P.E.R.C. NO. 82-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF BRIDGEWATER,

Respondent,

-and- Docket No. CO-80-367-16

BRIDGEWATER PUBLIC WORKS

Charging Party.

SYNOPSIS

In an unfair practice charge alleging that the Township had violated the Act when it unilaterally removed use of the Township facilities for employees' personnel use, the Commission concluded that use of such facilities could be deemed to be a term and condition of employment in the form of compensation. However, no violation was found in this instance due to the fact that employee use of these facilities was conditioned upon first obtaining Township approval, and there was never any obligation on the Township's part to grant approval.

An unfair practice was found by the Commission in regard to the Township's transfer of an employee from one position to another resulting in a $.25 per hour loss to that employee. The Township's reasons for the transfer were deemed to be pretextual and motivated by the employee's exercise of a protected right.

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TOWNSHIP OF BRIDGEWATER,

Respondent,

-and- Docket No. CO-80-367-16

BRIDGEWATER PUBLIC WORKS

Charging Party.

Appearances:
For the Respondent, Lanigan, O'Connell & Jacobs, Esqs.
(Daniel F. O'Connell, Esq.)

For the Charging Party, Fox and Fox, Esqs.
(Richard H. Greenstein, Esq.)

DECISION AND ORDER

On June 11, 1980, the Bridgewater Public Works Association (the "Association") filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the Township of Bridgewater (the "Township") had 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. (the "Act").

In particular, the Association alleges two separate unilateral incidents. First, it alleges that on January 23, 1980, the Township unilaterally eliminated a term and condition of employment for employees in the unit represented by the Association, namely, permitting said employees to use Township equipment on their own time for work on their own motor vehicles. The second alleged unfair practice concerns the transfer of one employee, Anthony Longo, from his position of Assistant Park Foreman to another job in the Road Department, which paid $.25 less per hour

in alleged reprisal for his exercise of protected rights. It is further alleged that the Township violated the Act when it failed to follow the provisions of the Township's Employee Handbook when it transferred Longo, as that Handbook requires the service of a written complaint upon any employee who is being "dismissed, suspended or demoted" and further provides for a hearing. All of these actions were alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4), (5) and (6) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on Septtember 9, 1980. Pursuant to the Complaint and Notice of Hearing, a hearing was held on February 6, 1981[2/] in Newark, New Jersey, before Hearing Examiner Alan Howe, at which time the parties were given an opportunity to examine witnesses, present evidence and argue orally. The parties filed post-hearing briefs by March 16, 1981.

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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (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. (6) Refusing to reduce a negotiated agreement to writing, and to sign such agreement."

2/ At this hearing, the Township moved to dismiss the allegations of Subsections 5.4(a)(2), (4) and (6) violations, which motion was granted.

The Hearing Examiner issued his Recommended Report and Decision, H.E. No. 8131, 7 NJPER ____ (¶_____ 1981), on March 17, 1981. He concluded that the Township's unilateral action in eliminating the use of Township equipment by the employees, on their own time to repair and maintain their motor vehicles was not a term and condition of employment and thus was not a violation of the Act. He also concluded that the transfer of Anthony Longo and the conduct of Cynthia Blodgett, the Director of Parks and Recreation who granted wage increases to employees represented by the Association, were not violations of Subsections (a)(1) and (3) of the Act. He recommended that the Commission dismiss the Association's Complaint in its entirety.

The Association has filed exceptions with a supporting brief to the report of the Hearing Examiner. We have reviewed the entire record in this matter and studied the exceptions filed by the Association and believe that further treatment of the issues involved in this case are warranted.

The two issues involved herein are unrelated and will be treated separately in this opinion. Turning first to the alleged unilateral change in a term and condition of employment, the record establishes that the Association was voluntarily recognized by the Township on October 11, 1979. Prior to this time, the Township had over the years consulted with employee representatives on matters involving terms and conditions of employment. For a period of ten years the Township had allowed its employees and elected officials to use the Township garage and its equipment to maintain and repair their privately owned vehicles during non-working hours, provided that a Township mechanic was on the premises

at the time and the foreman had granted permission. On January 23, 1980, the Township unilaterally and without prior negotiations with the Association, discontinued its past practice.

The reasons given by the Mayor for this unilateral withdrawal were that he had discovered that the Chief of Police had borrowed heavy equipment belonging to the Township for use by a relative, and that an elected Township official had appropriated Township gasoline for private use in her automobile. The Mayor also received from the Township attorney a memorandum advising him that the practice of allowing Township employees use of the garage facilities was in violation of the laws of the State of New Jersey. 3/

The Association has excepted to the Hearing Examiner's Report on several points. The most important point being that the Examiner ruled that the employees use of the Township garage facilities for personal use was not a term and condition of employment. Quoting from State of New Jersey v. State Supervisory

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3/ In particular, the statutes referred to by the Township attorney were the following: (a) N.J. Const., art 8, which states that public funds are to be raised and used only for public purposes, and loaning or donating money or property to any individuals is prohibited. (b) N.J.S.A. 40A:11-36 relating to a sale or other disposition of personal property not needed for public use. (c) N.J.S.A. 40A:12-13 relating to sales of real property, capital improvements or personal property; exceptions; procedure. (d) N.J.S.A. 40A:12-14 relating to leasing of county or municipal real property, capital improvements or personal property.

Employees Association, 78 N.J. 54 (1978), the Examiner noted that negotiable terms and conditions of employment were defined as "...those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy..." (78 N.J. at 67). Additionally, it was noted that in Board of Education of Englewood v. Englewood Teachers, 64 N.J. 1 (1973) the Supreme Court indicated that working hours, compensation, physical arrangements and facilities and customary fringe benefits were the essential components of terms and conditions of employment (64 N.J. 6, 7).

In holding that the employees' use of Township facilities for maintenance and repair of personal vehicles was not a term and condition of employment, the Examiner found that such a practice did not intimately and directly affect the work and welfare of the Township employees, especially when considering that the benefit did not arise in and out of the services performed during the work day. The Examiner also held that such a benefit was not earned by the employees and could not be considered as compensation. We do not adopt the Hearing Examiner's position that employee use of such Township facilities is not a term and condition of employment; however, we do uphold his conclusion that the Township did not commit an unfair practice in unilaterally withdrawing the use.

Although on its face, a connection between an employee's use of Township facilities and equipment to repair his own vehicle,

and the services he must perform during the workday, is not direct, this by and of itself is not enough to find the subject to be non-negotiable. It is well established that forms of compensation are terms and conditions of employment, notwithstanding the nexus between the benefit and the work performed. There is virtually no connection between an employee's child's dental care and that employee's work, and yet it is traditionally accepted that dental plans which include family coverage are terms and conditions of employment when those dental plans are a method of additional compensation.[4/] It is apparent that compensation, in any legal form, is a term and condition of employment regardless of the connection between the benefit and the work performed by an employee.[5/] Whether the form of compensation is typical or not is not a factor which should effect the negotiability of the benefit. For the past ten years the employees of the Township have been using the Township's garage and equipment to repair and maintain their own motor vehicles and thus have been reaping an economic benefit from this use which can well be considered a form of compensation.

This is not a novel consideration and the very same situation has been presented before the New York Public Employment Relations Board. In Westbury Water and Fire District, 13 PERB 3019 it was ruled that an employer had violated its negotiations obligation by discontinuing certain established employee services during negotiations for a successor contract. Those services which

4/ Township of Hillsdale, 4 NJPER 159 (1978).
5/ Jersey City Medical Center, 7 NJPER ___ (¶___ 1981); Pennsville Board of Education, 7 NJPER ____ (¶___ 1981); Burlington Ct. Col. Fac. Assoc. v. Bd. of Trustees, 64 N.J. 10 (1973).

the Board found to be terms and conditions of employment, included: (1) employee use of employer's shop facilities to repair their vehicles; and (2) employee's personal use of employer's tools and equipment. The Association has treated and considered the use of the garage and equipment as a form of compensation and representatives of the Association advised the Mayor that they would seek a greater increase in salary to offset the loss of this benefit. As a form of compensation, this subject falls within the ambit of a term and condition of employment.

Although we find that the employees use of Township facilities and equipment is a term and condition of employment in the form of compensation, the facts of this particular case require the Commission to find that the Township has done nothing contrary to the Act by its actions. As was mentioned earlier, in order for the employees to use the facilities, they each had to obtain prior approval from the garage foreman and a mechanic had to be on the premises at the time the facilities were being used. This practice of first gaining permission had been in existence since the benefit was first granted and at no time was this practice changed to allow the employees free use without approval. This fact was testified to by one of the original association organizers when he stated that the use of the garage had gotten a little bit out of hand, when employees would work on their automobiles without first getting a foreman's permission. A notice too had been placed on the job site long before the time the benefit was withdrawn reiterating the old rule that before an employee could use the facilities he first had to obtain permission from the

garage foreman. This rule was never challenged by the Association and use of the garage was acknowledged to be conditioned upon granted permission.

Since use of the garage and its equipment was always conditioned upon Township approval as set up in the rules, it would be contrary to reason to find that the Township could not unilaterally withdraw such use. At no time did the Township ever become obligated to supply this benefit to its employees and at no time did the employees feel that it was a benefit conferred upon them without the reservation of employer discretion. When certain employees did try and use the garage without gaining permission from the foreman, the Township quickly posted notices restating the rule and the employees complied. As long as the Township maintained control of the garage use, it was never raised to a form of benefit that the Township was obligated to continue. The Township then only removed a gratuity which had been enjoyed by the employees but was always within its control. The employees at all times recognized this control. For this reason, the Commission cannot find that the Township had committed an unfair practice in unilaterally withdrawing its permission of the employees' use of the garage and equipment.

The second issue herein involves the Association's allegations that the Township engaged in unfair practices in violation of N.J.S.A. 34:13A5.4(a)(1), (3), and (5) of the Act in that the Township transferred Longo from his position of Assistant Park Foreman to another job in the Road Department which paid $.25 less per hour in retaliation for his exercise of protected rights. The Association also claims that the Township acted illegally when it

failed to follow the provisions of the Township's Employee Handbook, which requires the service of a written complaint upon any employee who is being "dismissed, suspended, or demoted" or a thirty day notice of demotion, and further provides for a hearing.

Anthony Longo was hired in October 1971 as a mechanic in the Road Department. He was transferred to the Recreation and Parks Department in 1975. In June 1979, Longo was promoted to the position of Assistant Foreman with a salary increase of $.33 cents per hour. Thereafter Longo was active in organizing the seven Recreation and Parks Department employees into the Association. Longo at one time had been designated as one of the Association representatives that met with the Mayor in negotiations with the Township.

The Association has excepted to the Hearing Examiner's treatment of Longo's job displacement as a transfer and not as a demotion. The Association has also excepted to the Hearing Examiner's failure to consider in his report statements made by Longo in connection with a meeting that was held on March 5, 1980 between Cynthia Blodgett, the Director of Parks, and the employees of the Recreation and Parks Department.

On March 5, 1980, Longo was among the employees of the Recreation and Parks Department, who were summoned to a meeting with the Parks Director, Cynthia Blodgett. The Superintendent, Ernest Barack, passed out an envelope to each of the employees and instructed them not to open it until Blodgett had addressed the group. When Longo opened his envelope he found that he had a wage increase of $.10 cents per hour effective January 1, 1980. Longo then raised an objection to the meeting claiming that there should be an Association representative present. After the meeting the

employees met with the Association president, Richard Housten, to voice their displeasure with the meeting. Longo testified to the effect that this meeting created an impression in the minds of the employees that these wage increases were given to suggest that the employees did not need to be represented by the Association.

The Hearing Examiner found that there was never any mention by Blodgett to the employees that these increases were given as inducements to leave the Association, nor that the increases were conditional upon such an occurrence. The Township stated that the reason for this meeting was to change the job descriptions for the Parks employees which better suited their responsibilities and to create more levels of promotion for which their salaries could be increased. Under the old system apparently, the Parks and Road Departments both had the same job titles and salary increases, but the job titles and promotions were geared best for the Road Department and not for Recreation and Parks. In any event, however, the employees at the meeting complained to the Association president believing that Blodgett had offered them a better deal than they were getting as Association members and implying that they did not need the union. A meeting was immediately set up with the Mayor for March 7, 1980.

At the meeting on March 7, Blodgett and the Parks employees were present. Blodgett related what she had said at the March 5th meeting with the employees. She stated that she had had no intention of persuading the employees to leave the Association. She randomly chose two of the employees and stated to them, "Now you can't honestly sit there and say you heard me say, 'Leave the union'." The two employees indicated that she had not so stated.

Longo chose to remain silent until the end of the meeting when the Mayor heard him say that "they apparently had been intimidated" and that "she's got them scared to death." A memo was subsequently written to the Mayor by the Association president in which he apologized and indicated that before the meeting he had had the support of all Parks' employees and that he could not understand why they had apparently changed their minds or attitudes about their original meeting with Blodgett.

On April 21, 1980, Longo was summoned to a meeting with the Mayor and at that meeting Longo was informed that he was being transferred to the Department of Public Works (Road Department) as an operator, the following day. There were two reasons given by the Mayor for this action. The first being that Longo's position of Assistant Foreman was not necessary in that the Parks Department had a Director, a Superintendent, a Foreman, an Assistant Foreman and only five laborers, and the second being that Longo could not get along with his superiors and was disrupting the other employees' work performance.

While the Commission has ruled that transfers are non-mandatory subjects for collective negotiations,[6/] when a transfer is motivated by anti-union animus, the Commission has found the employer to have violated the Act.[7/] In order to analyze whether the Township violated the Act by changing Longo's job, it is essential that the Commission first discuss the meeting which was held on March 5, 1980 between the Director and the employees of

6/ Deptford Township Bd. of Ed., P.E.R.C. NO. 80-82, 6 NJPER 29 (¶11014 1980).
7/ County of Middlesex, H.E. No. 8118, 6 NJPER 596 (¶11295 1980).

the Recreation and Parks Department and the ramifications of such a meeting.

The Commission accepts the finding that at that meeting Blodgett, the Director, did not directly ask the employees to leave the Association or threaten them. The effect that this meeting had on those employees, however, is interesting and uncontradicted. At the meeting Longo protested that what was occurring was illegal and asked that an Association representative be present, and after the meeting every one of the employees met with the Association president to voice similar objections. The objections were strong enough so that a meeting was scheduled and held with the Mayor, which all the employees attended. After that meeting the President sent a memo to the Mayor apologizing for any embarrassment it may have caused Blodgett but still expressing disbelief that the employees had changed their minds.

Although Blodgett did not ask the employees to leave the Association or condition their receipt of the wage increases on such an occurrence, these facts alone are not sufficient to relieve the Township of liability for such an action. In NLRB v. Exchange Parts Co., 395 U.S.405, 84 S. Ct. 457, 55 LRRM 2098 (1964) the Supreme Court stated that "...the absence of conditions or threats pertaining to the particular benefits conferred would be of controlling significance only if it could be presumed that no question of additional benefits would arise in the future; and of course, no such presumption is tenable." 55 LRRM at 2100. The Parks' employees believed that they were being offered a benefit above what the Association could have negotiated for them. There is a delicate balance which must be maintained and it is an accepted

principle that, "The action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination."[8/] In order to protect employees and preserve the balance which could easily be tilted by an employer granting wage increases and other benefits, the Supreme Court has held that it is a violation of the essential principle of collective bargaining to allow an employer to negotiate with individual employees concerning wages, hours, and working conditions and disregarding the representative of those employees. The Court also stated that "...orderly collective bargaining requires that the employer not be permitted to go behind the designated representatives, in order to bargain with the employees themselves..."[9/]

It is uncontradicted that the Township offered wage increases to the Park's employees without negotiating with an Association representative. Furthermore, it is clear that an action such as this, without union participation, dangerously tips the scale and could very well induce employees to realign their favors. Longo's protest of the meeting was a protected action within the meaning of the Act and was rightfully expressed.

The preceding incidents serve as the background reasons why Longo was transferred out of the Recreation and Parks Department into the Public Works Department. This job change from one department was alleged to be a retaliation for his exercise of protected

8/ Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 64 S.Ct. 830, 14 LRRM 581, 585 (1944).

9/ Medo, at 584. See also NLRB v. Kotz, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962) as discussed approvingly in Galloway Twp. Bd. of Education v. Galloway Twp. Ed. Ass'n, 78 N.J. 25, 48 (1978).

rights, and it cannot be denied that the $.25 an hour deduction adversely affected his financial welfare. There were two reasons given to justify Longo's job change. The Mayor testified that one reason for the transfer was simply because there were "too many chiefs" in the Department and not enough laborers, and that work was not getting done. Longo was promoted to the position of Assistant Foreman in June of 1979 by Blodgett even though there had never been such a position before. The record indicates there really was no need for an Assistant Foreman either, but that that position was created only to warrant the pay increase that Longo received. At the time of the promotion there was no foreman and one was not appointed until January of 1980. Longo's superior, prior to Blodgett, had recommended that Longo be promoted and when Blodgett did so, she testified that the increase in pay warranted the position of Assistant Foreman rather than vice-versa.

It is also important to realize that there were "too many chiefs" for a period of almost four months before Longo's position was eliminated. If indeed a controlling reason for the job change was that there were too many superiors and not enough laborers, it would seem as though this would have surfaced before four months had elapsed. There was also Blodgett's testimony that the Assistant Foreman position was created only to coincide with Longo's pay increase. It then appears that Longo's responsibilities were no different than they were before his promotion. He was an Assistant Foreman not because there was a job which the Assistant Foreman had to perform, but because the Township wanted to justify the pay increase it felt he deserved.

The second reason given for Longo's job change was that he could not get along with either Blodgett or Barack, the Superintendent. There is no record of this, however, except testimony by the Mayor that he had heard about Longo's uncooperative attitude at the time he was running for office prior to July of 1979. Additionally, Harold Klein, the business administrator for the Township, testified that he had heard that there were some problems between Barack and Longo and that the problems had existed right from the beginning. During this period, however, Longo was promoted so that he could receive a wage increase. There has also never been a written complaint about Longo's work performance or his failure to get along with his supervisors. These rumors of problems seem inconsistent with the fact that Longo was actually promoted by Blodgett and Longo's record is devoid of any complaints.

Because of the foregoing reasons, the Commission finds the Township's business justifications for Longo's removal to be pretextual and not controlling. The timing of Longo's transfer in view of his work record and his promotion, in relation to his activities involving the meeting of March 5, 1980 is sufficient for the Commission to infer that the Township was motivated by anti-union animus. Longo also testified that he had taken part in advising his fellow employees of their right to demand overtime when a job they were instructed to do would require them to work beyond the normal quitting time and this was offered as an example of why Longo believed his superiors felt him to be uncooperative. Other than offering conclusions that Longo was "uncooperative" and "hamstrung" the department's operations, no specific evidence was offered by the Township to support its conclusions.

Finally, the manner in which Longo's transfer was treated merits some discussion. He was never advised that there were charges filed against him that would give rise to a demotion and he was never given any kind of notice that his position was being abolished for whatever reason, prior to the meeting of April 21, 1980. This does appear to be contrary to the procedure established in the Township's Employee Handbook and is further evidence to support the claim that the Township's action was discriminatory. The Handbook requires that an employee receive thirty days prior notice when his position is being abolished as was the Assistant Foreman position in the present case, and yet Longo was never so informed. The Township's failure to follow its own published process as it concerned Longo is suspect, and there has been no reason proffered for neglect of the process.

For the foregoing reasons, the Commission finds that the Township violated sections 5.4(a)(3) and (a)(1) when it transferred Longo from Assistant Foreman in the Recreation and Parks Department to Operator in the Road Department at a reduction of $.25 per hour.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that that portion of the Complaint alleging that the Respondent violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it withdrew its approval of allowing employees to use garage facilities and equipment for personal use, be dismissed.

IT IS FURTHER ORDERED that the Respondent, Townsip of Bridgewater:

A. Cease and desist from interfering with, restraining

or coercing its employees in the exercise of the rights guaranteed to them by this Act by transferring and demoting employees in retaliation for their exercise of those rights.

B. Take the following affirmative action:

1. Make Anthony Longo whole by paying him the difference between the wages he received since his transfer in April 1980 and the wages he would have received had he not been so transferred, together with interest at a rate of 8% per annum from the date of the transfer, and then continuing him at the wage rate he would have received had he not been transferred, including increases, if any, to which he would have been entitled.[10/]

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

3. Notify the Chairman of the Commission within

10/ In his testimony Mr. Longo indicated he had no preference for his old job or his present one. Additionally, since the record establishes that the title of Assistant Foreman was created only to justify his wage increase with no apparent change in job status, it does not appear that ordering Mr. Longo transferred back to Parks and Recreation is required to effectuate the purposes of the Act. N.J.S.A. 34:13A-5.4(c).

twenty (20) days of receipt what steps the Respondent Township has taken to comply herewith.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

The vote was as follows on Issue No. 1 (use of garage):
Chairman Mastriani, Commissioners Hartnett, Newbaker, Parcells and Suskin voted in favor of this issue. Commissioner Hipp voted against this issue. Commission Graves abstained.

The vote on Issue No. 2 (Longo matter) was as follows:
Chairman Mastriani, Commissioners Graves, Hartnett, Hipp, Newbaker, Parcells and Suskin voted in favor of this issue. None opposed.

DATED: Trenton, New Jersey
July 21, 1981
ISSUED: July 22, 1981

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 this Act by transferring and demoting employees in retaliation for their exercise of those rights.

WE WILL make Anthony Longo whole by paying him the difference between the wages he received since his transfer in April 1980 and the wages he would have received had he not been so transferred, together with interest at a rate of 8% per annum from the date of the transfer, and then continuing him at the wage rate he would have received had he not been transferred, including increases, if any, to which he would have been entitled.

TOWNSHIP OF BRIDGEWTATER

(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. 81-31

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

In the Matter of

TOWNSHIP OF BRIDGEWATER,

Respondent,

- and -

Docket No. CO-80-367-16

BRIDGEWATER PUBLIC WORKS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find thatthe Township did not violate Subsections 5.4 (a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act. The Association had alleged that the Act was violated when the Mayor on January 23, 1980 unilaterally discontinued the practice of permitting Township employees to utilize Township equipment and facilities for the servicing and maintenance of private automobiles on non-work time. The Hearing found that this was not a "term and condition of employment" within the meaning of decisions of the New Jersey Supreme Court. The Association had also alleged that the Township violated the Act when its Director of the Recreation and Parks Department at a meeting with employees sought to undermine the Association by having said employees resign therefrom. The Hearing Examiner did not credit the testimony of Association witnesses that this occurred. Finally, the Association alleged that the Mayor discriminatorily transferred an employee from the Recreation and Parks Department to the Department of Public Works in violation of the Act. The Hearing Examiner concluded that the Township exercised an inherent managerial prerogative in making the transfer and did, therefore, 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.

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BRIDGEWATER PUBLIC WORKS ASSOCIATION,

Charging Party.

Appearances:

For the Township of Bridgewater
Lanigan, O'Connell & Jacobs, Esqs.
(Daniel F. O'Connell, Esq.)

For the Bridgewater Public Works Association
Fox & Fox, Esqs.
(Richard H. Greenstein, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on June 11, 1980 by the Bridgewater Public Works Association (hereinafter the "Charging Party" or the "Association") alleging that the Township of Bridgewater (hereinafter the "Respondent" or the "Township") had 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. (hereinafter the "Act"), (1) in that the Respondent on January 23, 1980 unilaterally eliminated an alleged term and condition of employment of employees in the unit represented by the Association, namely, permitting said employees to use Township equipment on their on time for work on their on motor vehicles; (2) in

that the Respondent in reprisal for the exercise of rights guaranteed by the Act by Anthony Longo, transferred Longo from his position of Assistant Park Foreman to another job in the Road Department, which pays $.25 less per hour; and (3) in that the Respondent in transferring Longo, supra, failed to follow the provisions of Respondent's Employee Handbook, which requires the service of a written complaint upon any employee who is being "dismissed, suspended, or demoted" and further provides for a hearing; all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1),(2),(3),(4),(5) and (6) of the Act. 1/

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices, within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 9, 1980. Pursuant to the Complaint and Notice of Hearing, a hearing was held on February 6, 1980 2/ in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The parties filed post-hearings briefs by March 16, 1981.

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.

"(2) Dominating or interfering with the formation, existence or administration of any employee organization.

"(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.

"(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.

"(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

2/ The Hearing was orginally scheduled to commence on October 28, 1980, However, at the request of the Charging Party, the hearing was rescheduled to November 7, 1980. As a result of the illness of the Hearing Examiner during the month of November the first mutually available date for hearing was February 6, 1981.

Respondent moved to Dismiss the allegations of Subsection 5.4(a)(2), (4) and (6) violations, which was granted.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Township of Bridgewater is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Bridgewater Public Works Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The Township voluntarily recognized the Association as the exclusive collective negotiations representative for all hourly public works and park maintenance employees in October 1979 pursuant to the rules and regulations of the Commission (see CP-6). 3/

4. Prior to the recognition by the Township of the Association, supra, representatives of the Township met with representatives of its employees monthly over the years on matters involving terms and conditions of employment, particularly in connection with the salary ordinance adopted annually by the Township's Council.

5. After the Township's recognition of the Association in October 1979, meetings of the parties continued as negotiations, principally in connection with the salary ordinance to be adopted for 1980. The first such meeting was held on December 5, 1979, at which time representatives of the Association made a demand for a 7% salary increase, a cost-of-living adjustment and other fringe benefits including a dental plan. A second meeting occured on January 4, 1980 where the same subject matter was discussed without agreement being reached on any specific matter.

3/ The Association became incorporated under date of July 23, 1980 (CP-1).

6. Under date of January 23, 1980 the Mayor, John P. Morrissey, posted a Notice "To all employees and elected officals of Bridgewater Township," which provided, inpart, that "Effective immediately there will be no borrowing, loaning or use of any kind of Township equipment, tools or supplies, except if the use is specifically used for Township purposes. This includes the servicing and maintenance of privately owned vehicles in or near Township garages..." (CP-2). This represented a change in a long-standing practice whereby Township employees were permitted, after obtaining express permission, to utilize Township equipment and the Township garages for the repair of personal vehicles after working hours (see, for example, CP-3).

7. At a meeting of the parties on January 25, 1980 the Mayor verbally amplified on his Notice of January 23rd, stating that no longer could Township equipment and the garages be used for personal use after working hours. Thereafter, the Mayor obtained a legal opinion from the Township Attorney, which indicated that the prior practice of the Township had been in violation of the laws of the State of New Jersey (R-1). The Mayor testified that his decision and the Notice of January 23rd had been precipitated by discovery that the Chief of Police had borrowed heavy equipment belonging to the Township for use by a relative and that an elected Township offical had appropriated gasoline belonging to the Township for use in a private automobile. The Association witnesses acknowledged that they were also aware of Township employees repairing vehicles belonging to third parties, as to which the employees benefited by charging for the services performed by them. 4/

8. Anthony Longo was hired in October 1971 as a mechanic in the Road Department. After being transferred to the Recreation and Parks Department in

4/ On February 11, 1980 the Association met with the Mayor and others at which Exhibit CP-2 was discussed. The Association proposed self-insurance with each employee assuming any risk, and argued the hardship that the withdrawal of use of Township equipment would present. When the Mayor refused to change his position the Association representatives stated they would seek a greater increase in salary to offset the loss of this "benefit."

1975, Longo was promoted in June 1979 to position of Assistant Foreman with a salary increase of 33 cents per hour. Thereafter Longo was active in organizing the seven Recreation and Parks Department employees into the Association. Longo was designated as one of the Association representatives that met with the Mayor in negotiations with the Township.

9. On March 5, 1980 Longo was among the employees of the Recreation and Parks Department, who were summoned to a meeting with Cynthia Blodgett, the Director. The Superintendent, Ernest Barack, passed out an envelope to each of the employees assembled with instructions not to open it at that time. According to Longo, Blodgett said that the men would receive more money if they "stick with me". 5/ When Longo opened his envelope he found that he had a wage increase of 10 cents per hour effective January 1, 1980 (CP-4). Longo testified that he told Blodgett that what she was doing was illegal.

10. On the same day, March 5, 1980, the employees of the Recreation and Parks Department went to the President of the Association, Richard A. Housten, complaining as to what Blodgett had said at the meeting, supra. Housten immediately set up a meeting with the Mayor for March 7, 1980.

11. At the meeting on March 7th Blodgett was present. Blodgett related what she said at the March 5th meeting with the employees of the Recreation and Parks Department, supra. She stated that she had no intention of persuading the employees to leave the Association. Then Blodgett, at random, singled out two employees and asked if they had any disagreement as to her version of what had transpired at the meeting. The two employees indicated they did not. Longo,

5/ Although there were some indication from the Charging Party witnesses that Blodgett had stated that the men should resign from the Association, Blodgett testified credibly that she did not make any such statement and that her only concern was that the job descriptions in the Recreation and Parks Department be changed to provide more steps for promotion and advancement vis-a-vis the Department of Public Works.

who was at this meeting, chose to remain silent.

12. Under date of March 10, 1980 Housten, as President of the Association, sent a memo to the Mayor apologizing "...for the possible embarrassment that we may have caused you because of the meeting we asked for with Cindy Blodgett..." (R-2). The thrust of Housten's memo was that in the future any "grievances" of employees would be reduced to writing before bringing any matter before the Mayor.

13. On April 21, 1980 Longo was summoned to meeting with the Mayor by the Business Administrator, Harold M. Klein. At the meeting the Mayor told Longo that he was being transferred to the Department of Public Works (Road Department) as an operator the following day because there was no further need for an Assistant Foreman in the Recreation and Parks Department. The Mayor testified credibly that there were "too many chiefs." 6/ Longo testified credibly that the Mayor also said the transfer was because Longo could not get along with Barack and Blodgett. Longo reported as assigned on April 23, 1980 with a 25 cents per hour reduction in salary. 7/ Longo was replaced one month later by a laborer in the Recreation and Parks Department.

THE ISSUES

1. Did The Township violate Subsection (a)(5) of the Act, and derivatively Subsection (a)(1), when the Mayor under date of January 23, 1980 posted a notice unilaterally discontinuing the practice which permitted employees to utilize Township equipment and facilities for the servicing and maintenance of privately owned vehicles?

2. Did the Township violate Subsection (a)(3) of the Act, and derivatively Subsection (a)(1), by the actions and conduct of Cynthia Blodgett at a meeting of Recreation and Parks Department employees on March 5, 1980 and by the actions and

6/ The Department had had a Director, a Superintendent, a Foreman, an Assistant Foreman (Longo) and only five employees.

7/ Exhibit CP-5, the Township's Employee Handbook was received in evidence for the purpose of indicating that Longo did not receive a written complaint regarding "demotion" and did not receive a thirty-day notice of "demotion."

conduct of the Mayor on April 21, 1980 when Anthony Longo was summarily transferred to the Department of Public Works (Road Department)?

DISCUSSION AND ANALYSIS

The Respondent Township Did Not Violate Subsections (a)(1) and (5) Of The Act When The Mayor On January 23, 1980 Posted a Notice Unilaterally Discontinuing The Practice Of Permitting Employees To Utilize Township Equipment and Facilities For The Servicing and Maintenance Of Privately Owned Vehicles

The threshold inquiry as to whether or not the Mayor's action of January 23, 1980 constituted an unfair practice is whether or not the "practice" of permitting employees to utilize Township equipment and facilities to service and maintenance privately owned vehicles was a "term and condition of employment." The New Jersey Supreme Court in State of New Jersey v. State Supervisory Employees Association, 78 N.J. 54 (1978) defined negotiable terms and condition of employment as "...those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy..." (78 N.J. at 67). The Court then went on to state that it had in Bd. of Ed. of Englewood v. Englewood Teachers, 64 N.J. 1 (1973) indicated that working hours, compensation, physical arrangements and facilities and customary fringe benefits were the essential components of terms and conditions of employment (see 64 N.J. at 6, 7).

Applying the foregoing test of "terms and conditions of employment" as delineated by the New Jersey Supreme Court to the instant case, the Hearing Examiner finds and concludes that the Township's "practice" of permitting its employees to utilize Township equipment and facilities for the servicing and maintenance of privately owned vehicles is not a negotiable term and condition of employment.

It should be noted that this alleged "term and condition of employment"

does not "...intimately and directly affect the work and welfare of public employees...," particularly since the benefit to Township employees does not arise in and out of the services performed during the workday. In other words, it is distinguishable from such benefits as break time, lunch periods or wash-up time at the end of the workday. An employee of the Township does not earn a specified number of minutes or hours use of Township facilities and equipment on non-work hours as measured against the number of hours of service rendered to the Township for which employees are compensated. It can in no way be considered as deferred compensation. 8/

The Hearing Examiner, in reaching this conclusion, takes note of the fact that the Township was without legal authority to permit its employees to use Township equipment and facilities for the servicing and maintenance of privately owned vehicles. The Mayor belatedly obtained from the Township's attorney a legal memorandum, which clearly indicated that the Township's past permission of this activity was ultra vires. The Township could have been sued by the taxpayers for this abuse of the use of Township equipment and facilities.

Accordingly, the Hearing Examiner must recommend dismissal of the alleged Subsection (a)(5) violation of the Act when the Mayor under date of January 23, 1980 unilaterally discontinued the foregoing prior practice regarding use of Township equipment and facilities.

The Respondent Township Did Not Violate Subsections (a)(1) and (3) of the Act By The Conduct Of Cynthia Blodgett On March 5, 1980 And Of The Mayor On April 21, 1980 In Transferring Anthony Longo To The Department of Public Works

8/ Compare the receipt by public employees of tuition payments for attending school during non-work hours which, the Hearing Examiner concludes, is a quantified measure of compensation for services rendered during the workday which, instead of being paid to the employee as salary for hours work is paid out separately as a tuition stipend. Cf. Township of Hillside, P.E.R.C. No. 78-39, 4 NJPER 159 (1978).

The Hearing Examiner finds and concludes that what transpired at the meeting of employees of the Recreation and Parks Department, which Cynthia Blodgett convened on March 5, 1980, did not interfere with, restrain or coerce employees in the rights guaranteed to them by the Act. Notwithstanding that employees such as Longo, who attended the meeting, were advised of the receipt of a wage increase retroactive to January 1, 1980, Blodgett did not in any way seek to induce the said employees to resign from or cease being represented by the Association. It is noted that Housten apologized to the Mayor subsequent to the meeting for the lack of support which he received at the meeting on March 7, 1980 where Blodgett, with the concurrence of two employees present, stated that she had no intention of persuading the employees to leave the Association. The mere fact that employees were given a unilateral increase, which may well have been for merit and in no way a violation of the bilateral obligation to negotiate with the Association, does not persuade the Hearing Examiner that the Township violated the Act.

Finally, the Hearing Examiner finds and concludes that the Township by its Mayor did not violate the Act, as alleged, when on April 21, 1980 Longo was transferred from the Recreation and Parks Department to the Department of Public Works (Road Department). This was clearly the exercise of an inherent managerial prerogative within the meaning of the New Jersey Supreme Court's decision in Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978).[9/] An objective look at the Recreation and Parks Department indicates clearly that it was top heavy in supervision (see footnote 6, supra). There were clearly, as the Mayor testified, "too many chiefs." Also, Longo had a problem in getting along with Barack and Blodgett, which the Mayor took into consideration in transferring Longo to the Department of Public Works (Road Department). The Township's conduct in transferring Longo was thus

9/ Accord, Deptford Township Board of Education, P.E.R.C. No. 80-82, 6 NJPER 29 (1980).

not a violation of the Act.

Accordingly, the Hearing Examiner will recommend dismissal of these allegations in the Complaint.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Respondent Township did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) by its conduct herein.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed at its entirety.

DATED: March 17, 1981
Trenton, New Jersey

Alan R. Howe
Hearing Examiner