P.E.R.C. NO. 80-89

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF DOVER BOARD OF HEALTH,

Respondent,

Docket No. CO-79-247-90

-and-

LOCAL 2279, COUNCIL 71, AFSCME, AFL-CIO,

Charging Party.

SYNOPSIS

In an unfair practice case the Commission dismisses a complaint filed against the Township of Dover which alleged that the Township had violated the Act by changing the hours of the dog warden from staggered hours to a regular work schedule. The Commission found that the contract between the parties permitted the employer to change the hours of work and furthermore that, in this case, the employer had not implemented any change in hours.

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Charging Party.

Appearances:
For the Respondent, Murray, Granello and Kenney, Esqs. (Mark J. Blunda, Esquire)

For the Charging Party, Sterns, Herbert & Weinroth, Esqs. (John M. Donnelly, Esquire)

DECISION AND ORDER

Local 2279, Council 71, AFSCME, AFL-CIO (the "Charging Party" or "AFSCME") filed an unfair practice charge with the Public Employment Relations Commission on March 16, 1979 alleging that the Township of Dover Board of Health (the "Respondent" or the "Board") had violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., (the "Act"). Pursuant to a Complaint and Notice of Hearing issued on May 15, 1979, a hearing was held on August 7 and September 11, 1979 before Commission Hearing Examiner Alan R. Howe, who, following receipt of briefs by October 19, 1979, issued his Recommended Report and Decision[1/] on November 1, 1979. He concluded the Respondent had not violated the Act and

1/ H.E. No. 80-18, 5 NJPER ____ (¶____ 1980). A copy of that report is attached hereto and made a part hereof.

recommended dismissal of the Complaint. Exceptions were filed by the Charging Party[2/] to which the Board of Health responded.

The case centers around a decision by the Board of Health to change the hours of work for the Dog Warden, Sydney R. Daniels, from staggered hours to a regular 8:30 A.M. to 4:30 P.M. work schedule. From the time of the Dog Warden's initial appointment on August 6, 1973 and throughout his employment which terminated in June of 1979, the issue of his hours was a subject of discussion because Daniels was employed as a school bus driver in a nearby district, making it impossible for him to work 8:30 A.M. to 4:30 P.M. during the school year.

The Hearing Examiner found that the Respondent passed a resolution on November 20, 1978 which provided that the warden would work a regular, fixed schedule effective January 1, 1979, with no change in the total number of hours worked. The Hearing Examiner did not find that this change violated the employer's obligation to negotiate the proposed change since the collective negotiations agreement between the parties permitted the Respondent to implement a change in hours of work after notifying the Charging Party and the affected employee. In reaching this decision, the Hearing Examiner relied on the Commission's recent decision in In re Rutgers, The State University, P.E.R.C. No. 80-26, 5 NJPER 391 (¶10201 1979) wherein we held that the employer did not violate the

2/ The Charging Party requested oral argument before us. The request is denied. This matter was fully litigated before the Hearing Examiner and the parties had an opportunity to argue orally at that time.

Act by unilaterally changing workshifts because the parties had negotiated an agreement that allowed the employer to make such change and that Rutgers had met its contractual obligation. Thus, there was no further negotiations obligation.

We agree with the Hearing Examiner in this case that the Respondent has met its contractual obligation and there was no further negotiations obligation.[3/]

The Charging Party objects to the Hearing Examiner's finding that the Board fulfilled its negotiations obligation because it did not negotiate to impasse additional compensation for the changed hours. Again, we agree with the Hearing Examiner that, in this case, the Respondent's negotiations duty prior to implementation of the change was notice.

We have reviewed the entire record in this matter and the exceptions and adopt the findings of fact and conclusions of law contained within the Hearing Examiner's Recommended Report and Decision. Therefore, the Unfair Practice Charge will be dismissed.

3/ Charging Party excepts to the Hearing Examiner's determination that the change was not implemented. The charge was filed March 16, 1979 and no change was implemented at that time. Further, the contract in effect at that time provided that the employee and union shall be notified "in advance of change". Hence, we agree with the Hearing Examiner that even assuming arguendo the change had been implemented, the employer would have fulfilled its negotiations obligation.

ORDER

For the foregoing reasons and upon the entire record herein, IT IS HEREBY ORDERED that the Unfair Practice Charge be dismissed in its entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hipp, Hartnett, Parcells and Newbaker voted for this decision. Commissioner Graves voted against this decision.

DATED: Trenton, New Jersey
January 17, 1980
ISSUED: January 18, 1980

H. E. No. 80-18

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

In the Matter of

TOWNSHIP OF DOVER BOARD OF HEALTH,

Respondent,

- and -

Docket No. CO-79-247-90

LOCAL 2279, COUNCIL 71, AFSCME, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices filed by the Charging Party against the Respondent. The Charging Party had alleged that the Respondent unilaterally changed the hours of work of the Dog Warden by resolution effective January 1, 1979. The Dog Warden had prior to January 1, 1979 worked on a staggered schedule and the Respondent had proposed changing that to a fixed schedule of 8:30 a.m. to 4:30 p.m. with no change in the total number of hours worked. The charge of unfair practices alleged that the Respondent not only refused to negotiate over the proposed change but unilaterally implemented it, all of which was alleged to be a violation of Sections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act.

The Hearing Examiner found that under the collective negotiations agreement in effect between the parties there was no obligation on the part of the Respondent to "negotiate" with respect to the proposed change in the hours of work of the Dog Warden. Further, even if it was assumed that there was an obligation to negotiate a proposed change in hours, there could be no violation of the Act since the proposed change in hours was never implemented.

In reaching the initial and basic decision that there was a contractual provision which permitted the Respondent to implement a change after notifying the Charging Party and the affected employee, the Hearing Examiner relied upon the Commission's recent decision in Rutgers, The State University, P.E.R.C. No. 80-26, 5 NJPER 391 (1979).

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. 80-18

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

In the Matter of

TOWNSHIP OF DOVER BOARD OF HEALTH, 1/

Respondent,

- and -

Docket No. CO-79-247-90

LOCAL 2279, COUNCIL 71, AFSCME, AFL-CIO,

Charging Party.

Appearances:

For the Township of Dover Board of Health
Murray, Granello and Kenney, Esqs.
(Mark J. Blunda, Esq.)

For Local 2279, Council 71, AFSCME, AFL-CIO
Sterns, Herbert and Weinroth, Esqs.
(John M. Donnelly, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 16, 1979 by Local 2279, Council 71, AFSCME, AFL-CIO (hereinafter the "Charging Party", the "Council" or the "Local") alleging that the Township of Dover Board of Health (hereinafter the "Respondent" or the "Board") 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"), in that the Respondent by resolution effective January 1, 1979 unilaterally changed the hours of work of the Dog Warden from an irregular schedule to a fixed schedule of 8:30 a.m. to 4:30 p.m., there being no change in the number of hours worked, and that thereafter the Respondent refused to negotiate over the change and has unilaterally implemented it, all of which is alleged to be a viola-

1/ At the hearing, counsel for the Charging Party amended the charge of unfair practices by deleting as a Respondent the Township of Dover.

lation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act. [2/]

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 May 15, 1979. [3/] Pursuant to the Complaint and Notice of Hearing, hearings were held on August 7 and September 11, 1979 [4/] in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties argued orally and filed post-hearing briefs by October 19, 1979.

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 oral argument and 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 Dover Board of Health is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Local 2279, Council 71, AFSCME, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The Charging Party was certified by the Commission on April 4, 1973 for a unit of white collar employees employed, inter alia, by the Respondent. The two most recent collective negotiations agreements were received in evidence as Exhibits J-1 and J-2, those being respectively the January 1, 1978 to December 31,

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2/ These Subsections 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.
"(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."

3/ An Answer was filed by Steven S. Glickman, Esq. of the office of Gerald L. Dorf, P.A., under date of May 18, 1979 (C-2) and thereafter the Respondent changed its counsel, who, at the hearing in this matter, adopted the said Answer.

4/ The delay in the initial hearing was due to change of counsel by the Respondent and the delay in the second day of hearing was due to the illness of the Hearing Examiner on a scheduled date, August 20, 1979.

1980 agreement and the January 1, 1976 to December 31, 1977 agreement. 5/

4. Sydney R. Daniels was employed as Dog Warden by the Respondent from August 6, 1973 to June 18, 1979 and he was in the collective negotiations unit covered by Exhibits J-1 and J-2, supra.

5. During the time of his employment with the Respondent, Daniels was also employed as a bus driver for the Toms River Regional Board of Education (hereinafter the "Board of Education").

6. Commencing with his initial date of employment, August 6, 1973, Daniels was appointed as Dog Warden by resolution of the Respondent Board for specific terms. 6/

7. The initial appointment of Daniels by the Respondent, August 6, 1973, for the balance of the year 1973, provided that his hours of work were 8:30 a.m. to 4:30 p.m., Monday to Friday (CP-1).

8. On December 11, 1973 the Secretary of the Board wrote to Daniels, advising that the Board had recently been made aware that Daniels was also employed by the Board of Education (CP-2), and on December 20, 1973 Daniels tendered his resignation as Dog Warden (CP-3). However, the Respondent was desirous of continuing Daniels' employment and on December 20, 1973 passed a resolution providing for staggered hours of work for Daniels, the Respondent reserving the right to vary Daniels' hours of work from time to time at its discretion (CP-4).

9. By resolution dated January 7, 1974, the Respondent appointed Daniels for the year 1974, also on staggered hours, and again reserved the right to vary the schedule of hours from time to time (R-4). The foregoing resolution was rescinded on February 4, 1974 and Daniels was reappointed, again on a staggered work schedule, with the Board reserving the right to vary the hours of work, the substance of the resolution being that Daniels' hours were increased from 35 hours per week to 40 hours per week (R-1).

10. By resolution dated January 6, 1975 Daniels was appointed for the year 1975, again with staggered work hours with the same reservation by the

5/ The 1978-80 agreement (J-1) was not executed until on or about March 29, 1979 and counsel for the parties stipulated at the hearing that the 1976-77 agreement (J-2) was the agreement that the parties operated under throughout the year 1978, during which the operative events underlying the instant unfair practice charge occurred.

6/ The Assistant Dog Warden, the Registrar and Deputy Registrar, all of whom are in the collective unit represented by the Charging Party herein, are likewise appointed for specific terms by resolution of the Board.

Respondent to vary his schedule of work hours (R-5).

11. By resolution dated January 5, 1976 the Respondent appointed Daniels for the year 1976, the resolution containing no reference to Daniels' hours of work and no reservation with respect to varying Daniels' work schedule (R-6).

12. During the year 1977 there were a series of resolutions by the Respondent appointing Daniels as Dog Warden, each one of which provided that the appointment was temporary and not for the entire year, and none of which contained a reference to work hours or the reservation to vary the schedule of work hours (R-7A to R-7E). The net result was that Daniels was appointed for the entire year 1977.

13. By resolution dated January 16, 1978 Daniels was appointed by the Respondent for the entire year 1978, again with no reference to work hours or reservation by the Board to vary the schedule of work hours (R-8).

14. As a result of a conflict between Daniels' schedule of work as Dog Warden for the Respondent, and Daniels' work schedule as bus driver for the Board of Education, Daniels was suspended for periods of three days and five days, the first suspension effective March 20, 1978 (R-9). Daniels filed a grievance regarding the suspensions on or about March 17, 1978, and in or about June 1978, a Stipulation and Settlement Agreement was entered into between the Charging Party, Daniels and the Board whereby Daniels was paid for the three and five day suspensions and the Board agreed not to discipline Daniels for the remainder of the 1977-78 school year of the Board of Education (CP-5).

15. On November 6, 1978, at a closed session meeting of the Respondent, at which Daniels and Raymond Tanner, the President of the Local, were present, along with Mr. Glickman, then the attorney for the Respondent, the matter of Daniels' hours of work was discussed. 1/ The minutes of the said meeting (R-12) indicate that: (1) the Board informed Daniels that it was considering enforcing the normal work schedule for Dog Warden of 8:30 a.m. to 4:30 p.m. as of January 1, 1979; and (2) Daniels requested that he receive a salary adjustment from Grade 8 to Grade 10, approximately a $2000 per year increase, to compensate Daniels for foregoing his employment with the Board of Education. The substance of the meeting of November 6, was set forth in a letter to Daniels dated November 9, 1978 (R-10).

1/ The same subject matter was discussed informally with Daniels and Tanner at a prior meeting on October 18, 1978.

16. Without resolving the matter of the pay increase requested by Daniels, the Board on November 20, 1978 passed a resolution, which provided that effective January 1, 1979 and thereafter the regular hours of employment for Dog Warden, including Daniels and his successors, shall be five days a week between the hours of 8:30 a.m. and 4:30 p.m. (R-11).

17. During 1978 and through the first two months of 1979, the Council, through its representative, Russell Weiss, had been in negotiations for a successor agreement to J-2, supra. The meetings with Daniels and Tanner on October 18 and November 6, 1978, with respect to Daniels' hours of work and compensation, were not collective negotiations for a successor agreement; Weiss was not present at either meeting. Although the parties went to mediation and fact-finding in the course of negotiations for a successor agreement, the issue of Daniels' hours of work and compensation was not the subject of mediation or fact-finding. There was never an impasse declared by representatives of the Respondent, nor was the term "impasse" ever used, in connection with discussions with Daniels and Tanner over Daniels' hours of work.

18. From January 1, 1979 to the date of filing the instant charge, March 16, 1979, Daniels worked as Dog Warden and as bus driver for the Board of Education between the hours of 6:00 a.m. and 6:00 p.m. Although the record is not clear as to how the hours of work were allocated between the two jobs, it is clear that Daniels continued to work staggered hours for the Board (1 Tr. 95, 96, 141, 142). 8/

19. Article XI, Section 7 of the 1976-77 collective negotiations agreement (J-2) contained the following provision with respect to a change in hours:

> "In the event the Employer decides to change the normal hours of work for any employee, said employee and the Union shall be notified in advance of the change." (Emphasis supplied).

20. Article XI, Section G of the 1978-80 agreement (J-1) contains the following modification with respect to a change in hours:

> "In the event the Employer decides to change the normal hours of work for any employee, prior notice of such change shall be given to said employee and the Union, and the Employer will discuss such change with the Union prior to implementation." (Emphasis supplied)

THE ISSUE

Did the Respondent Board violate the Act when, effective January 1, 1979,

8/ This was also confirmed by a post-hearing stipulation of counsel for the parties.

it unilaterally, and without negotiations with the Charging Party, set the work hours of the Dog Warden at 8:30 a.m. to 4:30 p.m., thereby altering the prior staggered work schedule of the Dog Warden?

DISCUSSION AND ANALYSIS

The Respondent Board Was Under No Obligation To Negotiate A Proposed Change In The Hours Of The Dog Warden, Effective January 1, 1979, And Further, The Respondent Board Did Not Violate The Act Since An Enabling Resolution Was Never Implemented

The Hearing Examiner, in finding and concluding that the Board did not by its conduct herein violate the Act, adopts the arguments of counsel for the Board, in particular, Points I and IV of the Board's brief (see pp. 8-14 and 26-28).

The Board first cites the Commission's decision in Rutgers, The State University, P.E.R.C. No. 80-26, 5 NJPER 391 (1979), which involved an undisputed change in the daily workshift of certain employees without prior negotiations or the exhaustion of impasse procedures between Rutgers and the union. Rutgers conceded that the change in hours itself was mandatorily negotiable. However, Rutgers contended that it fulfilled its contractual obligations relating to a change in hours and, therefore, did not violate the Act.

The contractual provision at issue in Rutgers provided as follows with respect to "Change in Workshifts":

> "Prior to effecting a change other than minor in the regular starting time of workshifts, Rutgers will give reasonable notice to affected employees and will discuss such change and the need for same with the representatives of the Union, unless circumstances, such as emergency situations, make such notice and prior discussion impracticable."
> (Emphasis supplied)

Rutgers notified the union of a proposed change in workshift and met with the union to discuss the proposed change. Rutgers refused to negotiate the proposed changes with the union or the affected employees. The union, however, requested negotiations with Rutgers, which request was rebuffed, and Rutgers proceeded to implement the change on a given date.

The Commission sustained Rutgers' actions, stating, inter alia:

> "...Hours of work are unquestionably mandatory subjects of negotiations - see the Dunellen Trilogy of the Supreme Court - and shift schedules fall within the ambit of that topic. (citing Town of Irvington)...Nevertheless, once a particular subject has been negotiated and an agreement embodied in a contract, then the employer need only comply with the contract to meet its duty. (citing Sayreville Bd. of Ed.)..." (5 NJPER at 392)
> (Emphasis supplied)

The Commission in Rutgers thereafter noted that the contract "...unambiguously covers the topic of changes in workshifts and only requires Rutgers to give notice and discuss the change prior to implementation..." The Commission noted that "discussion" has a meaning clearly distinct from "negotiations" and, further, that there was no dispute that Rutgers had given notice and met with the union to discuss the proposed changes. The Commission then said: "...Consequently, it was then free under the contract to implement a change in shifts and did not have to engage in further negotiations regarding this change..." (See 5 NJPER at 392).

In the instant case it is first noted that the controlling provision of the collective negotiations agreement, which was in effect in 1978 (J-2), provided only that when the employer decides to change the normal work hours for any employee "...the employee and the Union shall be notified in advance of the change." (Finding of Fact No. 19, supra). The Respondent Board clearly satisfied this contractual provision when its representatives met with Tanner and Daniels on October 18 and November 6, 1978 and discussed a proposed change in Daniels' work schedule as of January 1, 1979 (see Finding of Fact No. 15, supra).

Thus, the Hearing Examiner can see no distinction whatsoever between the facts in the instant case and those in Rutgers, supra. The Respondent Board did everything that was contractually required of it before passing the resolution of November 20, 1978, which provided prospectively that effective January 1, 1979 the regular hours for the Dog Warden would be five days a week between the hours of 8:30 a.m. and 4:30 p.m. (see Finding of Fact No. 16, supra). The Respondent Board not only had the right to change the hours of work under the existing contractual provisions (J-2,supra),but even went one step further and complied with the provision of the successor agreement (J-1, supra), which provides for discussion with

the union prior to implementation. 9/

Even assuming arguendo that "negotiations" were required with respect to the proposed change in Daniels' hours of work, the fact is that the proposed change was never implemented on or after January 1, 1979. Daniels continued to work staggered hours for the Board as Dog Warden from January 1, 1979 to the date of filing of the instant charge, March 16, 1979 (see Finding of Fact No. 18, supra). If the proposed change was never implemented, the Hearing Examiner is hard put to understand how there could in fact be a violation of the Act, as to which a remedial order could be entered.

Accordingly, the Hearing Examiner having found no obligation to negotiate the decision to change Daniels' hours in the first instance, coupled with the Board having failed to implement the change on and after January 1, 1979, the Hearing Examiner has no alternative but to recommend dismissal of the charges of unfair practices against the Respondent Board herein.

* * * *

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

CONCLUSIONS OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) by its resolution of November 20, 1978, changing the hours of work of Sydney R. Daniels, which change was never implemented.

RECOMMENDED ORDER

The Respondent Board not having violated the Act, supra, it is HEREBY ORDERED that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

DATED: November 1, 1979
Trenton, New Jersey

9/ Since "negotiations" were never required under the contractual provisions on change of work hours, supra, the Charging Party's citation and reliance upon City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122(L977) is misplaced since that case involved "negotiations" for a successor collective negotiations agreement. We are herein concerned with "discussion" as distinct from "negotiation" with respect to a proposed change (see Rutgers, supra).