H.E. NO. 90-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF MORRIS PLAINS,

Respondent,

-and- Docket No. CO-H-89-164

MORRIS PLAINS PBA, LOCAL NO. 254,

Charging Party.

SYNOPSIS

A Hearing Examiner grants in part and denies in part respondent's motion for summary judgment on charges that it unilaterally changed a term and condition of employment and that the change had a chilling effect on negotiations. The employment actions allegedly violated subsection 5.4(a)(1), (3), (4), (5) and (7) of the Act.

The Hearing Examiner granted the motion on that portion of the charge alleging an unlawful unilateral change because he found that the parties' contract permitted the change. He also granted the motion on the 5.4(a)(4) and (7) charges because no facts were alleged supporting them.

The Hearing Examiner denied the motion on those portions alleging that the unilateral change was in retaliation for the PBA's advancing a position at the negotiations table. The Hearing Examiner found that a material issue of fact concerning the respondent's motive for the change required a plenary hearing.

The parties may appeal the Hearing Examiner's decision by filing exceptions by special permission. N.J.A.C. 19:14-4.8(e), (f); N.J.A.C. 19:14-4.6(b).

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Appearances:

For the Respondent, Hansbury, Martin & Knapp, Esqs.
(Fredric M. Knapp, of Counsel)

For the Charging Party, Loccke & Correia, P.A.
(Leon Savetsky, of Counsel; Richard D. Loccke, on the brief)

DECISION ON MOTION FOR SUMMARY JUDGMENT

On December 14, 1988, Morris Plains PBA, Local 254 ("PBA") filed an unfair practice charge against the Borough of Morris Plains ("Borough"), alleging that the Borough violated subsections 5.4(a)(1), (3), (4), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[1/] The PBA alleged

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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.

Footnote Continued on Next Page

that the Borough violated the Act by unilaterally eliminating the policy of giving compensatory time off to patrol officers in lieu of money for their overtime work. It also asserts that by eliminating compensatory time for patrol officers on the day after a negotiations session where the issue was discussed, the Borough chilled the negotiations process.

On March 15, 1989 the PBA filed a request for interim relief. It sought an order compelling the Borough to reinstate compensatory time for patrol officers. On April 4, 1989, Commission designee Arnold H. Zudick denied the request, finding that the PBA failed to establish a substantial likelihood of success on the merits of this case.

On April 17, 1989 the Director of Unfair Practices issued a Compliant and Notice of Hearing. On May 17, 1989, the Borough filed an Answer admitting that it began paying overtime rather than compensatory time. The Borough asserts that the change conforms with the parties' collective negotiations agreement. It also asserts the Charge is untimely and the PBA failed to exhaust internal procedures.

1/ Footnote Continued From Previous Page

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

On May 22, 1989, the Borough filed a Motion for Summary Judgment along with a supporting brief, documents and affidavits. The PBA did not file a response.

The motion was referred to the Chairman of the Public Employment Relations Commission ("Commission"), pursuant to N.J.A.C. 19:14-4.8. He referred the motion to me for a decision. Based upon the papers filed by the parties, I make the following:

UNDISPUTED FINDINGS OF FACT

The Borough and PBA signed a collective negotiations agreement which extended from January 1, 1987 through December 31, 1988. Article 4, Section 8 of the agreement provides:

> Notwithstanding the above Sections 3 through 7 inclusive, where an employee is required by the Fair Labor Standards Act, as amended, to be paid overtime for hours worked, he shall be provided overtime on the following basis:
>
> (a) Patrolman - time and one half pay based on the officer's regular hourly rate of pay calculated as required by the F.L.S.A.
>
> (b) Non-exempt Superior Officers - time and one half compensatory time as permitted by F.L.S.A.
>
> Superior Officers exempt from F.L.S.A. requirements shall be given compensatory time off on an hour for hour basis for overtime hours worked.

The parties' previous collective agreement (which ran from January 1, 1985 through December 31, 1986), contained the same language in Article 4, Section 8. This language was included in the parties' agreement as the result of an interest arbitration award issued May 23, 1986 for the agreement effective from January 1, 1985 through

December 31, 1986. The language was not changed by the parties' 1987-1988 agreement. Notwithstanding Article 4, Section 8, the Borough gave patrol officers compensatory time in lieu of overtime pay for several years.

In the fall of 1988, the parties began negotiations for a new collective agreement. Negotiations sessions were conducted on October 26, and November 9, 1988. At the latter session, the Borough made two proposals concerning overtime and compensatory time. Proposal 11 states:

> Overtime shall be provided on the following basis: Employees will be paid overtime for hours worked at time and one-half pay based on the officer's regular hourly rate of pay calculated as required by FLSA.

The Borough told the PBA that Proposal 11 was designed to exclude paid leave days from calculation of the regular hourly rate for purposes of computing overtime.

The second proposal, Proposal 14, states that "[e]mployees will be paid overtime for hours worked." The Borough told the PBA that Proposal 14 was designed to permit the Borough to pay all police employees for overtime instead of providing them compensatory time. Although the proposal does not specifically include superior officers, the Borough said this proposal applied only to those employees permitted by the contract to receive compensatory time.

The PBA negotiating committee responded that patrol officers were entitled to compensatory time as a past practice, notwithstanding the language in Section 8. It also stated that it

would negotiate compensatory time versus overtime pay as part of an overall settlement.

On November 10, 1988, the Borough terminated the policy of allowing patrol officers to receive compensatory time. On December 2 and 16, 1988, the Borough issued checks to the patrol officers who had accumulated compensatory time. The checks represented overtime pay in lieu of compensatory time. David Banks, Borough Treasurer and Chief Financial Officer since May 11, 1987, issued the checks. Between March 24, 1986 and Banks' appointment, Thomas Sangemino served as treasurer and chief financial officer. Before his appointment, John Dougherty held the position. Jannell Bliss served as acting Financial Administrator for several months before Sangemino's appointment.

The successor to the parties' 1987 through 1988 agreement is currently the subject of an interest arbitration.

ANALYSIS

N.J.A.C. 19:14-4.8(d) provides that a summary judgment motion may be granted:

> [i]f it appears from the pleadings, together with the briefs and other documents filed, that there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law.

See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954); New Jersey Civil Practice Rules (R.4:46-2). Summary judgment may be granted only with extreme caution. The motion must

be considered in the light most favorable to the opposing party, all doubts must be resolved against the moving party, and the procedure may not substitute for a plenary hearing. State of New Jersey (Human Services), P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988), citing Baer v. Sorbello, 177 N.J. Super 182, 185 (App. Div. 1981).

"Material facts" tend to establish the existence or non-existence of an element of a charge or defense that is derived from the controlling substantive law. See Lilly, Introduction to the Law of Evidence (West Publishing 1978) at p. 18; McCormick, On Evidence (West Publishing, 2nd edition; 1978) at p. 434. The PBA's charge alleges the Borough unilaterally changed a term and condition of employment during negotiations and the change chilled the negotiations process.

The Borough does not dispute that it eliminated compensatory time on November 10, 1988. It asserts that the contract permitted the change.

N.J.S.A. 34:13A-5.3 requires that "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." Employers may not unilaterally change prevailing terms and conditions of employment because such changes circumvent the statutory duty to bargain. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25, 48 (1978). The duty to bargain "... applies at all times...", especially during collective negotiations, (Galloway at 49); NLRB v. Katz, 369 U.S. 736, 743-47 (1962); New

Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), mot. for recon. den., P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd App. Div. Dkt. No. A-2450-77 (4/2/79).

A public employer violates this obligation by implementing a new rule concerning a term and condition of employment without first negotiating in good faith to impasse or having a contractual defense. Elmwood Park, P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). An employer meets its negotiations obligation when it makes a change that is permitted under the collective negotiations agreement. Sussex-Wantage Regional Bd. of Ed., P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985); Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Bound Brook Bd. of Ed., P.E.R.C. No. 83-11, 8 NJPER 439 (¶13207 1982); Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980). Past practices which are construed contrary to the express provisions of a collective agreement cannot be relied upon to change the clear meaning of the agreement, Randolph Twp. Bd. of Ed. The contract provides a defense to a unilateral change in a past practice only where it specifically and expressly authorizes the change, Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983).

The Borough changed the past practice of allowing patrol officers to accumulate compensatory time instead of receiving overtime pay. The overtime provisions of the contract provide that patrol officers receive overtime pay at a rate of time and one half

and that superior officers receive compensatory time. The contract permitted the Borough to pay patrol officers for their overtime. It did not permit or prohibit accumulation of compensatory time by patrol officers. Accordingly, I grant the motion for summary judgment concerning the allegation that the Borough unilaterally changed terms and conditions of employment when it eliminated compensatory time in lieu of overtime pay for the patrol officers.

The PBA also alleged that by eliminating the right to compensatory time the day after a negotiation session at which the subject was discussed, the Borough violated subsections 5.4(a)(1) and (3). Whether an employer illegally discriminates in retaliation for union activity requires a charging party prove that protected activity was a substantial or motivating factor for the employment action, In re Bridgewater Tp., 95 N.J. 235, 244 (1984). Ordinarily, the charging party must show it engaged in protected activity, the employer knew about the activity and was hostile toward the exercise of protected rights. If the charging party proves that hostility toward exercise of protected rights was a substantial or motivating factor in the employer's action, the burden shifts to the employer to show the action would have occurred absent protected activity. The employer's affirmative defenses need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the action. Bridgewater.

At the November 10 negotiations session, the PBA objected to the Borough's proposal to eliminate compensatory time for the patrol officers. Compensatory time was eliminated the next day. Timing is an important factor in assessing motivation. See Downe Tp. Bd. of Ed., P.E.R.C. No. 86-6, 12 NJPER 2 (¶17002 1985). The timing of the change in overtime benefits is sufficient to raise a question concerning the Borough's motivation. The Borough raises as an affirmative defense frequent turnover in the finance office. I find that material issues of fact about the Borough's motives for eliminating compensatory time require that a plenary hearing be conducted on that issue.

CONCLUSION

I grant The Borough's motion for summary judgment on the allegation that it violated subsections 5.4(a)(5) and derivatively (a)(1) when it unilaterally eliminated the policy of permitting patrol officers to accumulate compensatory time in lieu of overtime pay. No facts were alleged that suggests that the Borough violated subsection 5.4(a)(4) and (7). Accordingly, I grant the motion on those portions of the PBA's charge.[2/]

I deny the Borough's motion for summary judgment on the allegation that it violated subsections 5.4 (a)(1) and (a)(3) when

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2/ Since accumulation of compensatory time was eliminated on November 10, 1988 and the Charge was filed on December 14, 1988, I find it timely. See N.J.S.A. 34:13A-5.4(c). The Borough also asserts the Charge should be dismissed because the PBA did not exhaust internal procedures. It did not, however, discuss the nature of those procedures.

it unilaterally eliminated the policy of permitting patrol officers to accumulate compensatory time in lieu of overtime pay on the day after a negotiations session at which the issue was discussed.

ORDER

I ORDER that a HEARING take place on the remaining issues at the Commission offices in Newark, New Jersey, on September 12, 1989, at 9:30 a.m.

Jonathon Roth, Hearing Examiner

DATED: July 27, 1989
Trenton, New Jersey