

P.E.R.C. No. 90-75

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BELMAR,

Respondent,

-and-

Docket No. CO-H-89-327

BELMAR PBA, LOCAL NO. 50,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, pursuant to authority granted by the full Commission in the absence of exceptions, dismisses a Complaint based on an unfair practice charge filed by Belmar PBA Local No. 50 against the Borough of Belmar. The Complaint alleged that the Borough violated the New Jersey Employer-Employee Relations Act by unilaterally enrolling PBA unit members in the New Jersey Temporary Disability Benefits Plan and deducting contributions from each unit member's paycheck. The Chairman found that the unfair practice charge was untimely filed.

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Charging Party.

Appearances:

For the Respondent, Crammer & Covelli  
(Timothy M. Crammer, of counsel)

For the Charging Party, Joseph N. Dempsey, Esq.

DECISION AND ORDER

On May 4, 1989, the Belmar PBA, Local No. 50 filed an unfair practice charge alleging that the Borough of Belmar violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(5) and (7),<sup>1/</sup> by unilaterally and without notice enrolling PBA unit members in the New Jersey Temporary Disability Benefits Plan and deducting contributions from each unit member's paycheck.

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<sup>1/</sup> These subsections prohibit public employers, their representatives or agents from: "(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." and "(7) Violating any of the rules and regulations established by the commission."

On June 12, 1989, a Complaint and Notice of Hearing issued. The Borough requested that an earlier statement of position be treated as its Answer. It claimed that the PBA had agreed to the temporary disability plan. It also claimed that since the PBA knew of the Borough's action in January 1988, the charge is untimely.

On August 17, 1989, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On December 11, 1989, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 90-27, 16 NJPER \_\_\_\_ (¶\_\_\_\_ 1989). He found that the PBA had accepted membership in the plan and that therefore the Borough did not violate the Act by adopting the benefit plan and deducting contributions. He found no merit to the PBA's claim that it did not have notice of the deductions until early 1989, over a year after the deductions began.

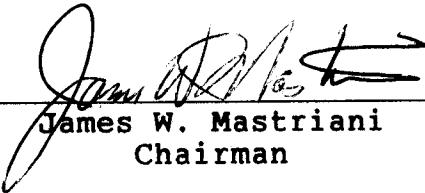
The Hearing Examiner served his decision on the parties and informed them that exceptions were due on December 26, 1989. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-7) are accurate. I incorporate them here. Acting pursuant to the authority granted to me by the full Commission in the absence of exceptions, I find that the charge was untimely filed and that therefore the Complaint should be dismissed. N.J.S.A. 34:13A-5.4(c).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
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James W. Mastriani  
Chairman

DATED: Trenton, N.J.  
February 8, 1990

H.E. NO. 90-27

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

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BOROUGH OF BELMAR,

Respondent,

-and-

Docket No. CO-H-89-327

BELMAR PBA, LOCAL NO. 50,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Borough did not violate Sections 5.4(a)(5) or (7) of the New Jersey Employer-Employee Relations Act when, following a negotiated agreement in November 1987 as to the enrollment of all employees of the Borough, including PBA unit members, in the New Jersey Temporary Disability Benefits Plan, it proceeded to enroll all such employees and commenced deductions for the employees' share of the contribution to the Plan, beginning in January 1988.

The PBA witnesses testified that there was no such agreement in November 1987 since all provisions of the successor agreement had not been agreed to. However, the Hearing Examiner could not credit the PBA witnesses in this respect since they testified incredibly that they had no knowledge that deductions were being made from their pay since January 1988 until 90 days prior to the hearing in this matter on August 17, 1989!! The PBA as Charging Party had requested reimbursement of all deductions made as to its unit members since January 1988 and this, of course, was denied due to the dismissal of the complaint.

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. 90-27

STATE OF NEW JERSEY  
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Appearances:

For the Respondent, Crammer & Covelli, Esqs.  
(Timothy M. Crammer, of counsel)

For the Charging Party, Joseph N. Dempsey, Esq.

HEARING EXAMINER'S RECOMMENDED  
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on May 4, 1989, by the Belmar Policemen's Benevolent Association, Local No. 50 ("Charging Party" or "PBA") alleging that the Borough of Belmar ("Respondent" or "Borough") 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"), in that the Borough without negotiations or notice to employees or their collective negotiations representatives enrolled the unit employees in the New Jersey Temporary Disability Benefits Plan, and for approximately one year the Borough has "without disclosure" deducted monies from unit employees' pay for this benefit; the PBA and the unit employees only

learned of this conduct of the Borough in the course of an interest arbitration proceeding;<sup>1/</sup> all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(5) and (7) of the Act.<sup>2/</sup>

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 June 12, 1989. Pursuant to the Complaint and Notice of Hearing, a hearing was held on August 17, 1989 in Newark, New Jersey, 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 September 22, 1989.

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.

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<sup>1/</sup> The Charging Party in its post-hearing brief (p. 5) states that it is not requesting "damages" but it is seeking in this proceeding reimbursement for the PBA unit employees the deductions made from their pay as the employee contribution to the New Jersey Temporary Disability Benefits Plan since mid-January 1988.

<sup>2/</sup> These subsections prohibit public employers, their representatives or agents from: "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

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

FINDINGS OF FACT

1. The Borough of Belmar is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The Belmar Policemen's Benevolent Association, Local No. 50 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. The most recent collective negotiations agreement between the parties was effective during the term January 1, 1985 through December 31, 1987 (J-2). At the time of the instant hearing the parties were awaiting the award of Interest Arbitrator Paul Kell as to the terms and conditions for the successor collective negotiations agreement to J-2.
4. The collective negotiations for the successor agreement to J-2 commenced sometime in the fall of 1987 for a three-year agreement [1988 through 1990] (Tr 81, 82).
5. Among the proposals made to the PBA by the Borough in the fall of 1987 was one for coverage of unit employees in the New Jersey Temporary Disability Benefits Plan ("TDP" or "SDI"). Charles F. Ormsbee, Jr., the Borough Clerk since 1984 and the Deputy Clerk since 1977, and the financial advisor for the Borough in negotiations, testified without contradiction that in the negotiations in the fall of 1987 the Borough explained its interest in providing TDP coverage for every employee in the Borough and that



for this to occur the necessary resolutions and documents had to be completed and submitted to the State by January 1, 1988 (Tr 82, 86).

6. Therefore, the Borough requested the PBA's agreement to accept the TDP, and this acceptance was granted by the PBA in November 1987. Although the PBA's witnesses claimed that a document entitled "Revised Pay Raise Request - 11/30/87" (R-1), which was authored by the PBA, did not indicate the PBA's acceptance of the Borough's proposal for TDP, this document clearly states in ¶19 "Accept Borough's position on Temporary Disability" and was submitted by the PBA to the Borough in November 1987, supra. The Hearing Examiner cannot credit the contrary testimony of Richard T. Lynch, the current President of the PBA, or the past PBA President Harry M. Harsin, that Exhibit R-1, supra, was merely a counteroffer of the PBA and did not contain an "agreement" or an "acceptance" of the Borough's proposal for enrollment in TDP (Tr 13, 14, 21, 22, 45-47).

7. The Hearing Examiner credits the forthright testimony of Ormsbee that the Borough explained the TDP to the PBA in November 1987, specifically, that it could not be put into effect unless the PBA and the other units explicitly agreed.<sup>3/</sup> Ormsbee also testified that he was present when Lynch and Harsin responded that

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<sup>3/</sup> Terry A. Duffield testified for the Borough that, as a member of the I.U.E., Local 417 negotiating committee, the Borough, during negotiations in 1987, proposed the enrollment of all employees in the TDP and that this was contingent upon the acceptance of the same proposal by all of the Borough's employees (Tr 56, 60, 61).

they would accept TDP as a separate benefit even though the complete contract had not been negotiated and reduced to writing, and that R-1, supra, was a written confirmation of this acceptance [Tr 86-89].

8. Ormsbee also testified credibly that the PBA was the last of the four collective negotiations units in the Borough to accept the Borough's TDP proposal and that following this acceptance by the PBA the Borough prepared the necessary resolutions and documents for enrollment in the TDP program (Tr 82-84). In emphasizing his testimony that the PBA had accepted the TDP, Ormsbee testified without contradiction that if the PBA had not accepted or agreed to TDP, then the resolutions would not have been prepared by the Borough for submission to the State (Tr 85). Also, Ormsbee testified credibly that the PBA was told in the November negotiations that the TDP proposal required equal contributions from the employer and the employee (Tr 83).

9. Exhibit CP-1 is the "Final Offer" of the Borough to the Interest Arbitrator on economic issues (Tr 91). It contains in ¶6 the Borough's position that Article XIX of J-1 is to be amended to include a new subsection H, providing that the Borough shall enroll in the TDP all employees covered by the agreement subject to the terms, requirements and restrictions of the TDP. Ormsbee testified that counsel for the Borough subsequently withdrew CP-1 from the interest arbitration (Tr 96). The Hearing Examiner draws the inference that this act of the Borough is consistent with Ormsbee's earlier testimony that there had been no dispute between

the parties before Interest Arbitrator Kell on the TDP issue and, further, that at a meeting before the Interest Arbitrator Ormsbee noted "ok" on his notes as to the TDP matter, adding that it "...meant that they accepted it..." and this was mentioned by Kell (Tr 94, 95).

10. The Hearing Examiner rejects as incredible the testimony of Lynch and Harsin that their first knowledge about TDP having been adopted was at an interest arbitration hearing before Interest Arbitrator Paul Kell approximately 90 days prior to the date of the instant hearing on August 17, 1989 (Tr 17, 27, 47, 48).<sup>4/</sup> The essential basis for rejecting this testimony of Lynch and Harsin is the fact that they must have known from their pay stubs that monies were being deducted for TDP or SDI, particularly, in the light of the testimony of Sharon A. Wells, the Borough's Principal Account Clerk, who waived confidentiality and produced her W-2 wage statement for 1988, which shows \$59.99 as the gross deduction for "SDI" in that year (Tr 72, 73; R-7). Wells also testified credibly that such a deduction had never appeared prior to the calendar year 1988 and that every police officer in the Borough received a W-2 for 1988, which indicated the "SDI" deduction (Tr 73, 74, 76, 79).

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<sup>4/</sup> See, for example, R-3, which is the handwriting of Lynch in which he recorded in negotiations the Borough's proposal, which includes under "Temp. Disability" the calculation of \$56.50 as the Borough's portion and \$56.50 as the employee's portion (Tr 36, 37).

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Exhibit R-6 (for "ID"), which is an excerpt from the collective negotiations agreement between the Borough and I.U.E., Local 417 (January 1, 1988 through December 31, 1990) was never received in evidence and, thus, it is not a document to which reference can be made by the parties or this Hearing Examiner in the instant decision (see Charging Party's brief, p. 5).

Also, at at the conclusion of the hearing there was reserved for post-hearing submission as Exhibit J-3 in evidence the then pending Interest Arbitration Award of Paul Kell. There was also reserved as Exhibit R-8 in evidence the post-Interest Arbitration brief of counsel for the Borough. [Tr 96-98]. However, neither of these documents was ever submitted to the Hearing Examiner prior to the receipt of the post-hearing briefs in this matter on September 22, 1989, supra, at which time the hearing record was deemed closed. Thus, neither party nor this Hearing Examiner may make any reference to or rely upon these documents. Thus, Exhibit numbers J-3 and R-8 remain vacant in this proceeding.

#### DISCUSSION AND ANALYSIS

The Respondent Borough Did Not Violate Sections 5.4(a)(5) Or (7) When, Following The PBA's Acceptance In November 1987, It Proceeded To Enroll All Employees Of The Borough In The New Jersey Temporary Benefits Plan As Of January 1, 1988.

The Hearing Examiner concedes that this is a case of first impression on the facts and that there is, therefore, no "on all fours" Commission precedent. The basic problem to be resolved is

the position of the PBA that there could only be an "agreement" as to the terms and conditions of employment for the successor agreement to J-2 when all of the outstanding issues had been agreed upon vis-a-vis the position of the Borough that the PBA in R-1 allegedly agreed to "accept" separately the Borough's proposal that the TDP be implemented as of January 1, 1988.<sup>5/</sup> The Hearing Examiner finds and concludes that the PBA did "accept" the Borough's contract proposal that PBA unit members be enrolled in the TDP as of January 1, 1988. Why else would the Borough have proceeded with the necessary resolutions and documents for submission to the State, thereby enrolling all employees of the Borough in the TDP? This conclusion is supported by the testimony of Duffield, a Borough witness and a member of the Local 417 negotiating committee, who testified, however briefly, that during the Local 417 negotiations the Borough proposed the enrollment of all Borough employees in the TDP and that this was contingent upon the acceptance of the same proposal by all employees in the Borough (Tr 56-60, 61).

With respect to what occurred during collective negotiations between the PBA and the Borough in November 1987 on the Borough's TDP proposal, the Hearing Examiner has no difficulty in crediting the testimony of Ormsbee for the Borough as against the testimony of Lynch and Harsin for the PBA regarding the interpretation to be placed upon R-1. This exhibit was a

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<sup>5/</sup> This Plan required that all employees of the Borough be enrolled, beginning January 1, 1988.

counterproposal by the PBA, entitled "Revised Pay Raise Request - 11/30/87" and, while all of the provisions contained therein from ¶1 through ¶18 might be deemed "tentative," there can be no doubt whatever that in subsequent negotiations, the statement in ¶19, "Accept Borough's position on Temporary Disability," meant that the PBA was accepting and assenting to the proposal of the Borough that all Borough employees be enrolled in the TDP as of January 1, 1988.

Admittedly, this is a departure from the way in which negotiations are normally conducted. However, having credited Ormsbee as against Lynch and Harsin, there is no other conclusion to be reached but that the PBA "accepted" the TDP in the negotiations in November 1987. The specific basis for crediting Ormsbee in this regard vis-a-vis Lynch and Harsin is the overall appraisal by the Hearing Examiner of their respective testimonies.<sup>6/</sup> It will be recalled that Lynch and Harsin each testified that the first time that they learned of the fact of deductions for TDP was in the interest arbitration proceedings before Paul Kell some 90 days prior to the hearing in this matter on August 17, 1989!! Given the essential fact that most if not all employees are sensitive to their net pay, it is inconceivable that employees Lynch and Harsin together with the other employees in the PBA unit did not notice until some months after January 1989 that there was a deduction

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<sup>6/</sup> Also, there was nothing in the testimony of Ormsbee, which in any way indicated that he was other than a forthright and truthful witness.

made, however small, from their net pay. Recall also, that Wells testified credibly that all employees had the TDP deductions made from their salaries on and after January 1988. All employees had received W-2 income earning statements by the end of January 1989. Exhibit R-7 was introduced in evidence as the W-2 statement of Wells, who waived confidentiality.

Thus, does the Hearing Examiner conclude that the Respondent Borough did not engage in bad faith negotiations with the PBA as to the terms and conditions to be incorporated into the successor agreement to J-2. The Borough did not make any unilateral change in the terms and conditions of employment of PBA unit members that were not agreed to by the PBA, namely, the implementation of TDP in January 1988. The fact that the Borough had included in its "Final Offer" to the Interest Arbitrator the ¶6 TDP language to be incorporated into a successor agreement and then later withdrew it does not suggest to the Hearing Examiner that the Borough has engaged in bad faith negotiations given the totality of the Borough's conduct in negotiations since 1987: see State v. Council of N.J. State College Locals, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super. 470 (App. Div. 1976).

Additionally, since the PBA adduced no evidence indicating that the Borough violated Section 5.4(a)(7) of the Act, the Hearing Examiner will recommend that the Complaint be dismissed in its entirety. Therefore, there will be no recommendation that the PBA unit members be reimbursed for deductions made by the Borough for TDP since January 1988.

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

CONCLUSIONS OF LAW

1. The Respondent Borough did not violate N.J.S.A. 34:13A-5.4(a)(5) when, following negotiations with the Charging Party in November 1987, the Borough perfected its application to the State of New Jersey for enrollment in the "New Jersey Temporary Disability Benefits Plan," which covered all employees of the Borough, and thereafter implemented payroll deductions for the employees' contribution of all employees of the Borough as of January 1988.

2. The Respondent Borough did not violate N.J.S.A. 34:13A-5.4(a)(7) by its conduct herein.

RECOMMENDED ORDER

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



Alan R. Howe  
Hearing Examiner

Dated: December 11, 1989  
Trenton, New Jersey