. We use the "set" to refer to statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer... (78 N.J. at 80) (emphasis supplied).

Clearly, the above-cited provisions of Title 40A afford a public employer "discretion" in establishing programs to recognize employee merit and performance. Thus, N.J.S.A. 40A:5-31 provides,

in part, that: "Any local unit may establish and maintain plans for award programs for employees, designed to promote efficiency and economy in government functions, to reward individual employees for meritorious performances and suggestions..." Neither of the above provisions of Title 40A mandate the creation of an awards program. Further, there is no requirement that an award contain an economic or monetary component. For example, as provided in N.J.S.A. 40A:9-18, the awards may be in the form of "...cash, medals, certificates, insignia, or other appropriate devices or tokens of appreciation..."

Based on the foregoing, the Hearing Examiner concludes that the Title 40A provisions above cited do not preempt negotiations and, therefore, the County was obligated to negotiate with CWA over the establishment of the economic terms of the Program before it was implemented since the proposed economic component clearly implicated a term and condition of employment for those employees in the Road and Bridge Department, who were to be covered by the Program: see §5.3 of the Act which provides that proposed new rules governing working conditions shall be negotiated before they are established.

This Hearing Examiner decided a like case in Twp. of Middletown, H.E. No. 85-39, 11 NJPER 328 (¶16117 1985), which was affirmed pro forma by the Commission in P.E.R.C. No. 85-122, 11 NJPER 377 (¶16136 1985). In that case the Charging Party conceded that the employer lawfully exercised a managerial prerogative in establishing an evaluation system. Thus, there was no serious discussion regarding that issue. However, the non-negotiated

economic component of compensatory time off and the use of a police vehicle was deemed to have been a violation of §5.4(a)(5) of the Act since it was unilaterally created by the Township without negotiations with the PBA, notwithstanding that the initial evaluation system was lawfully established as a managerial prerogative, supra.

In Middletown, as in the instant case, the employer decided to discontinue the granting of compensatory time off and the use of a police vehicle. The PBA sought a monetary remedy, which the Hearing Examiner denied on the ground that any award in that case would have been speculative and inconsistent with the decision of the Supreme Court in Galloway Twp. Bd. of Ed. v. Galloway Twp. Ass'n of Educ'l Secys., 78 N.J. 1, 16 (1978), which authorizes the Commission to make employees whole "...for their actual losses sustained..." Accordingly, the Hearing Examiner issued a "cease and desist" order, directing the Township there to cease and desist from refusing to negotiate regarding the implementation of an economic component to any evaluation system and, further, requiring the employer to cease and desist from resuming the economic component in the evaluation system "...until such time as the Township has negotiated the issue in good faith with the PBA..."

Relying primarily upon Middletown, supra, as well as State Supervisory, supra, the Hearing Examiner finds and concludes herein that the County violated the Act as alleged when on December 28, 1984, it unilaterally and without negotiations with CWA established

a Safety Incentive Demonstration Program, in which an economic component of cash awards was inseparably entwined. This case is, thus, distinguishable from Middletown in the respect that there is no separately established evaluation system as to which a lawfully exercised managerial prerogative might be involved. An examination of J-2 discloses that the thrust of the Program is to reward during the calendar year 1985, employees in the Roads and Bridge Department who complete the year without on-the-job injury or where only slight injury is involved or where the least loss of time is involved. This is set forth in three paragraphs which contain the amount of the cash award per employee, ranging from $50 to $100 for the year. Such a monetarily conceived program required negotiation ab initio prior to implementation.

The County also contends that it has not violated the Act because CWA never made a demand to negotiate. CWA received notice of J-2 by routine means and also by the minutes of the Board of Chosen Freeholders, which CWA received sometime in January 1985. The Hearing Examiner rejects the County's contention on the ground that the Program was presented to CWA as an accomplished fact and, as is argued by CWA, it was under no obligation to request negotiations. In other words J-2 was presented to CWA in due course as a "fait accompli."

The Hearing Examiner concurs with the cases cited from the federal sector at pp. 4 and 5 of CWA's post-hearing brief. Additionally, the Hearing Examiner cites the Commission's decision

in New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978) where the Commission held that an employer must negotiate proposed changes with an employee representative prior to implementation and that, "...Accordingly, the Association was under no obligation to request negotiations subsequent to the Board's unilateral action..." (4 NJPER at 85). Thus, New Brunswick is a complete answer to the County's contention that CWA was obligated to request negotiations, it being the County's obligation to have negotiated prior to implementation.

For all of the foregoing reasons, the Hearing Examiner finds and concludes that the County violated §§5.4(a)(1) and (5) of the Act when it unilaterally and without prior negotiations with CWA established The Safety Incentive Demonstration Program for the employees of the Road and Bridge Department on December 28, 1984.

The Respondent County Did Not Violate §5.4(a)(4) Of The Act When It Discontinued The Safety Incentive Demonstration Program On November 12, 1985.

CWA proffered testimony from its representative, Alan B. Kaufman, regarding what occurred at an exploratory conference conducted by the Commission on October 28, 1985. This was in support of CWA's amended Unfair Practice Charge of December 13, 1985, where CWA alleged that in response to certain demands or requests made by CWA at the exploratory conference the County terminated the Program in retaliation for CWA having filed its initial Unfair Practice Charge thereby violating §5.4(a)(4) of the Act.

Contrary to the initial impression given by the Hearing Examiner at the hearing on May 5, 1986, the Hearing Examiner has considered as probative the testimony of Kaufman as to what transpired at the exploratory conference on October 28th. However, the Hearing Examiner has concluded that even if the testimony of Kaufman is taken at face value, CWA has failed to establish the occurrence of any subsequent events which might causally connect the demands or requests made by Kaufman on October 28th to the County's decision to terminate the Program on November 12, 1985, "effective immediately." As previously found, the Hearing Examiner is not persuaded that the County at any time manifested any anti-union animus towards CWA in the course of the establishment and continuance of the Program and, thus, not only is there no violation of the §5.4(a)(3) of the Act involved but there has been no violation by the County of §5.4(a)(4) of the Act. It strains credulity to reach a contrary conclusion given the stipulated facts and the testimony of Kaufman.

As noted above, the employer in Middletown voluntarily discontinued its evaluation system and the PBA in that case alleged no violation. Thus, the Hearing Examiner and the Commission in that case did not have before them the issue of a violation by the employer in voluntarily and unilaterally discontinuing a program or system, which had been illegally established by unilateral action. The Hearing Examiner in this case is persuaded that just as the County has a managerial prerogative to institute a non-economic

evaluation or incentive system so, too, does it have the right to discontinue such a system unilaterally even if as in Middletown it has an economic component.[4/] What the County cannot do herein is resume the Safety Incentive Demonstration Program, or any like compensatory program, until such time as it has negotiated the matter in good faith with CWA. However, it is not within CWA's power to force or require the County to negotiate a new program, effective January 1, 1986, or any other date. The decision to establish another program is solely a prerogative of the County, it being obligated to negotiate with CWA only as to any economic component proposed to be incorporated into any new program.

Accordingly, the County's Motion to Dismiss the allegation that it violated §5.4(a)(4) of the Act is granted.

REMEDY

There is no disagreement as to the fact that no eligible employees in the Road and Bridge Department received any compensation under the Program before it was discontinued. Although counsel for the County argues that no payment under the Program was due until the end of the 1985 calendar year, an examination of J-2 does not disclose that this is a necessary condition precedent. Paragraphs 1, 2 and 3 of the Program provide for cash awards of $50 to $100 for eligible employees, who satisfy the requirements set forth in those three paragraphs.

4/ The question of remedy in the case at bar is considered infra.

Unlike Middletown, supra, where a monetary was deemed by the Hearing Examiner to be speculative, the Hearing Examiner in this case is persuaded that proration of the $50 to $100 cash awards can be made and, thus, the Galloway, supra, requirement of "actual losses" is met. In deciding that proration is appropriate by way of remedy, the Hearing Examiner notes that in the Program itself (J-2) the County recognized that where an employee was assigned from one crew to another "...his time or incidents will be prorated..." This suggests that the County itself has considered the elemental fairness of proration when the Program was established on December 28, 1984.

Thus, the Hearing Examiner will recommend hereinafter an affirmative monetary remedy, using an appropriate formula.

* * * *

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

CONCLUSIONS OF LAW

1. The Respondent County violated N.J.S.A. 34:13A-5.4 (a)(1) and (5) when it unilaterally and without negotiations with CWA established and implemented the Safety Incentive Demonstration Program for employees in its Road and Bridge Department, effective January 1, 1985.

2. The Respondent County did not violate N.J.S.A. 34:13A-5.4(a)(3) or (4) by its conduct herein.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent County cease and desist from:

1. Refusing to negotiate in good faith with CWA regarding the implementation of a Safety Incentive Demonstration Program, or any like program recognizing employee performance, which contains an economic component.

2. Resuming the Safety Incentive Demonstration Program, or any like program recognizing employee performance, which contains an economic component until such time as the County has negotiated the issue in good faith with CWA.

B. That the Respondent County take the following affirmative action:

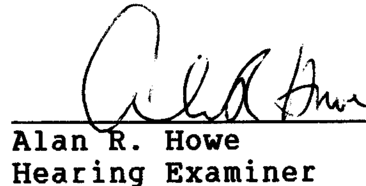
1. Forthwith make payment with interest at the rate of 9.5% per annum from July 1, 1985, the prorated share of the cash awards due to eligible employees in the Road and Bridge Department, i.e., those employees who qualified under ¶¶1, 2 and 3 of the Program between January 1, 1985 and the date of discontinuance on November 12, 1985, the said proration to be based upon the number of days between January 1, 1985 and November 12, 1985 divided by 365 days and multiplied by the amount of the cash award which would have been due as of December 31, 1985.

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 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 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 herewith.

C. That the allegations that the County violated N.J.S.A. 34:13A-5.4(a)(3) and (4) be dismissed in their entirety.



Alan R. Howe
Hearing Examiner

Dated: June 10, 1986
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 CWA regarding the implementation of a Safety Incentive Demonstration Program, or any like program recognizing employee performance, which contains an economic component.

WE WILL NOT resume the Safety Incentive Demonstration Program, or any like program recognizing employee performance, which contains an economic component until such time as the County has negotiated the issue in good faith with CWA.

WE WILL forthwith make payment with interest at the rate of 9.5% per annum from July 1, 1985, the prorated share of the cash awards due to eligible employees in the Road and Bridge Department, i.e., those employees who qualified under ¶¶1, 2 and 3 of the Program between January 1, 1985 and the date of discontinuance on November 12, 1985, the said proration to be based upon the number of days between January 1, 1985 and November 12, 1985 divided by 365 days and multiplied by the amount of the cash award which would have been due as of December 31, 1985.

HUNTERDON COUNTY BOARD OF CHOSEN FREEHOLDERS
(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, CN 429, Trenton, New Jersey 08625, Telephone (609) 292-9830