

P.E.R.C. No. 92-47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BURLINGTON COUNTY BRIDGE COMMISSION,

Respondent,

-and-

Docket No. CO-H-90-103

BURLINGTON COUNTY BRIDGE POLICE
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Burlington County Bridge Commission violated the New Jersey Employer-Employee Relations Act by unilaterally changing the practice of including bereavement and personal time in determining if enough hours have been worked for employees to be eligible for overtime compensation. The Complaint was based on an unfair practice charge filed by the Burlington County Bridge Police Association.

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BURLINGTON COUNTY BRIDGE POLICE
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Ferg, Barron & Gillespie, attorneys
Stephen J. Mushinski, of counsel

For the Charging Party, Michael J. Sweeney, attorney

DECISION AND ORDER

On October 12, 1989, the Burlington County Bridge Police Association filed an unfair practice charge against the Burlington County Bridge Commission. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (5),^{1/} by unilaterally changing its method of determining eligibility for overtime compensation.

^{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."

On March 21, 1990, a Complaint and Notice of Hearing issued. On April 3, the employer filed its Answer claiming that it relied on specific contractual language concerning overtime pay.

On May 10, 1990, Hearing Examiner Elizabeth J. McGoldrick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by August 9, 1990.

On March 20, 1991, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 91-31, 17 NJPER 194 (¶22083 1991). She found that the employer's decision not to consider sick or vacation time in computing overtime compensation was authorized by the parties' collective agreement. As for the employer's exclusion of bereavement and personal time in determining overtime eligibility, she found that "the Association may be correct." She added, however, that the Association did not produce evidence that any officer was denied overtime and that the issue was more appropriately resolved through the negotiated grievance and arbitration procedures.^{2/}

On April 5, 1991, the Association excepted to the portion of the decision concerning the exclusion of bereavement and personal time. It claims that the Hearing Examiner recognized the validity of the Association's contentions and that the parties had agreed

^{2/} We note that the final step of the parties' negotiated grievance procedure is an appeal to the Bridge Commission.

that if the Association prevailed, specific computations over pay entitlements would be worked out between them or in another proceeding.

On April 12, 1991, the employer filed a reply. It confirms the Association's characterization of the parties' procedural agreement but adds that the agreement does not change the Hearing Examiner's analysis or legal conclusions.

We have reviewed the stipulated facts. We incorporate them here.

The parties' contract provides for overtime compensation whenever an employee physically works in excess of 12 hours in one day or 40 hours in one week. It further provides that hours charged to sick or vacation time will not be counted as hours physically worked. In August 1989, the employer changed a long-standing practice of considering sick, vacation, bereavement and personal time in determining if enough hours had been worked to be eligible for overtime compensation. The Association then filed this charge alleging that the employer violated the Act by "depriving employees of overtime pay in accordance with the undisputed past practice and past meaning attributed to the term 'physically worked.'"

In the absence of exceptions, we find that the employer's decision not to consider sick or vacation time in computing overtime was authorized by the contract and did not violate the Act. See Red Bank Reg. Ed. Ass'n v. Red Bank Reg. Bd. of Ed., 78 N.J. 122, 140 (1978).

We further find that the contract does not specifically authorize the employer to exclude bereavement or personal leave in calculating the basis for overtime. Accordingly, the employer violated subsections 5.4(a)(5) and, derivatively, (a)(1) by changing the parties' consistent practice in that regard.^{3/} Since the parties agreed that they would attempt to work out an agreement on payments to employees should a violation be found, we order only that the employer cease its unfair practice and post a notice of the violation.^{4/}

ORDER

The Burlington County Bridge Commission is ordered to:

A. Cease and Desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing the practice of including bereavement and personal time in determining if enough hours have been worked to be eligible for overtime compensation.

^{3/} Although this entire dispute might have been resolved through the negotiated grievance procedures, it has been fully litigated in the unfair practice forum. Under these circumstances, we will entertain these allegations that the employer has repudiated a contractual obligation by changing the parties' past and consistent practice in administering a disputed clause. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419, 423 (¶15191 1984).

^{4/} In the absence of exceptions, we dismiss the subsection 5.4(a)(3) allegation.

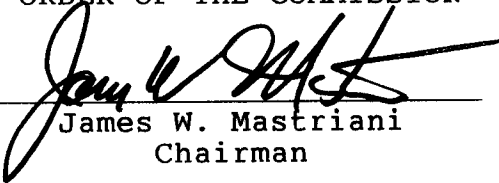
2. Refusing to negotiate in good faith with the Burlington County Bridge Police Association concerning terms and conditions of employment, particularly by unilaterally changing the practice of including bereavement and personal time in determining if enough hours have been worked to be eligible for overtime compensation.

B. Take this action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: October 17, 1991
Trenton, New Jersey
ISSUED: October 18, 1991



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 NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing the practice of including bereavement and personal time in determining if enough hours have been worked to be eligible for overtime compensation.

WE WILL NOT refuse to negotiate in good faith with the Burlington County Bridge Police Association concerning terms and conditions of employment, particularly by unilaterally changing the practice of including bereavement and personal time in determining if enough hours have been worked to be eligible for overtime compensation.

Docket No. CO-H-90-103

BURLINGTON COUNTY BRIDGE COMMISSION

(Public Employer)

Dated: _____

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, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

H.E. NO. 91-31

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

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-and-

Docket No. CO-H-90-103

BURLINGTON COUNTY BRIDGE POLICE
ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Burlington County Bridge Commission did not violate the New Jersey Employer-Employee Relations Act when it changed its practice of paying overtime to employees represented by the Burlington County Bridge Police Association. The Hearing Examiner concluded that the Bridge Commission had acted pursuant to its collective agreement and, therefore, did not violate the Act.

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.

H.E. NO. 91-31

STATE OF NEW JERSEY
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Appearances:

For the Respondent
Stephen J. Mushinski, Attorney

For the Charging Party
Michael J. Sweeney, Attorney

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On October 12, 1989 the Burlington County Bridge Police Association ("Association") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the Burlington County Bridge Commission ("Bridge Commission") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"). The Association alleges that the Bridge Commission

violated subsections 5.4(a)(1), (3) and (5) of the Act^{1/} by deviating from its past practice with respect to the payment of overtime to members of the Association's unit.

A Complaint and Notice of Hearing was issued on March 21, 1990. A hearing was held on May 10, 1990, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by August 9, 1990.

FINDINGS OF FACT

The parties jointly stipulate the following facts:

1. The Bridge Commission and Association are currently parties to a collective bargaining agreement entitled "Police Association Agreement" dated October 1, 1987 through September 30, 1990, referred to as J-1 in evidence.(T9)^{2/}

2. Article III, section 4, paragraph D of the agreement provides as follows:

^{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."

^{2/} "T-" indicates transcript of hearing on May 10, 1990. "J-1" refers to the parties collective agreement, effective October 1, 1987 through September 30, 1990.

Overtime will be paid whenever an employee physically works in excess of 12 hours within one calendar day or for any work hours physically worked in excess of 40 physically worked hours within one week.(T9-10, J-1)

3. Article III, Section 4, paragraph F of the agreement provides as follows:

At no time will hours charged to and paid to an employee as sick hours or vacation hours be counted as hours physically worked.(J-1,T10)

4. Identical language contained in the above referred to paragraphs 2 and 3 is also contained in prior collective bargaining agreements between the parties dated October 1, 1981 through September 30, 1984 and October 1, 1984 through September 30, 1987.(T10)

5. During the negotiations of the present agreement, the language set forth in paragraphs 2 and 3 was not an issue. It was merely carried to the succeeding contract.(T10)

6. Patrolmen, sergeants and full time dispatchers are paid on a two-week basis, working four 12-hour days during one week, and three 12-hour days during the second week.(T10-11)

7. Under the prior agreements, and until the first week of August 1989, if any employee covered by the agreement had a paid sick day, vacation day, bereavement leave or personal day, i.e., any authorized leave day, during such two week work periods, he or she was paid overtime at the rate of time and one-half for any nonscheduled work performed during the same two-week period.(T11-12)

8. In August of 1989, the Bridge Commission determined that the term "physically worked" in the agreement would be given its literal meaning so that the practice described in paragraph 7 above would no longer be followed.(T11)

ANALYSIS

The issue here is whether the Bridge Commission violated the Act when it changed the practice under which overtime payments

are made to members of the Association's unit. The Association alleges that the Bridge Commission unlawfully unilaterally changed a past practice on which the Association had come to rely. The Bridge Commission argues that no violation should be found because in changing its practice, it relied on specific language in J-1 which, it alleged, permitted the change implemented in August 1989. I find the Bridge Commission did not violate the Act since the change implemented in August 1989 was consistent with the language in the parties' collective agreement.

A public employer meets its negotiations obligation when it acts pursuant to its collective negotiations agreement. In Ramapo State College, P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985) the Commission explained:

"Because the policy of our Act favors negotiations before any change in terms and conditions of employment is made, a contractual waiver of a majority representative's right to negotiate such a change will not be found unless a contract clearly, unequivocally and specifically authorizes a unilateral change.
Id. at 582

A contractual waiver of a majority representative's right to negotiate will be found if the parties' collective agreement clearly and unequivocally authorizes the employer to make the pertinent changes. Red Bank Reg. Ed. Assn. v. Red Bank Reg. Bd. Ed., 78 N.J. 122, 140 (1978); State of N.J., P.E.R.C. No. 77-40, 3 NJPER 78 (1977); Deptford Bd. Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Dkt. No. A-1818-80T8 (5/24/82).

In applying the clear and unequivocal rule, the Commission has found waivers in numerous cases in which a collective agreement permitted the employer to make certain changes. In New Jersey Sports and Exposition Authority, P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987) the Commission found no violation where the Authority had changed its maintenance employees' workweek. There, the parties' contract authorized flexibility in workweek adjustments and no additional negotiations were required. In Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13202 1982) no violation was found where the contract specified one preparation period per day but did not specify total amount of time required for preparation and the Board decreased the preparation time of certain teachers by 50 minutes. The Commission held that past practice did not control the Board's action where contract had clear language regarding teachers' work hours, and teachers continued to receive one preparation period per day as contract required.

In another case, Randolph Twp. School Bd., P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980) the Commission stated:

It is not necessary to address any past practice of working less than that period of time . . . since the provision of the collective agreement controls over past practices where, as here, the mutual intent of the parties concerning work hours "can be discerned with no other guide than a simple reading of the pertinent language," citing New Brunswick Bd. of Ed., 4 NJPER 84 (¶4040 1978), mot. for recons. den., 4 NJPER 156 (¶4073 1978)

There, a charge that the employer unlawfully unilaterally changed a teacher's schedule was dismissed because the change was authorized

by the agreement. See also, Sussex-Wantage Reg. Bd. Ed., P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985)(Board did not violate duty to bargain requirement that teachers report to class 5 minutes sooner than longstanding practice because change in schedule was within contractual limits of workday); Old Bridge M.U.A., P.E.R.C. No. 84-116, 10 NJPER 261 (¶15126 1984)(sewer authority lawfully changed hours of certain employees assigned to work at night without paying them overtime where parties' contract expressly reserved to employer right to maintain flexible scheduling for personnel upon proper advance notice).

Until August 1989 the Bridge Commission actually paid overtime for non-scheduled work even where employees had not physically worked in excess of forty hours within one week due to having used sick, vacation, bereavement or personal leave. Thus, unit employees were granted greater overtime benefits than the written agreements provided. In August 1989 the Bridge Commission changed its practice and paid overtime only when an employee physically worked in excess of the hourly limits set forth in Article III, Section 4, Paragraphs D and F of J-1. This change was consistent with a literal reading of the agreement.

The result here is the same as in the above-cited cases. Article III clearly and unequivocally sets the precondition for overtime that none of the hours calculated as part of the 40 hours per week shall be hours not physically worked. Hours physically worked are defined at Section 4, Paragraph F. Standing alone,

Article III requires the Authority to pay overtime only when an employee physically works in excess of the hourly limits set forth in Section 4, Paragraphs D and F. Its prior overtime payment method was a mere gratuity. A prior practice cannot supercede the clear and unequivocal language in a collective agreement. Thus, the Authority had the right to unilaterally change its overtime payment practice to be consistent with the clear terms of its collective agreement.

The Association also alleged that the Bridge Commission violated subsection 5.4a(3) of the Act, but it did not present any facts to support this allegation.

In its post-hearing brief the Association argues the significance of the fact that the language regarding overtime pay was not an issue in the parties' last three negotiations. According to the Association, this fact distinguishes this case from other similar cases. The Association states it did not challenge the contract language at negotiations because it was satisfied with the existing longstanding practice. It further states that had the Bridge Commission signaled its intent to rely on the literal meaning of the contract, then the Association would have negotiated a modification in language. Under this reasoning the Bridge Commission had a duty to notify the Association of its intent to change its practice to conform with the contract before implementing the change. I find that this argument lacks merit. A past practice cannot supercede the plain meaning of a written contract; parties to

a negotiated agreement always have the right to rely upon their written terms. The amount of time that actual practice has varied from written terms does not matter. New Jersey Sports and Exposition Authority There is no evidence that the Association was deprived of its opportunities to negotiate modifications in language regarding overtime compensation. Having found no basis for the allegation that the Bridge Commission caused the Association to forego any challenge to the overtime clauses, I find the Association's equitable estoppel argument inapplicable.

Finally, as to the Bridge Commission's treatment of bereavement and personal leave in calculating the basis for overtime, the Association may be correct. However, it did not produce any evidence showing that any officer was denied overtime because these types of leave were not counted toward the required 40 hours per week. This issue is more appropriate for the parties' negotiated grievance and arbitration procedures.

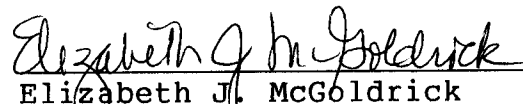
Accordingly, based upon the entire record and the above analysis I make the following:

CONCLUSION OF LAW

The Burlington County Bridge Commission did not violate N.J.S.A. 34:13A-5.4(a)(3), (a)(5), or derivatively, (a)(1), by changing the method of paying overtime to the Police Patrol Officers, Sergeants, or full time dispatchers represented by the Burlington County Bridge Police Association.

RECOMMENDATION

I recommend that the Commission ORDER that the Complaint be dismissed.


Elizabeth J. McGoldrick
Hearing Examiner

DATED: March 20, 1991
Trenton, New Jersey