H.E. NO. 2013-9

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

In the Matter of

TOWNSHIP OF EAST WINDSOR,

Respondent,

-and- Docket No. CO-2009-427

TEAMSTERS LOCAL UNION NO. 676,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission found that the Township of East Windsor violated the Employer-Employee Relations Act by unilaterally implementing changes in terms and conditions of employment before reaching a genuine post fact-finding impasse. The Township never advised Teamsters Local 676 that it was changing its position from the last best offer it had presented to the fact-finder and never provided Local 676 with the opportunity to negotiate with respect to the Township's new position.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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TEAMSTERS LOCAL UNION NO. 676,

Charging Party.

Appearances:

For the Respondent,
Ruderman and Glickman, attorneys
(Mark S. Ruderman, of counsel)

For the Charging Party,
Willig, Williams and Davidson, attorneys
(Laurence M. Goodman, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On May 20, 2009, Teamsters Local No. 676 (Local 676 or Charging Party) filed an unfair practice charge (C-2)[1/] alleging that the Township of East Windsor (Township) refused to negotiate concerning a fact-finding report issued after an impasse was reached by the parties during the course of their negotiations for a successor collective agreement. On August 25, 2009, Local

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1/ "C" refers to Commission exhibits received into evidence during the hearing, "CP" and "R" refer to charging party and respondent exhibits, respectively. Transcript references for the hearing are "1T" or "2T" representing the transcript dated May 17 and June 22, 2011, respectively.

676 filed an amended unfair practice charge (C-3) claiming that the Township imposed new terms and conditions of employment on negotiations unit members which were inconsistent with the Township's "last, best and final offer" made during the fact-finding process, in violations of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically N.J.S.A. 34:13A-5.4a(1) and (5).[2/]

On August 12, 2010, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). On August 31, 2010, the Township filed an Answer denying that it refused to negotiate with Local 676, that it wrongfully imposed new terms and conditions of employment, and that it violated the Act.

Hearings were conducted on May 17 and June 22, 2011. The parties examined witnesses and presented documentary evidence. On November 4, 2011, the parties filed timely briefs. On February 17, 2012, the Director of Unfair Practices reassigned this matter to me upon the retirement of Hearing Examiner Stuart Reichman. N.J.A.C. 19:14-6.4. Upon the entire record, I make the following:

2/ These provisions 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."

FINDING OF FACTS

1. Teamsters Local Union 676 is a public employee organization within the meaning of the Act (1T8). The Township of East Windsor is a public employer within the meaning of the Act (1T8).

2. Local 676 and the Township were parties to a collective negotiations agreement covering the period January 1, 2000 through December 31, 2003 (CP-1; 1T15). The unit consists of approximately six police dispatchers and records bureau clerks (CP-1, CP-2). Subsequent to the Township's imposition of certain terms and conditions of employment by Township Ordinance on August 4, 2009 (discussed in greater detail below), the parties entered into a successor agreement covering the period January 1, 2010 through December 31, 2011 (J-1). J-1 contained a provision which reserves the issues raised in the instant unfair practice charge (2T67).

3. Since the expiration of CP-1 in December 2003 the parties had engaged in extraordinarily lengthy negotiations sessions (1T16, 2T6). Since direct negotiations between the parties proved unsuccessful, the parties went to mediation (2T7). Resolution of an agreement was not accomplished in mediation, so the parties entered into fact-finding (1T16). On December 4, 2008, a formal fact-finding hearing was conducted at which time the parties introduced documentary evidence and argued orally

(CP-2). On December 23, 2008, the fact-finder issued her report (CP-2). The report was received by the parties in late January or early February 2009 (1T17-1T18, 2T29).

4. During the course of the parties negotiations, the parties reached numerous tentative agreements and codified them in a document dated June 11, 2008 (CP-4). Local 676 also prepared and presented contract language concerning overtime pay in response to a demand sought by the Township (CP-5). On June 30, 2008, Township Manager, Alan M. Fisher presented Local 676 with a Memorandum of Understanding setting forth the terms for a successor collective agreement (CP-3).

The Memorandum was subject to ratification by the principles from both sides. It (CP-3) contained changes in the health insurance program sought by the Township and the compensation program covering a six year period, which included an increase in longevity of four percent in each year of the agreement, reference to the overtime language set forth in CP-5, and incorporated the other changes tentatively agreed upon by the parties as stated in CP-4. The Memorandum (CP-3) was voted on by the Local 676 membership and was rejected (1T18, 1T20, 2T9).

In the Memorandum (CP-3), the Township offered Local 676 a base salary increase of three percent in years 2004 through 2009 inclusive and a mid-year increment of one percent in each year except 2004. Local 676 sought a base salary increase of three

and one half percent each year; a mid-year increment in 2004 in addition to the other years of the agreement, and one additional vacation day for all unit employees and a second additional vacation day for those employees with one hundred eighty months or more of service (1T19, 1T22). Ultimately, the parties took those positions into fact-finding.

5. In fact-finding, Local 676 maintained its position that wages should be increased by three and one half percent per year, and there should be a mid-year increment of one percent in each year, including 2004. Local 676 further agreed to the overtime language it proposed in CP-5 in return for the Township's agreement to one additional vacation day for each unit member and a second additional vacation day for unit employees with more than one hundred eighty months of service as of 2004 (CP-2).

6. The Township maintained its positions reflected in CP-3 (2T8). Accordingly, the Township proposed a three percent wage increase in each year of the agreement and an annual one percent mid-year increment beginning in 2005 through the end of the contract. The Township maintained its position that longevity would be increased by four percent in each year of the contract. While the Township was also agreeable to the modification in the overtime provision, its position in fact-finding was not to increase unit employees vacation allotment (CP-2).

7. Ultimately, the fact-finder recommended that the parties accept on annual three percent increase in wages effective in 2004 and a one percent mid-year increment effective in 2005. The fact-finder also suggested that in return for the change in overtime language, unit employees with one hundred and eighty months of service or more receive one additional vacation day effective January 1, 2008. The four percent original longevity increase contained in CP-3 was not a disputed issued raised in fact-finding and, consequently, was not addressed by the fact-finder (CP-2).

8. Soon after his receipt of the fact-finder's report, Local 676 Trustee/Business Agent Tom Lyon telephoned Township Manager Fisher to set a date for a negotiations session addressing the fact-finder's recommendations (1T25, 2T31). The parties agreed to meet on March 23, 2009 (1T26, 2T31-2T32). During that meeting, Local 676 continued to seek extra vacation days in return for the fact-finder's recommendation that the overtime language be adopted. Local 676 also continued to seek the mid-year increment for 2004 (1T27, 2T9-2T11). The Township would not agree to modify its position on vacation days (2T39).

Fischer told Local 676 that the Township's only purpose at the meeting was to discuss the fact-finder's report and determine whether that report would be accepted or rejected (2T10). Thereafter, Local 676 requested a caucus, deliberated on what

took place during the meeting, and returned to the meeting to advise Fisher that Local 676 decided to accept the fact-finder's recommendation (1T28, 2T11, 2T39). CP-3 was never discussed during the meeting (2T33).

9. Local 676 contends that after it agreed to accept the fact-finder's report, Fisher also agreed on behalf of the Township and advised those present at the meeting that retroactive payments would be promptly issued to unit employees (1T28). Fisher testified that he never made such a statement, because any agreement would require the Township Council's ratification, and he could not bind the Council nor could he represent to Local 676's negotiations committee that the Council would accept the report (2T11, 2T21). Fisher testified that it was long-standing precedent, that any tentative agreement reached during negotiations was subject to formal ratification by both sides and he never communicated to Local 676 that he had authority to consummate the contract (2T24, 2T26, 2T34). Fisher said, that he told Local 676 that the Mayor and Council had not yet considered the fact-finder's report, and he would have to get back to the union after Council met (2T35). I credit Fisher's testimony. While Lyon believed he had concluded a deal with Fisher by the end of the March 23 meeting after Local 676 told Fisher that it accepted the fact-finder's report (1T28), when Lyon subsequently called to follow-up on the processing of the

retroactive payments, Lyon acknowledged that Fisher told him that he (Fisher) was awaiting Council approval (1T29).

Also, on April 13, 2009, Lyon sent Fisher a letter (CP-6) confirming their prior conversation that Fisher would endeavor to have the fact-finder's report placed on Council's agenda for approval (1T29-1T30). Lyon testified that while he thought Fisher could bind the Township, he also understood that Council would have to approve any settlements (1T35-1T36). Moreover, other members of the Local 676 negotiating committee acknowledged, that Fisher could not bind the Township and any agreement had to be approved by Council action (2T40, 2T48). Fisher was consistent in his testimony that as negotiations spokesperson on behalf of the Township, he had no authority to bind the Township to an agreement (2T5-2T6, 2T24-2T25, 2T34-2T35).

10. On April 21, 2009, Township Council considered the fact-finders report in executive session and voted to reject it (2T13, 2T35, 2T70). Fisher never communicated the Council's action to Local 676 (2T35). However, in correspondence dated May 8, 2009 between Local 676 and the Township's attorney, Local 676 requested to be apprised of the Township's position concerning whether it accepted the fact-finder's report as the basis of a successor agreement or wished to resume negotiations (CP-7). On

May 20, 2009, the Township's attorney responded that the Township did not accept the fact-finder's report (CP-8).

11. The parties did not conduct any other meetings or negotiations after March 23, 2009 (2T65-2T66). Between June 2008, when CP-3 was proposed, and March 2009, when the parties met to discuss the fact-finder's report, the Township's economic condition changed significantly. Its surplus fund balance was reduced by $1.7 million to $4.6 million. Historically, the Township maintained a surplus fund balance of between $6 and $7 million. The Township was having difficulty keeping under its four percent tax levy cap. Tax appeals cost the Township approximately $500,000. The Township laid off four police officers and two other employees (2T15-2T16). Fisher never shared this information with Local 676 and did not raise it during the March 23, 2009 meeting (2T33).

12. In correspondence dated July 17, 2009, the Township, through counsel, advised Local 676 that further negotiations for a successor collective agreement would be pointless (CP-10). The Township advised Local 676 that effective August 4, 2009, it would impose changes to terms and conditions for negotiations unit employees as follows:

> The new compensation and benefit plan will adjust the Health Benefits Plan consistent with other employees and provide for 3% increases for 2004, 2005, 2006 and 2007 and a 2% increase for 2008 and 2009. Article 32G [of the collective agreement] also provides

for certain mid-year adjustments in compensation [CP-10].

Article 32G of the contract provided for mid-year increments. The Township granted mid-year increments in years 2005 through 2009 (CP-10). Article 33, Longevity, as implemented, provided for no increase during the period 2004 through 2009 at the rate established for 2003 (CP-10, CP-11; 1T33).

ANALYSIS

N.J.S.A. 34:13A-5.3 states that "[p]roposed new rules or modification of existing rules governing working conditions shall be negotiated with the majority representative before they are established." However, it is also well settled, that a public employer may act unilaterally to change terms and conditions of employment without committing an unfair practice if it has negotiated in good faith, engaged in and exhausted the dispute resolution procedures established by the Act and Commission regulation, and a genuine impasse still remains.[3/] See, City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977); Readington

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3/ The right to unilaterally implement changes to terms and conditions of employment post exhaustion of the dispute resolution process does not apply to police and firefighters since they are eligible to initiate compulsory interest arbitration. See N.J.S.A. 34:13A-16 through 13A-21; N.J.A.C. 19:16-1.1 et seq. Nor does this right apply to employees employed by any local or regional school district, education services commission, jointure commission, county special services school district, or board or commission under the authority of the commissioner or State Board of Education. N.J.S.A. 34:13A-33.

Tp. Bd. of Ed., P.E.R.C, No. 96-4, 21 NJPER 273 (¶26176 1995); Rutgers, the State University P.E.R.C. No. 80-114, 6 NJPER 180 (¶11086 1980); Redbank Bd. of Ed., P.E.R.C. No. 81-1, 6 NJPER 364 (¶11185 1980), aff'd NJPER Supp 2d. 99 (¶81 App. Div. 1981)

Impasse has been defined as ". . . a state of facts in which the parties, despite the best of faith, are simply deadlocked." NLRB v Tex-Tan, Inc., 318 F.2d 472, 53 LRRM 2298, 2305 (5th Cir. 1963). "Whether an impasse has been reached is a difficult judgment to make and must be tied to each specific situation." Rutgers, 6 NJPER at 181. The Commission sees impasse as "a hybrid, partly a factual determination and partly a conclusion of law." Id. It does not use "a mechanical counting of the number of bargaining sessions but will look to the totality of the negotiations history in all post fact-finding unilateral implementation matters." Id.

In Taft Broadcasting Co., 163 NLRB 475, 64 LRRM 1386 (1967), aff'd 395 F.2d 622, 67 LRRM 3032 (D.C. Cir. 1968), the National Labor Relations Board stated:

> Whether a bargaining impasse exists is a matter of judgement. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. [64 LRRM at 1386.]

In Readington Tp. Bd. of Ed., the Commission found that the Board did not violate the Act when it implemented its last best offer and unilaterally imposed salary guides it had proposed during fact-finding. There, the Board advised the Association that it was considering implementing its salary guide proposal if mutually agreed guides could not be developed by the date established by the Board for Board action. When the Association submitted a guide proposal on that established date, the Board postponed implementation in order to give it an opportunity to review the Association's proposal. The Board advised the Association that it would not let the old salary guide be used in the upcoming academic year. Another negotiation session was arranged. During that last joint negotiation session before the Board implemented its version of the salary guides, both parties' chief spokesperson recognized that they could not construct guides that would be satisfactory to both sides. The Commission found, under those circumstances, a genuine post fact-finding impasse existed.

In contrast, the Commission's determination in Fredon Township Bd. of Ed. P.E.R.C. No. 96-5, 21 NJPER 275 (¶26177 1995), is instructive in this matter. The Fredon Township Board of Education and the Fredon Education Association had a strained relationship going into negotiations. The parties began negotiations and after nine negotiations sessions jointly

declared that they were at an impasse and sought mediation. The parties held two mediation sessions which concluded without reaching an agreement. They then proceeded to fact-finding. Two fact-finding sessions were conducted which culminated in the issuance of a fact-finder's report. The parties agreed to post fact-finding negotiations sessions. During the first session, the Association advised the Board that it would accept the fact-finder's report; the Board rejected it. A second post fact-finding session was held and no agreement was reached. Subsequently, the Board notified the Association that it intended to implement its last offer presented to the fact-finder. The Board's last offer to the Association included the following:

> Salary - 3.5%, 4% and 5% inclusive of longevity;
>
> Maintenance of longevity of current employees with an undisclosed/undetermined fixed dollar amount for new hires;
>
> Undisclosed/undetermined fixed dollar amount for separation benefits in lieu of a rate based on one-half current substitute's pay, plus limits on eligibility;
>
> Deletion of accumulative family illness days.
>
> Decrease from 3 to 2 the number of annual paid personal days;
>
> Limitation on child rearing leaves;
>
> Changes on reporting and dismissal times; and
>
> Changes in language to reflect the change to Travelers health insurance.

At a subsequent Board meeting the Board voted to implement changes in salaries, longevity and health insurance only. The salary and health insurance proposals that were implemented reflected the proposals in the Board's last offer. The longevity proposal that was implemented appears to have eliminated longevity for new hires even though the last offer included an undisclosed fixed dollar amount for new hires. The Board also did not implement other elements of its last offer, such as a reduction in the number of personal days, changes in the length of the work day and the ability to return from child-rearing leave mid-year.

The Commission found that since the Fredon Board departed from implementing its last offer as conveyed to the Association, the parties were not at a genuine post fact-finding impasse. The Commission held that the Association had not been given an opportunity to accept, reject or suggest modification to the package which the Board ultimately implemented. The Commission noted that it was possible additional trade-offs could have occurred which might have resulted in the achievement of a voluntary overall settlement of the successor agreement had the Board offered the Association the specific terms of changes it unilaterally implemented. The Commission said:

> The concept of implementation is predicated on the notion that the majority representative has rejected the employer's last best offer. Under these facts, to allow

> the Board to implement something other than its last best offer presupposes that the Association would have rejected what may have been a more attractive package than the one the Board had finally presented to the Association. Id. at 278.

The Commission noted that any departure from the employer's last offer in itself would be a violation of its duty to negotiate in good faith. Id. at 279, n. 5.

I find with respect to the instant matter, Fredon is controlling. CP-3 is the Township's last best offer. The Township's proposed CP-3 to Local 676 on June 30, 2008 as a Memorandum of Understanding to conclude their negotiations for a successor collective agreement. More importantly, the Township submitted CP-3 to the fact-finder as constituting its position for the fact-finder to recommend settlement terms. On March 23, 2009, when the parties met, the topic of discussion was limited to the fact-finder's report; CP-3 was not discussed. After March 23, 2009, the parties conducted no further face-to-face meeting for the purposes of trying to reach a settlement for a successor agreement nor was there any correspondence concerning the Township's position on the fact-finder's report until May 8, 2009 (CP-7) when Local 676 asked to be advised as to whether the Township would accept the report. While on May 20, 2009 the Township advised Local 676 that it rejected the fact-finder's report, there was no further intercourse between the parties that focused on resolving their dispute over the successor contract

until July 17, 2009. At no time since CP-3 was offered by the Township to the fact-finder as the Township's position to resolve the parties' dispute did the Township indicate in any way that CP-3 did not represent the Township's last offer.

It was only in its July 17, 2009 correspondence, that the Township notified Local 676 that it would implement terms and conditions of employment which differed from its last offer (CP-3). It never provided Local 676 with the opportunity to negotiate over what amounted to a new Township negotiating proposal. I find, therefore, that since the Township adopted a new negotiations position, the parties had not reached a genuine impasse. Had the Township provided its new position to Local 676, the union could have accepted, rejected or proposed alternative which might or might not have been acceptable to the Township. Instead, the Township imposed changes in terms and conditions of employment which differed from CP-3, its last offer. Accordingly, the Township's actions constitute a unilateral change in mandatorily negotiable subjects of negotiations and violate the Act.

The Township argues that it had to reject the fact-finder's report, because its financial condition had deteriorated and it was trying to prevent additional layoffs. However, the Township never conveyed this information to Local 676. Had it done so, Local 676 may have been willing to make additional concessions.

Local 676 also might have been able to suggest certain economic or operational alternatives which may have been acceptable to both parties. However, this possibility never came to fruition, because the Township never informed Local 676 of its financial problem and, without providing Local 676 with an opportunity to provide input through negotiations, the Township instead moved to unilaterally implement a change in terms and conditions of employment. Fredon.

CONCLUSION OF LAW

The Township violated N.J.S.A. 34:13A-5.4a(1) and (5) when it unilaterally implemented terms and conditions of employment which differed from its last best offer at a point during negotiations for a successor agreement at which an impasse did not exist.

RECOMMENDED ORDER

Given that the parties had already entered into a successor collective negotiations agreement before this matter was litigated before the Hearing Examiner, it would appear that any order requiring the Township to take specific affirmative action which would bring the parties back to the positions they were in at the time of the wrongful implementation could have an unintended impact on the parties' 2010-2011 collective agreement. No evidence has been presented concerning such possible impact.

For that reason, I recommend that the Commission **ORDER** that the Township cease and desist from:

A. Interfering with, restraining or coercing employees included in the collective negotiations unit represented by Local 676 in the exercise of the right guaranteed to them by the Act, particularly by unilaterally implementing changes in terms and conditions of employment before reaching a genuine post fact-finding impasse.

B. Refusing to negotiate in good faith with Local 676 concerning terms and conditions of employment for employees contained in negotiations unit by unilaterally implementing changes in mandatory subjects of negotiations before entering into good faith negotiations concerning such issues with the majority representative or before reaching a genuine post fact-finding impasse.

C. The Township should take the following affirmative action.

1. Enter into good faith negotiation with Local 676 over issues which were unresolved prior to the wrongful unilateral implementation of terms and conditions of employment which occurred on August 4, 2009.

2. Post in all places where notices to employees are customarily posted copies of the attached notice marked as "Appendix A." Copies of such notices on forms to be provided by

the Commission, will be posted immediately upon receipt thereof and after being signed by the Respondent's authorized representative, will be maintained by it for at least sixty (60) consecutive days. Reasonable steps will be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials; and

3. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this **ORDER.**

Wendy L. Young

DATED: October 23, 2012
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by November 2, 2012.

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 cease and desist from interfering with, restraining or coercing employees included in the collective negotiations unit represented by Local 676 in the exercise of the right guaranteed to them by the Act, particularly by unilaterally implementing changes in terms and conditions of employment before reaching a genuine post fact-finding impasse.

WE WILL cease and desist from refusing to negotiate in good faith with Local 676 concerning terms and conditions of employment for employees contained in negotiations unit by unilaterally implementing changes in mandatory subjects of negotiations before entering into good faith negotiations concerning such issues with the majority representative or before reaching a genuine post fact-finding impasse.

WE WILL enter into good faith negotiations with Local 676 over issues which were unresolved prior to the wrongful unilateral implementation of terms and conditions of employment which occurred on August 4, 2009.

Docket No. CO-2009-427 Township of East Windsor
(Public Employer)

Date: _____ 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, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"