P.E.R.C. NO. 81-76

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

TOWNSHIP OF JACKSON,

Respondent,

-and-

JACKSON TOWNSHIP P.B.A. LOCAL 168,

Charging Party.

Docket Nos. CO-80-127-53
CO-80-128-54
CO-80-150-55
CO-80-262-69

SYNOPSIS

The Commission, in an unfair practice case, affirms the findings of fact and conclusions of law of a Commission Hearing Examiner and adopts, with one modification, his recommended order with respect to charges filed by the Jackson Township PBA Local 168 against the Township of Jackson.

The Hearing Examiner concluded that the Township had violated N.J.S.A. 34:13A-5.4(a)(5) and derivatively (a)(1) by making unilateral changes in the status quo concerning the method of purchase by officers of police uniforms and concerning tuition reimbursement for courses related to police science. The Hearing Examiner also found that the Township did not violate these same subsections of the Act with respect to changes in the granting of sick leave. No violation of the Act was found with respect to the Township's commencement of separate negotiations with police captains, nor with the Township's proposal that the PBA accept smaller wage and other economic benefits then had been previously agreed upon. None of the Township's actions were deemed violative of N.J.S.A. 34:13A-5.4 (a)(2), (3), (4) and (7) and the Commission affirmed the Hearing Examiner's recommendation that these alleged violations of the Act be dismissed.

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Docket Nos. CO-80-127-53
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CO-80-262-69

Appearances:
For the Respondent, Joseph F. Martone, Esquire

For the Charging Party, Abramson and Liebeskind, Labor Consultants (Arlyne Liebeskind)

DECISION AND ORDER

A series of four Unfair Practice Charges were filed with the Public Employment Relations Commission on four separate dates: November 16 and December 6, 1979, and January 17 and February 22, 1980, by the Jackson Township P.B.A. Local 168 ("PBA"). The charges stated five basic allegations.

(1) It was alleged the Township of Jackson ("Township") entered into separate negotiations with the captains employed by the Township disregarding the PBA's designation as exclusive majority representative which constitutes a violation of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act").[1/]

1/ It was specifically alleged that the Township violated Subsections 5.4(a)(2), (5) and (7) of the Act. These subsections provide in pertinent part that public employers, their representatives or agents are prohibited from "(2) dominating or interfering with the formation, existence or administration of any employee organization; (5) refusing to negotiate in good faith with a majority
(Continued)

(2) It was alleged that the Township unilaterally implemented a new procedure in the granting of sick leave which violated the provisions of the collective negotiations contract without prior negotiations.

(3) It was alleged that the Township unilaterally implemented a new procedure for the purchase of uniforms in violation of the provisions of the contract, without prior negotiations.

(4) It was alleged that the Township was selectively refusing to process requests for course reimbursement regarding college-level courses, in violation of the contract without prior negotiations. It was alleged that the Township's action in (2), (3) and (4) were violative of the Act for they constituted unilateral changes in terms and conditions of employment.[2/]

(5) It was alleged that the Township had engaged in a campaign designed to undermine and interfere with the PBA's active participation in the exercise of protected activities. In addition to the alleged events related to above, it is further alleged that the Township insisted that the PBA accept a raise for 1980 of 5% instead of the negotiated 8% increase and if they failed to accept a smaller raise then there would have to be layoffs of patrolmen.[3/]

1/ (Continued) 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."

2/ It was specifically alleged that such conduct violated Subsections (5) and (7) of the Act.

3/ It was alleged that this pattern of conduct violated Subsections (1), (3), (4) and (7) of the Act which prohibit public employers, their representatives or agents from "(1) interfering with, restraining or coercing employees in the exercise of the rights guaranteed to

(Ctoninued)

It appearing that the allegations of the Unfair Practice Charges, if true, might constitute unfair practices within the meaning of the Act, a consolidated Complaint and Notice of Hearing was issued on March 5, 1980. Pursuant to the Complaint and Notice of Hearing, hearings were held on April 7 and 8, 1980, at the Commission's offices in Trenton, New Jersey. Both parties were given the opportunity to present evidence, examine and cross-examine witnesses, argue orally and present briefs.

Following the close of the hearing and receipt of post-hearing briefs which were filed by June 9, 1980, the Hearing Examiner, on October 3, 1980, issued his Recommended Report and Decision, H.E. No. 81-12, 6 NJPER _____ (¶_____ 1980). A copy of his report is attached hereto and made a part hereof.

Both the PBA and the Township have filed exceptions challenging the correctness of certain of the Hearing Examiner's factual determinations and conclusions of law. The matter is now properly before us for final decision.

Discussing the above-outlined issues seriatum, the Hearing Examiner reached the following conclusions:

(1) That the Township did not violate the Act by negotiating separately with the captains because the Past President of the PBA, during his term indicated that he had no objection

3/ (Continued 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."

to such an arrangement and did not take any further action to protest the proposed arrangement. A letter requesting negotiations was sent by the captains to the Township with a copy to the PBA President who never objected. Under these facts, the Hearing Examiner found that the PBA had waived its right to protest the action of the Township in negotiating directly with the captains.

Neither party has excepted to this aspect of the Hearing Examiner's report. We concur with his conclusion that the conduct of its President constituted a waiver of the PBA's right to object to the direct negotiations with the captains and dismiss this aspect of the charges.

(2) The Hearing Examiner found that the issuance of an order by the Township concerning the securing of a doctor's certificate to verify sick leave and the Township's refusal to negotiate concerning the matter did not violate N.J.S.A. 34:13A-5.4(a)(5) on the facts before him. He found that the Town's action was consistent with the applicable provisions of the collectively negotiated agreement and a written Township policy which had been incorporated by reference therein. He also refused to follow an advisory opinion made by an arbitrator on a grievance the PBA filed after the Township's order was issued, noting that the requirements of proof in an unfair practice hearing are significantly different than those present in an arbitration.

The PBA excepts to the Hearing Examiner's ruling concerning sick leave arguing that the past practice of the parties should take precedence over the language of the contract and the

personnel code and that the hearer should not have "lightly dismissed" the arbitrator's ruling. While it is true that the policy in effect after the July 20, 1979 and the October 17, 1979 orders were more stringent than the prior practice we concur with the hearer's interpretation that the contract and the personnel policy were not inconsistent and the new policy was within the parameters of the Township's negotiated agreement with the PBA. We also concur that the hearer was not bound by the arbitrator's opinion and shall dismiss this aspect of the charges. 4/

(3) The Hearing Examiner found that a unilaterally adopted practice of the Town to purchase police uniforms directly from specified vendors who successfully bid on a Township contract offer constituted a change in terms and conditions of employment and was made in violation of the Township's obligation to negotiate with the PBA. Previously, in accordance with the language of the parties' collective negotiations agreement, individual officers would purchase uniforms directly from the vendor of their choice and receive reimbursement from the Township on submission of paid receipts. Apparently because some officers began to request that the Township make the purchases directly, rather than advance their own funds and await reimbursement, the Township advertised for and awarded bids for vendors of police uniforms, believing such

4/ It is well established that labor relations boards have the ability to interpret agreements of contracting parties to the extent necessary to resolve unfair practices. This is especially true where, as here, the grievance procedure in force between the parties does not provide for binding arbitration. See NLRB v. C&C Plywood, Corp., 385 U.S. 421, 87 S. Ct. 559, 17 L. ED. 2d. 486 (1967) and NLRB v. Hutting Sash and Door, 377 F. 2d. 964 8th Cir. (1967). These cases decided under the National Labor Relations Act, are appropriate for use as precedents for cases arising under our Act. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25 (1978).

action was mandated by the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq. As a result, officers could no longer buy uniforms where they chose but were limited to the successful bidders, one of which was located 80 miles away from Jackson Township.

The Town argues in its exceptions, as it did before the Hearing Examiner, that it must comply with the Local Public Contracts Law. Obviously, as a general principle this is true. However, the Town overlooks the fact that it was in no way obligated to purchase the uniforms directly. In fact, under the terms of the agreement, the Township was required to continue the system of reimbursing officers for their uniform purchases (up to the monetary limit in the agreement), unless it secured the agreement of the PBA to alter this term and condition of employment. A uniform allowance is a term and condition of employment and the inconvenience to some officers brought about by having to travel 80 miles (one way) for their uniform purchases does directly affect their financial and personal welfare.

N.J.S.A. 34:13A-5.3 provides in part that:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

The Township's unilateral action constituted a violation of this provision of the Act. Faced with the request from individual officers and its analysis of the bidding laws, it should have notified the PBA of the potential problem it saw if it made the payments directly and sought to negotiate a solution. It may be that the PBA would agree to the new procedure based upon the

Township's analysis of the bidding statute and the apparent desire of a growing number of its members. Thus we affirm the Hearing Examiner's conclusion that the Township violated N.J.S.A. 34:13A-5.4(s)(5) when it unilaterally altered the agreement and practice pertaining to the uniform allowance.

However, the Hearing Examiner's recommended remedy on this issue appears to be based on his perception that the uniform allowance was an annual stipend paid directly to the officers to enable them to purchase uniforms; but that they received the money even if the full amount was not spent on any given year. Rather, it appears that the officers were only reimbursed for monies actually spent for uniforms up to the maximum of the negotiated allowance. Thus, the requests from individual officers for direct payment by the Township. The Township in its exceptions states that it has no objection to the system whereby officers purchase uniforms directly and are reimbursed on presentation of paid receipts. It maintains, however, that direct payment by the Township presents the problem of the bidding statute. Therefore, we will modify the recommended remedy of the Hearing Examiner to provide that the status quo be restored whereby officers dealt directly with the vendors. The parties remain free to negotiate a new procedure consistent with the desires of the employees and the requirements of the bidding law, if such laws are applicable.

(4) The Hearing Examiner found that the Township's refusal to approve for tuition reimbursement courses in subjects other than in police science, but which were required for a

degree in police science constituted a change in the past practice of the Township and a violation of the contractual agreement and constitutes a unilateral change without negotiations in terms and conditions of employment in violation of N.J.S.A. 34:13A-5.4(a)(5). The disputed contract language, which has appeared in all Township-PBA agreements since 1974 provides "tuition and text books will be paid by the Township upon successful completion of any course related to police science..." It was undisputed at the hearing that prior to January 22, 1980, all courses taken by officers who were pursuing police science degrees were eligible for reimbursement. On that date, the Township posted a notice stating that no course will be eligible for reimbursement unless in the Township's opinion it is a police-related course. Subsequently, only courses in police science or criminal justice were approved--courses necessary for a police science degree but not in these subject areas were rejected.

In its exceptions, the Township admits it previously approved all courses but contends this was a mistaken application of the agreement. It is argued that the contract language is clear and unambiguous and only authorizes reimbursement in accordance with the Town's current practice. The Town contends that the Hearing Examiner should not have relied on past practice in the face of "clear and unambiguous" contract language. However, our review of the record indicates that the Hearing Examiner was correct in interpreting the contract through the parties' undisputed prior practice.

We agree with the Hearing Examiner that the language on this item is not so clear and unambiguous as to preclude resort

to past practice to clarify possible ambiguities in the language. Moreover, as it developed at the hearing, the Township itself did not apply its new policy consistently. Such deviation from its asserted interpretation of the language further weakens its position that the language was intended by the parties to have the meaning attributed to it by the Township.[5/] In the absence of clear and unambiguous language resort to the past practice was appropriate to clarify these parties' intentions with respect to this clause. We agree with the Hearing Examiner that the consistent past practice resolves the question in favor of the PBA's position. We affirm his determination that a unilateral change in terms and conditions of employment was made by the Township and shall adopt his recommended remedy that the Township restore the status quo and make retroactive reimbursement for all courses necessary for a police science degree taken by Township officers since the change in course reimbursement policy was made.

(5) Neither party filed exceptions to the Hearing Examiner's resolution of the remaining issues in dispute which involved the Township's request to the PBA's President that the PBA forego the 8% raise in the contract and accept a 5% raise

5/ In his recommended report and decision the Hearing Examiner refused to permit the PBA to rely on this revelation of disparate treatment to assert a new allegation of a violation of N.J.S.A. 34:13A-5.4(a)(3) for the first time in its post-hearing brief. We agree. However the Hearing Examiner does mention this fact in his report and apparently relies upon it as evidence that the language was less than clear on its face.

As we indicated in our prior discussion of the sick leave issue, an employer is not bound to maintain a past practice which is more generous than the language of the agreement. However, where the language is ambiguous, the past practice can clarify the meaning of that language.

instead plus a reduction of $40.00 in the clothing allowance, its alleged targeting of the police department for layoffs and the Township's questioning of candidates for promotion as to their willingness to join a superior officers' association. Of all the issues discussed in Section V of the Hearing Examiner's report, he recommended only that the Township be found in violation of N.J.S.A. 34:13A-5.4(a)(1) as its questioning of candidates for promotion tended to interfere with their exercise of rights guaranteed by the Act, i.e., the right to join and assist an employee organization. We believe his recommendation is supported by the record and is consistent with our prior determinations in similar cases which are cited by the Hearing Examiner.

Finally, we agree that none of the evidence adduced at the hearing demonstrated a violation of subsections (3), (4) or (7) of N.J.S.A. 34:13A-5.4(a) and those allegations shall be dismissed.

In summary, we find that the Township, by changing terms and conditions of employment concerning clothing allowance and course reimbursement violated N.J.S.A. 34:13A-5.4(a)(5). The Township's questioning of candidates for promotion with respect to their willingness to join a superior officers association violated N.J.S.A. 34:13A-5.4(a)(1). We find that the Township did not violate the Act with respect to its policy concerning the obtaining of a medical certificate to verify the use of sick leave nor did it violate the Act when it proposed a reduction in clothing allowance or a wage increase of five percent.

ORDER

Accordingly, for the reasons set forth above IT IS HEREBY ORDERED:

A. That the Respondent Township cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by interrogating its employees as to their membership in the PBA and their willingness to join a superior officers association.

2. Refusing to negotiate in good faith with the PBA concerning the alteration of the clothing allowance and alteration of the standard for college tuition reimbursement.

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

1. Cease and desist from interrogating all employees as to their employee association membership and preferences.

2. Forthwith discontinue contracting out for the direct purchase of officer uniforms and restore the status quo of reimbursing officers for uniform purchases on presentation of paid receipts.

3. Forthwith reimburse all officers retroactively for college courses taken and textbooks purchased for courses which are required by each respective institution to earn a degree in police science.

4. Post at 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 a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other material.

5. 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 in the Complaint that the Respondent violated Subsections 5.4(a)(2), (4) and (7) of the Act be dismissed in their entirety.

BY ORDER OF THE COMMISSION

Bernard M. Hartnett, Jr.
Acting Chairman

Acting Chairman Hartnett, Commissioners Graves, Hipp, Newbaker and Parcells voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
December 10, 1980
ISSUED: December 11, 1980

"APPENDIX A"

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 interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by interrogating our employees as to their membership in the PBA and their willingness to join a superior officers association.

WE WILL NOT refuse to negotiate in good faith with the PBA concerning the alteration of the clothing allowance and alteration of the standard for college tuition reimbursement.

WE WILL cease and desist from interrogating all our employees as to their association membership and preferences.

WE WILL forthwith discontinue contracting out for the purchasing of officer uniforms and pay out the uniform allowance directly to all uniformed officers less any monies already used by officers for uniforms during this current year.

WE WILL forthwith reimburse all officers retroactively for college courses taken and textbooks purchased for courses which are required by each respective institution to earn a degree in police science.

TOWNSHIP OF JACKSON
(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 the Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H.E. No. 81-12

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

In the Matters of

TOWNSHIP OF JACKSON,

Respondent,

-and-

JACKSON TOWNSHIP P.B.A.
LOCAL 168,

Charging Party.

Docket Nos. CO-80-127-53
CO-80-128-54
CO-80-150-55
CO-80-262-69

SYNOPSIS

In a Recommended Report and Decision by a Hearing Examiner of the Public Employment Relations Commission, the hearer considered a series of complaints involving the Township of Jackson and the Jackson Township PBA. It was alleged by the PBA that the Township unlawfully violated the Public Employer-Employee Relations Act when it unilaterally altered terms and conditions of employment by altering the terms of the contract without negotiations. The specific allegations concerned changes in sick leave policies, the representation of superior officers in the PBA unit, the alteration of the policy concerning the reimbursement for college-level courses and the alteration of the policy of reimbursement for uniforms. It was also alleged that the Township engaged in a campaign designed to undermine and interfere with the PBA's active participation in the exercise of protected rights. The hearer recommended that the Commission find that the Township did violated the Act when it implemented new procedures for the purchase of uniforms and for the reimbursement or course credits. It was recommended that the Commission find that the Board did not violate the Act when it altered the sick leave policy and the terms of representation of superior officers. The hearer further recommends that the Commission find that the Township violated the Act when it interrogated certain employees as to their preference of employee representation. It was recommended that the Commission not find that the Township engaged in a compaign designed to undermind and interfere with the PBA's active participation in the exercise of protected rights.

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.

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

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TOWNSHIP OF JACKSON,

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-and-

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CO-80-262-69

Appearances:

For the Respondent
Joseph F. Martone, Esq.

For the Charging Party
Abramson and Liebeskind, Labor Consultants
(Arlyne Liebeskind)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

A series of four Unfair Practice Charges were filed with the Public Employment Relations Commission (Commission) on four separate dates: November 16 and December 6, 1979, and January 17 and February 22, 1980, by the Jackson Township P.B.A. Local 168 (PBA). The charges stated five basic allegations.

(1) It was alleged the Township of Jackson (Township) entered into separate negotiations with the captains employed by the Township disregarding the PBA's designation as exclusive majority representative which constitutes a violation of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et

seq. (the Act). 1/

(2) It was alleged that the Township unilaterally implemented a new procedure in the granting of sick leave which violated the provisions of the collective negotiations contract without prior negotiations.

(3) It was alleged that the Township unilaterally implemented a new procedure for the purchase of uniforms in violation of the provisions of the contract, without prior negotiations.

(4) It was alleged that the Township was selectively refusing to process requests for course reimbursement regarding college-level courses, in violation of the contract without prior negotiations. It was alleged that the Township's action in (2), (3) and (4) were violative of the Act for they constituted unilateral changes in terms and conditions of employment. 2/

(5) It was alleged that the Township had engaged in a campaign designed to undermine and interfere with the PBA's active participation in the exercise of protected activities. In addition to the alleged events related to above, it is further alleged that the Township insisted that the PBA accept a raise for 1980 of 5%

1/ It was specifically alleged that the Township violated Subsections 5.4(a)(2), (5) and (7) of the Act. These subsections provide in pertinent part that employers, their representatives or agents are prohibited from "(2) dominating or interfering with the formation, existence or administration of any employee organization; (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."

2/ It was specifically alleged that such conduct violated Subsections (5) and (7) of the Act.

instead of the negotiated 8% increase and if they failed to accept a smaller raise then there would have to be layoffs of patrolmen. 3/

It appearing that the allegations of the Unfair Practice Charges if true may constitute unfair practices within the meaning of the Act, a consolidated Complaint and Notice of Hearing was issued on March 5, 1980. Pursuant to the Complaint and Notice of Hearing, hearings were held on April 7 and 8, 1980, at the Commission's offices in Trenton, New Jersey. Both parties were given the opportunity to present evidence, examine and cross-examine witnesses, argue orally and present briefs. Both parties filed briefs which were received by June 9, 1980.

I.

The Township and the PBA are parties to a collective negotiations agreement which was executed on May 22, 1979, was retroactive to January 1, 1979, and was to expire on December 31, 1980. The recognition clause of the contract recognizes the PBA as the sole and exclusive representative of all regular full-time officers except the chief of police.

In the fall of 1979 the Township entered into separate negotiations with Captains Borden Applegate and Dean Peterson. It

3/ It was alleged that this pattern of conduct violated Subsections (1), (3), (4) and (7) of the Act which prohibit 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."

was claimed by the PBA that these negotiations disregarded the PBA's exclusive jurisdiction under the contract. On November 27, 1979, the Township committee approved a new contract with the captains which directly contravened the terms of the contract's recognition clause.

Patrolman Dennis Baird, the current PBA President, testified that the first time he was informed of the negotiations between the Township and the captains was when the superior officer agreement was executed on November 27, 1979. At that time he brought this matter to the PBA's membership's attention. There was a unanimous decision to bring the instant unfair practice charge.

At the hearing, the Township called Det. Robert Farley as a witness. Farley was president of the PBA in 1978 and part of 1979.

He testified that in 1978 he was approached by Capt. Peterson and was asked if the PBA had any objections if the captains and lieutenants negotiated their own salaries. Farley said he saw no objection but he would have to bring this issue up with the membership of the PBA. 4/ The captain sent a letter to the Township which formally requested negotiations. A copy of this letter was sent to Farley in his capacity as PBA president. Farley testified that he brought this matter up before the PBA but at the time no action was taken by the PBA membership.

The PBA argues that Farley could not have granted the captains a severance, such action could only come from the membership.

4/ Tr. Vol. II, pp. 126 and 127.

I can find no reason not to credit Farley's testimony. He was asked as president of the PBA if the superior officers could form their own union and he told Capt. Peterson that he had no objection to this action but he would have to bring this matter before the PBA. Farley stated he did so. Moreover, the PBA never got back to the captains and this silence -- given that Farley initially stated he had no objections -- constituted a waiver, if not an implied acceptance of the severance, by the PBA of the right to represent the captains. Simply because Patrolman Baird was not informed of the captain's request does not prove that this request was not made. By failing to protest the proposed action in a reasonably timely manner, the PBA effectively waived its right to assert that the Township's action constitutes unilateral action violative of the Act. See, Coppus Engineering Corp., 195 NLRB No. 113, 79 LRRM 1449, Triplex Oil Refinery, 194 NLRB 500, 78 LRRM 1711 (1971); Medicenter, Mid-South Hospital, 221 NLRB 105, 90 LRRM 1576 (1975).

II.

Article 4 of the contract between the parties contains the following provisions:

> Section 2. An employee absent on sick leave shall submit acceptable medical evidence substantiating the illness and such employee's inability to perform any police duties. Employer may take any reasonable steps to verify the illness of an employee who is absent on sick leave.
>
> Section 3. The provisions of Section 20-23, Sick Leave of the Personnel Code, shall be applicable to all permanent full-time employees for illness, injury in line of duty or recouperation therefrom.

Section 20-34 of the Personnel Code relevant to the instant matter reads as follows:

> B. A certificate from the Township physician or the employee's own physician may be required as sufficient proof of the need for sick leave. In case of sick leave due to a contagious disease or exposure to same, a certificate from the Town ship Department of Health may be required.

Prior to July 20, 1979, the Township required that an employee absent for three consecutive days present a doctor's certificate upon return to active duty. On July 20th this policy was altered by a notice from Capt. Applegate which required that "officers who record three or more sick leave days within a six-month period shall be required to obtain a doctor's certificate certifying that the officer is fit to return to active duty." This order was modified by a subsequent directive on October 17, 1979, which stated that "The three days sick leave within six months will be used as a guide in requiring a doctor's certificate...each officer's sick leave record will be reviewed frequently. Those officers will be notified in advance when the sick leave reaches such proportions that a doctor's certificate will be required. Therefore the requirement for a doctor's certificate will be predicated upon the next occasion of sick leave following such written notice."

It was stipulated that the Township refused to negotiate these changes in sick leave policy. The PBA argues that the original sick leave policy constituted a past practice and any unilateral change in past practice constituted a violation of Subsection 5.4(a)(5) of the Act. In New Brunswick Board of Education, P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040, 1978), the Commission held that if the language of a contract is clear and unambiguous and the mutual intent of the

parties can be discerned from a simple reading of the contract, then said language is controlling over past practice.

Here, the PBA maintains that the phrase in Section 2 "acceptable medical evidence" could mean a note from a spouse, neighbor or pharmacist. A physician's note goes beyond the requirement of this language. However, Section 20-34 of the Township Personnel Code requires a note from a physician. Therefore it is argued the two provisions are in conflict and past practice is controlling over contract language. Before accepting the PBA's interpretation, an attempt should be made to harmonize the contractual provisions. Section 2 provides that employee shall submit acceptable medical evidence (emphasis supplied). This is a non-discretionary directive for evidence which may be less than a physician's note. The personnel code provides that a doctor's certificate "may be required" an action which is discretionary on the part of the employer (emphasis supplied). In such a light, the two provisions are not conflicting. The clear implication is that a physician's note is not required in every case but there may be times when nothing short of a doctor's note will satisfy the employer. Such an interpretation is not inconsistent with the Township's actions. The original policy was far more liberal than that required by the contract but it did not rise to the level of a binding past practice and the actions of the Township do not constitute unilateral changes within the meaning of the Act. It is noted that the contract between the parties has a provision for an advisory arbitration. The PBA brought this question of the change in sick leave policy to arbitration. The arbitrator recommended that the Township reinstitute the old policy. When the Township

refused, the PBA brought this charge. The arbitrator's advisory decision cannot be controlling here. N.J.A.C. 19:14-6.8 requires that in an unfair practices proceeding, the charging party shall "prosecute the case and shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." There is no such a burden before an arbitrator. See N.J.S.A. 2A:24-1 et seq. An arbitrator is free to fashion any award that does not violate the limited standards of N.J.S.A. 2A:24-8 and 9. [5/] "/A/rbitration is a process of infinite variety of form and operation. It is a process deliberately made subject to individual choice as to procedure and powers. As an adjudiative device, it is purposely tailored in each instance to fit the felt needs of one set of litigants rather than all litigants...." Thomas Christensen, Arbitration in the Enforcement of the National Labor Relations Act and the Future of Labor Arbitration in America, American Arbitration Association, New York (1976). When an arbitrator is confronted with two opposing, rational arguments as to contract

5/ 2A:24-8. Vacation of award; rehearing

The court shall vacate the award in any of the following cases:

a. Where the award was procured by corruption, fraud or undue means;

b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;

c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;

d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

When an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators. (continued)

interpretation, the arbitrator is free to decide on intangible factors such as the needs of the individual parties, the ongoing relationship, the preservation of the agreement or he may simply strike a compromise. The Commission has no such discretion. If the charging party, as in the instant case, fails to prove its position by a preponderance of the evidence, the charging party's case must fall. Since the standards to be applied by the Commission may be different, it is to be expected that the final disposition of the case may very well be different.

The Charging Party also introduced evidence of an alleged change in the policy concerning the use of vacation time for sick leave. Under Article VIII, Section 4 of the contract "both parties agree that the scheduling of vacations must be left to the employer..." This language clearly grants power to the employer to control when an employee may use his vacation leave. This change in the policy of the use of vacation time when an employee is out sick does not constitute a unilateral change in terms and conditions of employment within the meaning of the Act.

5/ (continued)

2A:24-9. Modification or correction of award; order

The court shall modify or correct the award in any of the following cases:

a. Where there was an evident miscalculation of figures or an evident mistake in the description of a person, thing or property referred to therein;

b. Where the arbitrators awarded upon a matter not submitted to them unless it affects the merits of the decision upon the matter submitted; and

c. Where the award is imperfect in a matter of form not affecting the merits of the controversy.

The court shall modify and correct the award, to effect the intent thereof and promote justice between the parties.

III.

The collective negotiations agreement contains a provision which provides for a $375 clothing allowance for all uniformed employees for the calendar year 1979 and a $425 allowance for the calendar year 1980. Such provisions have appeared in prior contracts for a number of years. Officers have purchased their own uniforms as they saw fit. On August 14, 1979, the Township adopted a resolution requiring all uniformed personnel to purchase uniforms from a specified dealer. Bids were solicited and received and contract awards were made to individual dealers. One particular dealer is in Wharton, New Jersey, approximately 80 miles from Jackson Township.

It is not disputed that no negotiations took place prior to the enactment of this resolution. The Township however maintains that it was strictly bound by the provisions of the State Local Public Contracts Law, N.J.S.A. 40A11-1 et seq. In substance, this law provides that where a municipality enters into a contract or series of contracts to furnish materials or supplies and the cost of such contracts exceeds $2500, then there must be public advertising for bids and contracts must be awarded on the basis of these bids. There is no dispute that the employer must act consistently with the requirements of the statute. But here the statute has been misapplied by the Township. 6/

The Township did not enter into a "purchase contract or agreement" for uniforms. The collective negotiations contract did

6/ The Commission may interpret State statutes outside its area of expertise in order to determine if an unfair practice has been committed. Board of Education of Bernards Township v. Bernards Township Education Association, 79 N.J. 311 (1979).

not say the Township must supply uniforms. Rather, the contract requires a sum of money be reimbursed to each employee as part of the compensation to said employees. As stated by the Charging Party, the clothing allowance is a fixed sum arrived at through the course of negotiations. It is a term and condition of employment, no different from a travel allowance, overtime or sick leave. Moreover, unlike a typical bidding situation, the clothing allowance is a fixed sum of money and no benefit accrues to the taxpayers from the Township's submission of this item to open bidding. Regardless of whether or not competitive bids are received, the financial obligation of the Township remains the same under the collective negotiations contract. Such employee compensation is not subject to the local public Contract Bidding Laws; it is subject to the Public Employer-Employee Relations Act and a unilateral alteration in terms and conditions of employment such as this is a violation of §5.4(a)(5) of the Act.

IV.

Since 1974 the contract between the parties provided that "tuition and textbooks will be paid by the Township upon successful completion of any course related to police science. Members are responsible for supplying receipts for vertification of purchases or tuition." It is not disputed that prior to January 22, 1980, all courses taken by police officers were approved for payment. On January 22, 1980, a notice was posted by the Township that "any course that the Township feels is not a police-related course will not be approved by the Township for reimbursement to the officer."

Subsequent to this notice the Township Administrator has reviewed each application for reimbursement and decided whether an individual course is to be reimbursed. Only courses in police science or criminal justice are now approved. Applications for courses in unrelated areas are automatically rejected even though said course may be necessary for a degree in police science. It was also brought out at the hearing that exceptions were made for four officers who were about to receive their degrees. These four officers were allowed to receive credit for any courses which are taken since they were about to graduate. 7/

The contract language in this matter is not explicit on its face. Does "any course related to police science" mean any course which is needed to earn a degree in that field of study or does it refer to specific courses in police science? As noted above in New Brunswick Bd. of Ed., supra, when the plain language of the contract does not reveal the intent of the parties, past practice may be used to define that intent. Here, since 1974, the Township has reimbursed patrolmen for all college-level courses. This past conduct clearly indicates the intent of the language is to impose upon the Township the obligation to pay for all courses needed to earn a degree in police science. When the Township both unilaterally and selectively

7/ In its brief the PBA argues that allowing certain officers to be treated differently than the rest of the unit should be found to be an independent 5.4(a)(3) violation. It was argued that the PBA was not aware that such actions were taken by the city until the Township Administrator testified and therefore such allegations could not have been part of its original pleadings. However, the time to have requested such an amendment would have been at the hearing when these facts were first made known to the PBA or at the very least a reasonable time prior to the submission of briefs in order to afford the Respondent an opportunity to address this issue in its own brief. To raise this issue at such a late hour is, under the circumstances, out of time and will not be considered as an independent violation.

altered their policy without negotiations they effectively violated section (a)(5) of the Act. It is noted that the contract does not impose an obligation to pay for any college classes, only those classes of an officer enrolled in a police science program which satisfy the particular college's requirements for a degree in police science.

V.

Finally, the PBA argues that the conduct of the Township discussed above, when coupled with a pattern of interference, threats, layoffs and employee interrogations, constitutes a violation of sections (a)(1), (3) and (4) of the Act. On February 12, 1980, the Township Mayor, Walter Rehack, met with Dennis Baird. The mayor stated that the Township had financial problems and asked if the PBA would be willing to accept only a 5% raise for 1980 and a $40 cut in their clothing allowance, even though the contract provided for an 8% raise. Baird claims that the mayor threatened that if the PBA did not go along with this cut in the pending wage increase, he would be forced to lay off a number of officers and that the mayor "was not going to forget the sneaky action by the PBA and that we would have to work together for quite some time and I'll never forget."

Rehack denies he made any threats at all at the meeting. He maintains that he stated only that cutbacks would have to be made as a whole in the Township. Ultimately, three police officers were laid off and several sergeants were reduced to patrolmen. The PBA contends that the layoffs were not necessary and moreover were moti-

vated by anti-union animus. They produced testimony which attempted to show how money could have been saved in the budget to preserve the positions of patrolmen and to further show that new positions were created by the Township which in fact increased expenditures.

I am satisfied however that the Township did have financial problems vis-a-vis the "Cap Law." Six Township employees besides the patrolmen were also laid off. The Township Department of Health was eliminated. Ninety thousand dollars was cut from the recreation department budget and several secretaries who were CETA employees were not picked up when their CETA grants expired. The Township's contribution to local hospitals was significantly reduced. The Township did hire an assistant administrator even though the position had been vacant for over a year but the vacancy was due to the death of the prior assistant administrator. There was credible testimony that a function of this position is searching for grants and financial aid. The net result of filling the position might in fact result in saving the Township significant amounts of money. The Township also wanted to promote four sergeants to the position of lieutenant even though the salary of a sergeant is some $1500 less than a lieutenant. The Township demonstrated that the third shift lacked proper supervision and there was a need for lieutenants. Further the real additional cost to the Township would be more like $600 or $700 per sergeant since the lieutenants did not get overtime and there would be a significant savings in overtime pay. 8/ The PBA introduced evidence

8/ There is also testimony about the Township could save money concerning the purchase of insurance. This testimony was inconclusive and the hearer could draw no inferences from said testimony.

that the Township was in negotiations with a union that represented white collar employees. In those negotiations, the Township offered a 5% increase for 1980, the inference being that money was available to the Township. To ask the Commission to infer that making a 5% offer to another unit in negotiations in a period of high inflation somehow demonstrates a bad faith on the part of the Township as to the PBA is presumptuous. If anything the offer shows a consistency on the part of the Township in its dealings with all its employees.

The statements which Baird claims were threats made by Rehack even if true cannot under the circumstances be considered threats in violation of the Act; nor can the layoffs of the three police officers. There was no evidence to indicate that these officers were even involved in any way in the PBA.

However, the Township conducted interviews with a number of sergeants who were in consideration for promotion to the rank of lieutenant. Those interviewed were asked if they were members of the PBA and, further, were asked if they would consider joining a new superior officers unit and leave the PBA.

In Fred Butler v. The Housing Authority of the City of Newark, P.E.R.C. 81-48, 6 NJPER (¶ , 1980), the Commission held "interrogation of employees on their union affiliations can, depending on the totality of the employer's conduct,interfere with an employee's protected rights under the Act. See also Cape May Board of Education, P.E.R.C. No. 80-37, 5 NJPER 411 (¶10214, 1980).

It is an employee's express right under the Act to be represented by an exclusive majority representative of his or her own choosing. Here, the implication of the questioning by the Township

is that the Township is considering whether to promote an employee to a position within the unit on the basis, at least in part, of whether that employee would be willing to be represented by a different unit. Accordingly, such an action constituted interference in the exercise of protected rights under the Act. An employer has no right to make a promotion within the unit on the basis of an employee's choice of exclusive representation. 9/ Accordingly, I will recommend that the Township has violated section 5.4(a)(1) of the Act by interfering with the exercise of an employee's right to freely and without fear of penalty or reprisal to form, join and assist any employee organization or refrain from any such activity.

None of the evidence presented by the PBA has demonstrated violations of subsections (3), (4) or (7) of the Act and I will recommend that the Complaint as it relates to these subsections be dismissed by the Commission.

Conclusions of Law

1) The Respondent Township violated N.J.S.A. 34:13A-5.4(a)(5) and derivatively 5.4(a)(1) when it unilaterally altered contractual provisions as to both uniform allowance and tuition reimbursement.

The Respondent Township further violated N.J.S.A. 34:13A-5.4(a)(1) when it questioned candidates for a promotion to lieutenant

9/ See N.J. Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285, 1979) wherein the standard for finding an independent (a)(1) violation is stated as

> "It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification."

as to their membership in the PBA and their willingness to join a superior officers association.

2) The Respondent Township did not violate N.J.S.A. 34: 13A-5.4(a)(2), (4) and (7) inasmuch as the Charging Party failed to adduce sufficient evidence of violation of these subsections.

Recommended Order

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Township cease and desist from:

1) Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by interrogating its employees as to their membership in the PBA and their willingness to join a superior officers association.

2) Refusing to negotiate in good faith with the PBA concerning the alteration of the clothing allowance and alteration of the standard for college tuition reimbursement.

B. That the Respondent Township take the following affirmative action.

1) Cease and desist from interrogating all employees as to the employee association membership and preferences.

2) Forthwith discontinue contracting out for the purchasing of officer uniforms and pay out the uniform allowance directly to all uniformed officers less any allotment already used by officers for uniforms during this current year.

3) Forthwith reimburse all officers retroactively for college courses taken and textbooks purchased for courses which are

required by each respective institution to earn a degree in police science.

4) Post at 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 a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other material.

5) 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 in the Complaint that the Respondent violated Subsections 5.4(a)(2), (4) and (7) of the Act be dismissed in their entirety.

Edmund G. Gerber
Hearing Examiner

DATED: October 3, 1980
Trenton, New Jersey

Recommended Posting

Appendix "A"

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 interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by interrogating our employees as to their membership in the PBA and their willingness to join a superior officers association.

WE WILL NOT refuse to negotiate in good faith with the PBA concerning the alteration of the clothing allowance and alteration of the standard for college tuition reimbursement.

WE WILL cease and desist from interrogating all our employees as to their association membership and preferences.

WE WILL forthwith discontinue contracting out for the purchasing of officer uniforms and pay out the uniform allowance directly to all uniformed officers less any monies already used by officers for uniforms during this current year.

WE WILL forthwith reimburse all officers retroactively for college courses taken and teztbooks purchased for courses which are required by each respective institution to earn a degree in police science.

WE WILL post at all places where notices to our 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 our authorized representative, shall be maintained by us for a period of at least sixty (60) consecutive days thereafter.

Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other material.

WE WILL notify the Chairman of the Commission within twenty (20) days of receipt what steps we have taken to comply herewith.

TOWNSHIP OF JACKSON
(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 the Chairman, Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.