H.E. NO. 90-11

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

In the Matter of

BARNEGAT TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-89-102

BARNEGAT FEDERATION OF TEACHERS,

Charging Party.

SYNOPSIS

A Hearing Examiner grants in part and denies in part respondent's motion to dismiss charges that it violated subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act. Allegations that the respondent violated subsection 5.4(a)(3) when it unilaterally eliminated the policy of permitting custodians and cafeteria workers to convert personal leave days to sick days and that it violated subsection 5.4(a)(5) and derivatively (a)(1) when it failed to post the availability of increased hours for a cafeteria worker and required cafeteria workers to perform additional tasks for recycling are dismissed.

The Hearing Examiner also found that a plenary hearing was necessary to determine whether the respondent violated subsection 5.4(a)(5) and derivatively (a)(1) when it unilaterally eliminated the policy of permitting custodians and cafeteria workers to convert personal leave days into sick days. A plenary hearing is also necessary to determine the allegations that the respondent violated subsection 5.4(a)(3) and derivatively (a)(1) when it failed to post the availability of increased hours for cafeteria workers and required them to perform additional tasks for recycling.

The parties may appeal the Hearing Examiner's decision by filing exceptions by special permission. N.J.A.C. 12:14-4.6(b).

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.

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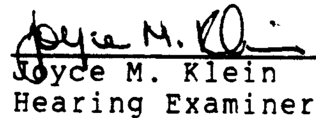
ERRATA

Add to the end of paragraph 2 on page 10 the following:

...and when it required cafeteria employees to separate garbage and crush aluminum cans for recycling.



Joyce M. Klein
Hearing Examiner

Dated: November 21, 1989
Trenton, New Jersey

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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BARNEGAT TOWNSHIP BOARD OF EDUCATION,

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Charging Party.

Appearances:

For the Respondent, Cassetta, Taylor & Whalen, Consultants
(Garry M. Whalen, Consultant)

For the Charging Party, Dwyer & Canellis, Esqs.
(Thomas D. Forrester, of counsel)

HEARING EXAMINER'S
DECISION AND ORDER ON MOTION

On October 12, 1988, the Barnegat Federation of Teachers, NJSFT, AFT/AFL-CIO ("Federation") filed an unfair practice charge alleging that the Barnegat Board of Education ("Board") violated subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act.[1/] On August 14, 1989, the

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. (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.

Director of Unfair Practices issued a Complaint and Notice of Hearing on paragraphs 10, 11 and 12 of the Charge. These paragraphs alleged that the Board violated the Act when it: (1) unilaterally changed the practice of permitting cafeteria and custodial workers to convert personal days to sick leave which may be accumulated; (2) required cafeteria workers to separate garbage and crush aluminum cans for recycling and (3) failed to post increased hours given to a newly employed cafeteria worker.

On August 28, 1989 the Board filed an Answer admitting the above allegations, but asserting that the changes were at most, breaches of contract or exercises of managerial prerogatives. On the same date, the Board also filed a Motion to Dismiss the Complaint. On September 1, 1989, the Federation filed a response opposing the Motion.

Interim Findings of Fact

The Federation represents a unit of teaching, secretarial custodial and cafeteria employees employed by the Board. In October 1988, separate units of teachers, secretaries, custodians and cafeteria workers were consolidated into one unit after an election conducted by the Commission. Before the consolidation election, each unit was covered by a separate agreement.

The agreements effective from January 1, 1984 through June 30, 1987, covering the custodial and cafeteria workers, granted those employees three personal days. Personal days could not be accumulated or converted into sick leave. In 1985, after a new

teachers' agreement was reached, the Board permitted custodians and cafeteria workers to convert unused personal days into sick leave and accumulate those days as sick leave. Unused personal leave was converted into sick leave at the end of the 1985-1986 and 1986-1987 school years. At the end of the 1987-1988 school year, the Board refused to convert unused personal leave into sick leave.

In September 1988 or sometime thereafter, the Board required cafeteria workers to separate garbage and crush aluminum cans for recycling. The Board asks me to take administrative notice that, "recycling is a major part of a state wide governmental effort to decrease garbage carting costs and to protect the environment, and that the requirement to recycle does not normally have a demonstrable impact on anyone's workload."[2/] Over the summer and through October 1988, the Board and the Federation negotiated over terms and conditions of employment for cafeteria workers.

On September 12, 1988, the Board approved an increase in hours for a newly employed cafeteria worker. The Board did not post the position.

Analysis

A motion to dismiss before hearing under N.J.A.C. 19:14-4.7 is similar to a motion to dismiss for failure to state a claim upon which relief may be granted under R.4:6-2(e). City of Margate, H.E. 89-23, 15 NJPER 166 (¶20070 1989). It is a motion for judgment on

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2/ I take administrative notice of the existence of a state-wide recycling effort.

the pleadings which raises only issues of law, while admitting all of the facts plead by the opponent. Reider v. State of New Jersey Dept. of Transp., 221 N.J. Super 547 (App. Div. 1987).

In Reider v. State of New Jersey Dept. of Transp., 221 N.J. Super 547 (App. Div. 1987), the court stated:

> On a motion made pursuant to R. 4:6-2(e) "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." P. & J. Auto Body v. Miller, 72 N.J. Super 207, 211 (App. Div. 1962). The court may not consider anything other than whether the complaint states a cognizable cause of action. Ibid. For this purpose, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Smith v. City of Newark, 136 N.J. Super 107, 112 (App. Div. 1975). See also Heavner v. Uniroyal, Inc., 63 N.J. 130, 133 (1973); Polk v. Schwartz, 166 N.J. Super 292, 299 (App. Div. 1979). A complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by way of amendment. Muniz v. United Hsps. Med. Ctr. Pres. Hsp., 153 N.J. Super 79, 82-83 (App. Div. 1977). However, a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted.
>
> Reider, at 552.

In considering a motion to dismiss a complaint for failure to state a claim on which relief can be granted, the allegations of the complaint must be taken as true and all favorable inferences drawn from the allegations must be accorded to the Charging Party. Wuethrich v. Delia, 134 N.J. Super 400 (Law Div. 1975), aff'd 155

N.J. Super 324 (App. Div. 1978); Sayreville B/E, H.E. No. 78-26, 4 NJPER 117 (¶4056 1978). [3/]

The Federation alleges that the Board unilaterally eliminated the practice of converting personal days into sick leave in violation of subsections 5.4(a)(1), (3) and (5). The Board asserts the allegation should be dismissed because it is, at most, a mere breach of contract under State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

In Human Services, the Commission held that:

> a mere breach of contract claim does not state a cause of action under subsection 5.4(a)(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures.

The Commission listed examples of situations where a breach of contract claim may warrant complaint issuance. One such example is when the allegations suggest that the employer changed the parties' past and consistent practice.

Here, the Complaint alleges that the Board unilaterally changed a term and condition of employment when it discontinued the practice of allowing custodians and cafeteria workers to convert unused personal leave into sick leave. N.J.S.A. 34:13A-5.4(a)(5)

3/ Compare New Jersey Turnpike, P.E.R.C. No. 79-81, 5 NJPER 197 (1979) where the Commission adopted the standard used by the New Jersey Supreme Court in Dolson v. Anastasia, 55 N.J. 2 (1959) for a motion to dismiss at the close of a charging party's case. That standard requires that the evidence (at least a scintilla) be viewed in a light most favorable to the party opposing the motion.

makes it an unfair practice for a public employer to refuse to negotiate in good faith with the majority representative concerning employees' terms and conditions of employment. A public employer may violate these obligations by implementing a new rule or changing an old rule concerning a term and condition of employment without first negotiating in good faith to impasse or having a managerial prerogative or contractual defense authorizing the change. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). Willingboro Bd.of Ed., P.E.R.C. No. 86-76. 12 NJPER 32 (¶17012 1985).

In Hunterdon Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986), aff'd 116 N.J. 322 (1989), the County unilaterally instituted, and subsequently rescinded a safety incentive program. The Supreme Court affirmed the Commission's determination that both unilateral actions were unfair practices. The Federation argues that the Board's failure to negotiate before rescinding the practice of converting personal days to sick days similarly violates subsection 5.4(a)(5).

Drawing all inferences in favor of the charging party, I find that Paragraph 10 alleges a unilateral change in terms and conditions of employment and may not be dismissed as a mere contract

claim. See Passaic Cty. Bd. of Ed., P.E.R.C. No. 89-98, 15 NJPER 257 (¶20106 1989).[4/]

The Federation alleges that the Board's requirement that Association members separate garbage and crush aluminum cans for recycling was part of a course of conduct designed to chill employees' exercise of their rights. The Board asserts it had a managerial prerogative to require cafeteria workers to crush aluminum cans. The Association does not dispute that the Board had the right to assign the additional work but alleges that it did so as part of a course of conduct to chill negotiations.

Responding to the motion to dismiss, the Federation argues that the Board's imposition of new duties during negotiations chilled their rights under the Act. The Federation cites In re Bridgewater Tp., 95 N.J. 235, 244 (1984) and argues that it has shown a prima facie case of discriminatory conduct. Under Bridgewater, whether an employer illegally discriminates in retaliation for union activity requires a charging party must prove that protected activity was a substantial or motivating factor for the employment action, to show that an employer illegally discriminated in retaliation for union activity. Ordinarily, the charging party must show it engaged in protected activity, the employer knew about the activity and was hostile toward the exercise

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4/ Paragraph 10 does not allege any facts which might be a violation of subsection 5.4(a)(3). I dismiss the Complaint is with respect to that subsection. Brookdale Community College, P.E.R.C. No. 83-131, 9 NJPER 266, n.8 (¶14122 1983).

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 adverse 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.

Negotiation is protected activity. N.J.S.A. 34:13A-5.3. The Board and the cafeteria workers were negotiating when the recycling duties were assigned. Timing is an important factor in assessing motivation. See Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1986). The timing of the assignment of recycling duties is sufficient to raise a question concerning the Board's motivation. As an affirmative defense, the Board asks me to take administrative notice that its recycling program is part of a state-wide recycling effort. I find that material issues of fact about the Borough's motives for assigning recycling duties require that a plenary hearing be conducted on that issue.[5/]

Finally, the Board asserts that its failure to post increased hours for a newly employed cafeteria worker violates the

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5/ Neither party argues that the alleged chilling effect of this allegation constitutes an independent violation of subsection 5.4(a)(1). An independent (a)(1) does not require an illegal motive. Commercial Township, P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982); Middletown Township, P.E.R.C. No. 84-100, 10 NJPER 173 (¶15085 1984).

parties agreement is not an unfair practice. Paragraph 12 of the Complaint provides:

> On September 12, 1988, Respondent approved an increase in hours for a newly employed Cafeteria Worker. This change in terms and conditions of employment was made unilaterally and without posting the position in accordance with the provisions of the agreement covering cafeteria workers.

Deeming the allegations in the Charge as true, charging party alleges a mere breach of contract. Contract disputes are not violations of Subsection 5.4(a)(5) and derivatively (a)(1). They should be resolved through the parties' grievance procedure. Human Services.

The Complaint also alleges the Board's failure to post the increased hours had a chilling effect on negotiations. The Board's failure to post notice of the availability of additional hours for a cafeteria worker occurred during negotiations. Drawing all inferences in favor of the Federation, it also occurred during the same period as the assignment of recycling duties. Applying a Bridgewater analysis, I find a plenary hearing is required to determine whether the Board's failure to post the increased hours had a chilling effect.[6/]

6/ Neither party argues that the alleged chilling effect of this allegation constitutes an independent violation of subsection 5.4(a)(1).

CONCLUSION

I grant the Board's motion to dismiss on the allegation that it violated subsection 5.4(a)(3) when it unilaterally it unilaterally eliminated the policy of permitting custodians and cafeteria workers to convert personal days into sick leave and accumulate it from year to year.

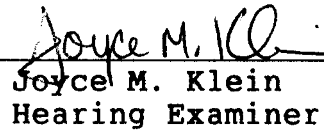
I grant the Board's motion to dismiss on the allegation that it violated subsection 5.4(a)(5) and derivatively (a)(1) when it failed to post the availability of increased hours for a cafeteria worker.

I deny the Board's motion to dismiss on the allegation that it violated subsections 5.4(a)(5) and derivatively (a)(1) when it unilaterally eliminated the policy of permitting custodians and cafeteria workers to convert personal days into sick leave and accumulate it from year to year.

I deny the Board's motion to dismiss the allegations that it violated subsections 5.4(a)(1) and (3) when it assigned recycling duties to cafeteria workers and when it assigned increased hours to a newly employed cafeteria worker without posting their availability.

ORDER

I ORDER that a HEARING take place on the remaining issues at the Commission offices in Trenton, New Jersey, on October 3, 1989 at 10:30 a.m.



Joyce M. Klein
Hearing Examiner

DATED: September 28, 1989
Trenton, New Jersey