

D.U.P. No. 2007-1

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

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Respondent,

-and-

Docket No. CO-2005-274

C.W.A., AFL-CIO, LOCAL 1040,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses a charge alleging that the New Jersey Department of Corrections changed certain employees' work schedules without notifying or negotiating with the union. The Director finds that the parties' collective agreement permits the employer to change work schedules with proper notice to employees. Therefore, the union waived its right to negotiate over such mid-contract changes.

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Appearances:

For the Respondent,
Zulima V. Farber, Attorney General
(Geri Benedetto, Deputy Attorney General)

For the Charging Party,
Robert O. Yaeger, Principal Staff Representative

REFUSAL TO ISSUE COMPLAINT

On April 26, 2005, the Communications Workers of America, AFL-CIO, Local 1040 (CWA) filed an Unfair Practice Charge against the State of New Jersey, Department of Corrections (DOC). The charge alleges that the DOC violated the provisions of 5.4a(5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when on April 1, 2005, it notified

^{1/} This subsection prohibits public employers, their representatives or agents from: (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.

identification officers in CWA's collective negotiations unit that, effective April 18, 2005, their work schedules would change because offices at various DOC facilities would be open for business until 6:00 p.m. one day per month. The charge alleges that the DOC violated the Act by failing to notify and negotiate with the CWA over the schedule change, and that the DOC also violated Article 39, Section B of the parties' collective negotiations agreement. However, the DOC argues that it has a managerial prerogative to determine hours of operation, and that it complied with Article 8, Section A, Paragraphs 4-5 of the parties' agreement, which allegedly permits the DOC to make schedule changes with notice to the affected employees.

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. N.J.A.C. 19:14-2.3. By letter dated July 18, 2006, I advised the parties that I was not inclined to issue a complaint in this matter and I set forth the basis upon which I arrived at that conclusion. Neither party filed a response. Based upon the following, I find that the complaint issuance standard has not been met.

FINDINGS OF FACT

The parties' agreement provides:

ARTICLE 8 - HOURS AND OVERTIME

A. Hours of Work . . .

4. For fixed workweek employees, when schedule changes are made the maximum possible notice, which shall not be less than seven (7) working days except for unforeseen circumstances, shall be given to the affected employee.

5. For fixed workweek employees, when such employees' shift is changed, adequate advance notice which normally will be at least seven (7) working days and which shall not be less than seventy-two (72) hours, except in the case of an emergency, will be given to the affected employee." (emphasis added)

ARTICLE 39 - MAINTENANCE OF BENEFITS,
EFFECT OF AGREEMENT AND COMPLETE AGREEMENT

B. Effect of Agreement

Regulatory policies initiated by the various institutions and agencies where these employees are working which have the effect of work rules governing the conditions of employment within the institution or agency and which conflict with any provision of this Agreement shall be considered to be modified consistent with the terms of this Agreement, provided that if the State changes or intends to make changes which have the effect of elimination in part or in whole such terms and conditions of employment, the State will notify the Union and, if requested by the Union within ten (10) days of such notice or of such change or of the date on which the change would reasonably have become known to the employees affected, the State shall within twenty (20) days of such request enter negotiations with the Union on the matter involved, providing the matter is within the scope of issues which are mandatorily negotiable under the Employer-Employee Relations Act as amended and further, if a dispute arises

as to the negotiability of such matters, that the procedures of the Public Employment Relations Commission shall be utilized to resolve such dispute.

ANALYSIS

Procedurally, we have held in earlier cases that the individual locals of CWA do not have standing to assert violations of section 5.4a(5) of the Act. The certified exclusive representative of these State employees is the CWA International organization. Since the statutory right to negotiate over employees' terms and conditions of employment rests with the certified representative, only that entity has standing to allege the employer's failure to negotiate in good faith. See, N.J. Dept. Of Human Services, D.U.P. No. 97-11, 22 NJPER 332 (¶27172 1996); N.J. Dept. Of Human Services, D.U.P. No. 95-21, 21 NJPER 52 (¶26036 1994). Accordingly, Local 1040 does not have standing to file this charge.

Nevertheless, the State correctly asserts that it had the right to decide the office hours of operation for identification officers. City of Newark, P.E.R.C. No. 2006-95, 32 NJPER 229 (¶95 2006); State of New Jersey, P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985). Normally, the issue of which employees will work what hours would be negotiable, and the employer would have a negotiations obligation before changing employees' individual work hours. City of Newark; State of New Jersey. However, the State argues that the parties have already negotiated over work

schedule changes, and that Article 8 cited above permits the State to make such a change.

An employer may change an existing, negotiable condition of employment where 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 [8]), aff'd 166 N.J. 112 (2000); 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); S. 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).

The Commission has previously interpreted the contract language in Article 8 above and found that the union had waived its right to negotiate over work schedule changes. N.J. Dept. of Human Services, D.U.P. No. 97-11, 22 NJPER 332 (¶27172 1996). In that matter, the Director held that the State's change in the starting and stopping times were authorized by the contract and, therefore, the State had no further duty to negotiate. The scheduled hours of three shifts were changed in that case, but the Director dismissed the charge, concluding: "It appears that

CWA waived its right both to negotiate over schedule changes and to advance notice by agreeing to Article VII, A.4, as written, which specifically requires the State to notify employees in advance of making a schedule change but is silent as to notice to CWA." 22 NJPER at 333.


The same reasoning applies here. The CWA appears to have waived its right both to negotiate work schedule changes and to advance notice from the DOC by agreeing to Article 8, Section A, Paragraph 4, which specifically requires the DOC to notify only affected employees in advance of schedule changes but is silent as to notice to the CWA.

Therefore, I find that the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of this charge.^{2/}

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: August 15, 2006
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by August 25, 2006.

2/ N.J.A.C. 19:14-2.3.