P.E.R.C. No. 91-40

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT
OF MILITARY AND VETERANS AFFAIRS
(MENLO PARK SOLDIERS HOME),

Respondent,

-and-

Docket No. CO-H-88-159

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL NO. 1,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the State of New Jersey, Department of Military and Veterans Affairs (Menlo Park Soldiers Home) violated the New Jersey Employer-Employee Relations Act by abrogating a negotiated agreement permitting human services technicians and assistants represented by AFSCME, Council No. 1 to have every other weekend off. The Commission rejects the employer's contention that it had a managerial prerogative and a contractual right to change the work schedules unilaterally.

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AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL NO. 1,

Charging Party.

Appearances:

For the Respondent, Peter N. Perretti, Jr., Attorney General
(Richard D. Fornaro, Deputy Attorney General)

For the Charging Party, Szaferman, Lakind, Blumstein,
Watter & Blader, attorneys (Sidney H. Lehmann, of counsel)

DECISION AND ORDER

On December 16, 1987, the American Federation of State, County and Municipal Employees, Council No. 1 filed an unfair practice charge against the State of New Jersey, Department of Military and Veterans Affairs (Menlo Park Soldiers Home). The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et. seq., specifically subsections 5.4(a)(1) and (5),[1/] by requiring newly-hired human services technicians and assistants to work every

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, and (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...."

weekend, despite a 1981 agreement granting employees in these classifications every other weekend off.

On February 9, 1988, a Complaint and Notice of Hearing issued. The employer's Answer asserts that the charge is untimely; the 1981 agreement is unauthorized and unenforceable and voided by later collective negotiations agreements, and AFSCME is estopped by laches and unclean hands.

On June 21, 1988, the employer moved for summary judgment on the grounds that the charge was untimely and barred by laches. We denied this motion. P.E.R.C. No. 89-76, 15 NJPER 90 (¶20040 1989).

On August 1, 1988, AFSCME amended its charge to allege that the employer was continuing to violate subsections 5.4(a)(1) and (5) by denying new employees any weekends off. The employer's Answer added contentions that it had a managerial prerogative to change work schedules and that the 1981 agreement was unenforceable because it was entered under duress and without legal consideration.

On September 28, 1988, AFSCME again amended its charge. This amendment alleges that the employer violated subsections 5.4(a)(2), (3), and (4)[2/] when it abrogated the 1981 agreement by

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2/ Subsections 5.4(a)(2), (3), and (4) prohibit public employers, their representatives or agents from: "(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, and (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."

issuing new work schedules, effective October 1, 1988, eliminating weekends off for 118 employees. The amendment further alleges that the new work schedules discriminatorily favored AFSCME officials. Interim relief was denied. I.R. No. 89-7, 14 NJPER 676 (¶19283 1988).

On February 8, 1989, the charge and amendments were consolidated. The employer filed a new Answer adding contentions that it had a contractual right to change work schedules and that these changes were based on legitimate business reasons and seniority rather than discrimination.

On June 2, 1989, the employer withdrew its defenses that the 1981 agreement was unauthorized and unenforceable by virtue of a later oral agreement and that it was executed under duress.

On June 5, 6, and 7, 1989, Hearing Examiner Jonathon Roth conducted a hearing. The parties examined witnesses and introduced exhibits. The employer filed a post-hearing brief.

On February 21, 1990, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 90-38, 16 NJPER 183 (¶21079 1990). He concluded that later collective negotiations agreements authorized the employer to disregard the 1981 agreement and that the new schedules were not discriminatory.

On March 27, 1990, AFSCME filed exceptions. It excepts to some findings of fact and to the Hearing Examiner's conclusions that later collective negotiations agreements superseded the 1981 agreement; that certain charges were not timely; and that the work schedule changes were not discriminatory.

On April 18, 1990, the employer responded. Its response incorporates its post-hearing brief and urges adoption of the Hearing Examiner's entire report.[3/]

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 5-23) are thorough and generally accurate. We adopt them with these observations, modifications, and additions.

Finding no. 3 accurately quotes provisions in the parties' collective negotiations agreements. At this juncture, we do not interpret the agreements or consider any of the parties' arguments about the significance of certain facts. The record does not reflect that the employer's representatives had asserted a contractual right to change work schedules before this case. The Deputy Director of the Office of Employee Relations testified that negotiations over Article 17 during the negotiations for the last three contracts were limited to notice and posting questions (2T102, 2T103). AFSCME's Associate Director testified on direct examination that Article 43, Section B applied to this dispute (3T93, 3T94).

We modify finding no. 5 to reflect that there are about 150 employees in the classifications of human services assistants, human services technicians, and licensed practical nurses; 20-26 of these

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3/ On April 27 and May 7, 1990, respectively, AFSCME and the employer filed further submissions chastising each other on procedural matters. We need not address these contentions because AFSCME's exceptions and the employer's reply and post-hearing brief squarely put before us the matters in dispute.

employees are LPNs (1T28, 1T29). There are about 151 budgeted positions for assistants and technicians (3T42, 3T43). On weekends, the recreation and physical therapy departments are closed and dental and transportation services are not provided (2T39, 2T40). Before the October 1988 changes, mid-week staffing was "more than adequate" (3T12).

We modify finding no. 6 to reflect that before March 1981, management and AFSCME representatives discussed changing the work week from a Saturday-Sunday schedule to a Monday-Friday schedule. The employees thought this change would be made in the April 1981 schedules. When unchanged schedules were posted, the employees walked off the job (1T33; 2T12).

We accept the description in finding no. 7 of the 1981 agreement. We quote the last paragraph:

> If the above three (3) conditions are not met, the every other weekend scheduled off program is subject to cancellation. If the Home determines that it is necessary to change the scheduled weekends off program, the Union will be notified and a meeting will be scheduled if requested. It is the intention of the Home to revert to a weekend off schedule of every third weekend off if the subject every other weekend program does not meet the above conditions.

The employer never called a meeting with AFSCME to discuss non-compliance or cancellation (1T160-1T161).

We reject as unproven the assumption in finding no. 8 that before 1981, optimal staffing levels on weekends and weekdays were the same.

In finding no. 9, the memorandum from Zaleski to Koerwer is CP-12. Dr. Melvin Friedman, the Home's chief executive, testified that as of May 1988, he considered the Home to still be bound by the 1981 agreement (3T38).

We add to finding no. 10 that CP-2 was the only memorandum sent to AFSCME about the 5% callout rate being exceeded (1T43-1T44).

We modify finding no. 11 to reflect that Friedman stopped monitoring weekend absenteeism rates in March 1983 (2T154). But in 1986 he ordered the collection of absenteeism data from 1984 to 1986 because he thought schedules might be changed if he could show that weekend staffing was a problem (2T157). The Hearing Examiner sustained objections to using data collected after March 1983 to prove absenteeism rates (2T160). Without that data we cannot speculate about how often weekend absenteeism after 1983 exceeded 5% (2T177).

We modify finding no. 12 to reflect the statement in the confidential memorandum (CP-14) that the right to terminate the 1981 agreement for non-compliance had never been exercised.

We see no need to change findings nos. 13 and 15.

With respect to findings nos. 16, 18, 20 and 22, we need not decide whether the parties agreed, as AFSCME contends, that 20 new positions would be created or, as the employer contends, that 20 new employees would be hired (3T76, 3T77). AFSCME had a reasonable basis for believing that the 1981 agreement still applied to already budgeted positions.

We see no need to change findings nos. 26, 27, and 28.

We clarify finding no. 29 by stating that Friedman's testimony about scheduling patterns before the October 1988 changes was consistent with J-6, showing the September 1988 scheduling patterns (3T7, 3T9).

We add to finding no. 30 that the October 1988 schedule changes were implemented without prior negotiations (3T42).

We add to finding no. 31 that J-5 reflects scheduled coverage rather than actual coverage. In a few instances, the scheduled coverage did not realize Friedman's desire to have the same staffing patterns every day after the change (J-6, pp. 3-4). AFSCME officials Reese and Juhass testified that actual coverage was worse on weekends, given resignations because of the change and increased callouts (1T88, 1T89, 1T99, 1T155, 2T23, 2T38). Friedman disagreed (3T33, 3T36). Absent any documents, we make no findings about actual coverage after the October 1988 changes.

With respect to the second sentence of footnote 14, we note that in the past Friedman and other management officials had wanted to isolate Reese and neutralize her ability to protest changes (1T103, 1T104, 3T71, 3T75, CP-14, CP-15 and CP-16). This evidence makes us suspicious, but does not lead us to displace the Hearing Examiner's conclusion that the use of seniority in calculating the October 1988 schedules was legally motivated. The employer did not need to cancel all weekends off for all employees to meet its desired staffing levels; and seniority was a logical and neutral basis for deciding who would have one or both weekend days off (3T20, 3T21).

We see no need to change finding no. 32.

We first consider whether the October 1988 schedule changes violated subsections 5.4(a)(2), (3) and (4). We hold they did not. We have accepted the Hearing Examiner's finding that the changes were legitimately based on seniority and were not meant to be discriminatory or retaliatory. Given that finding and applying the standards of In re Bridgewater Tp., 95 N.J 235 (1984), we find no violation.

We next consider whether the October 1988 schedule changes violated subsections 5.4(a)(1) and (5) because they abrogated the 1981 agreement and changed an established practice of allowing human services technicians and assistants every other weekend off. We hold they did.

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

> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit.
>
> * * *
>
> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

N.J.S.A. 34:13A-5.4(a)(1) makes it an unfair practice for an employer to interfere with these negotiation rights and N.J.S.A. 34:13A-5.4(a)(5) makes it an unfair practice to refuse to negotiate in good faith concerning employment conditions.

An employer may violate its obligations under N.J.S.A. 34:13A-5.3 in two ways: (1) repudiating an agreement setting a working condition, and (2) implementing or changing a working condition without first negotiating in good faith to impasse. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). This case involves both types of alleged violations.

In April 1981, representatives of the Menlo Park Soldiers Home and the Department of Human Services entered into a written agreement with AFSCME representatives. This agreement gave human services technicians and assistants at the Menlo Park Soldiers Home every other weekend off. The agreement was forwarded to the Office of Employee Relations. While the agreement could be cancelled if certain conditions were not met, the Home never invoked that right or complied with the procedures for doing so. Home administrators assumed the agreement was binding from 1981 through 1988 and conducted themselves accordingly. The October 1988 schedule changes repudiated that agreement.

Even if the 1981 agreement had not existed, employees had long been granted every other weekend off. They were often reassured that this employment condition would continue to be the status quo.[4/]

4/ The denial of weekends off for some new hires from 1985 to 1987 did not abrogate the 1981 agreement or change the status quo for existing staff. The parties' discussions about the 20 positions/employees issue assumed that the agreement and status quo would remain in effect.

We reject the employer's contention that it had a prerogative to eliminate weekends off unilaterally. The work schedules of individual employees are mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J. 393 (1982); Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973). This change had a draconian effect on employees and their morale. The employer resorted to this change because it did not want to bear the labor costs of hiring more staff or paying more overtime compensation. While we do not deny the legitimacy of these cost concerns, they may be addressed and protected through the negotiations process. Hunterdon Cty. Freeholder Bd. v. CWA, 116 N.J. 322 (1989). Further, the local agreement contains a mechanism for changing or cancelling the weekends off program. Granting the employer the only say on such a critical employment condition as work hours would destabilize the labor relations process. N.J.S.A. 34:13A-5.2; Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 591 (1980).

We also reject the employer's contention that it had a contractual right to change the work schedules unilaterally. There was no clear and unmistakable waiver of the right to negotiate. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978). We will not read the contractual language expansively. Ibid.

The State and AFSCME entered into a statewide collective negotiations agreement covering the health, care and rehabilitation services unit from July 1, 1986 through June 30, 1989 (J-4). Article 17 is entitled Hours of Work. This article has been in all

four collective negotiations agreements since 1979 and has only been changed once, to clarify notice and posting requirements. The Article provides:

> A. The work week for each job classification within the unit shall be consistent with its designation in the State Compensation Plan. When work schedules are prepared, an objective shall be that all employees be assigned five (5) consecutive work days whenever practicable. Work schedules will be posted within each work unit where employees sign in and off the shift.
>
> B. All employees shall be scheduled to work a regular shift as determined by the appointing authority which work shift shall have stated starting and quitting times. Employees shall be given maximum possible notice but no less than seven (7) days notice of any stated starting and quitting time change, except in an emergency. The work shift will consist of eight (8) consecutive hours interrupted by a meal period unless the nature of a particular operation makes it unfeasible to do so.
>
> C. An employee whose scheduled days off are changed shall be given maximum advance notice, which will be at least five (5) days, except in the case of an emergency. Should such advance notice not be given, an employee affected shall not be deprived of the opportunity to work the regularly scheduled number of hours in his work week. The use of a notification period of less than five (5) days shall not be abused. Work schedules that are used to indicate changes in days off, shift changes, etc., will be posted at the same location in the work unit where employees sign in and off the shift.

These sections require that the employer assign employees five consecutive workdays whenever practicable; empower the employer to set starting and quitting times; and require the employer to give maximum notice of changes in the scheduled days off of individual employees. Unlike the section granting the employer the express

right to determine starting and quitting times,[5/] these provisions do not specifically grant the employer the right to change days off.

Article 43 is entitled Maintenance of Benefits and Effect of Contract. It provides, in part:

> (B) Regulatory policies initiated by the various institutions and agencies where these employees are working which have the effect of work rules governing the conditions of employment within the institution or agency and which conflict with any provision of this Contract shall be considered to be modified consistent with the terms of this Contract, provided that if the State changes or intends to make changes which have the effect of eliminating such terms and conditions of employment, the State will notify the Union and post such changes if requested by the Union within ten (10) days of such notice or of such change or of the date on which the change would reasonably have become known to the employees affected. The State shall within twenty (20) days of such request enter negotiations with the Union on the matter involved, providing the matter is within the scope of issues which are mandatorily negotiable under the Employer-Employee Relations Act as amended and further, if a dispute arises as to the negotiability of such matters, that the procedures of the Public Employment Relations Commission shall be utilized to resolve such dispute.

Article 43 authorizes changes in terms and conditions of employment based on local work rules provided that the local work rules conflict with the statewide contract. Article 43 did not authorize this unilateral action since the local agreement on weekends off did not conflict with the statewide agreement.

5/ We found a waiver of negotiations over starting and quitting times based on contract language similar to section B in State of New Jersey, P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985).

Article 46 is entitled Complete Contract. It provides:

> The State and the Union acknowledge this to be their complete Contract except as may be added hereto by particular reference in memorandum of understanding predating the date of signing of the Contract, and inclusive of all negotiable issues whether or not discussed and hereby waive any right to further negotiations on any issues presented except that any rights or obligations of either party to negotiate as set forth within the New Jersey Employer-Employee Relations Act (Ch. 303 L. 1968 and Ch. 123, L. 1974 and as amended) are acknowledged and not waived.

This Article preserves, rather than displaces, the parties' negotiations rights and obligations under our Act. Consistent with Article 43, it does not empower the employer to rescind local agreements unilaterally if such local agreements do not conflict with the statewide contract.[6/]

Having rejected the employer's contract defense, we hold that the employer unlawfully implemented the October 1988 work schedule.[7/] This determination represents sound labor relations policy because it comports with the shared expectations of the

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6/ Contrast Local 747 v. Stone & Webster Eng. Corp., 808 F.2d 5, 124 LRRM 2258 (2d Cir. 1986); J.D. Steel Co. v. Iron Workers, 709 F.2d_1328, 113 LRRM 3591 (9th Cir. 1983); Bechtel Corp. v. Laborers Local 215, 544 F.2d 1207, 93 LRRM 2860 (3d Cir. 1976).

7/ We reject the employer's argument that the 1981 local agreement is unenforceable because it came on the heels of an illegal work stoppage. The public policy of this State is that labor disputes should be settled promptly and settlements require enforceable agreements. The cases cited by the employer are inapposite. They involved the unenforceability of agreements to commit illegal acts. See Naimo v. Lafianza, 146 N.J. Super. 362, 269 (Ch. Div. 1976), citing Duff v. Trenton Bev. Co., 4 N.J. 595 (1950).

affected employees and management officials. The subject matter of the local agreement was mandatorily negotiable. Contrast Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). The agreement did not conflict with any specific terms of the statewide contract. Contrast State of New Jersey (Dept. of Ed.), P.E.R.C. No. 88-72, 14 NJPER 137 (¶19055 1988). New statewide contracts were negotiated and the local agreement continued to be respected from 1981 to 1988.[8/] A contrary holding would encourage parties to renege on negotiated agreements and would destabilize labor relations.

We now address the appropriate remedy. The agreement provides that if the employer determines that it is necessary to change the weekends off program, the Union will be notified and a meeting will be scheduled if requested. Here, the employer did not notify or meet with AFSCME before changing work schedules. We order it to abide by the terms of the local agreement pending notification and any required meetings.

ORDER

The State of New Jersey, Department of Military and Veterans Affairs (Menlo Park Soldiers Home) is ordered to:

8/ The employer argues that AFSCME may not enforce the local agreement because AFSCME did not meet its obligations under the agreement. But the employer never invoked its explicit right to cancel the agreement if those conditions were not met.

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act, particularly by abrogating a negotiated agreement permitting human services technicians and assistants represented by AFSCME, Council No. 1 to have every other weekend off.

2. 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, particularly by abrogating a negotiated agreement permitting human services technicians and assistants represented by AFSCME, Council No. 1 to have every other weekend off.

B. Take this action:

1. Restore the every other weekend off work schedule for human services technicians and assistants.

2. Notify AFSCME, Council No. 1 of any intention to change work schedules and meet with AFSCME about proposed changes, if requested.

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

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

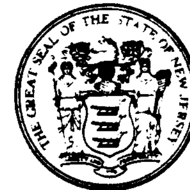
BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
October 26, 1990
ISSUED: October 26, 1990

NOTICE TO EMPLOYEES



PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED,

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by this act, particularly by abrogating a negotiated agreement permitting human services technicians and assistants represented by AFSCME, Council No. 1 to have every other weekend off.

WE WILL NOT refuse 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, particularly by abrogating a negotiated agreement permitting human services technicians and assistants represented by AFSCME, Council No. 1 to have every other weekend off.

WE WILL restore the every other weekend off work schedule for human services technicians and assistants.

WE WILL notify AFSCME, Council No. 1 of any intention to change work schedules and meet with AFSCME about proposed changes, if requested.

Docket No. CO-H-88-159

STATE OF NEW JERSEY, DEPARTMENT OF MILITARY AND VETERANS AFFAIRS (MENLO PARK SOLDIERS HOME)

(Public Employer)

Dated: ____________________ By: ____________________

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E. NO. 90-38

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

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT
OF MILITARY AND VETERANS AFFAIRS
(MENLO PARK SOLDIERS HOME),

Respondent,

-and- Docket No. CO-H-88-159

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL #1,

Charging Party.

SYNOPSIS

A hearing examiner recommends that the Commission dismiss a complaint based upon a charge that the State violated subsections (a)(5) and (a)(1) of the Act when it "repudiated" a 1981 written "understanding" that certain employees be given every other weekend off duty. The hearing examiner finds that AFSCME contractually waived its right to the benefit and that the waiver supercedes any inconsistent past practice.

He also recommends that the Commission dismiss allegations that the State violated subsections (a)(2), (a)(3) and (a)(4) when it issued new schedules which "appeared" to benefit AFSCME representatives only.

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. 90-38

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

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT
OF MILITARY AND VETERANS AFFAIRS
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-and-

Docket No. CO-H-88-159

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL #1,

Charging Party.

Appearances:

For the Respondent, State of New Jersey
Hon. Peter Perretti, Attorney General
(Richard D. Fornaro, D.A.G.)

For the Charging Party, AFSCME, Council #1
Szaferman, Lakind, Blumstein, Watter & Blader
(Sidney H. Lehmann, Esq.)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On December 16, 1987, the American Federation of State, County and Municipal Employees, Council No. 1 ("AFSCME") filed an unfair practice charge against the State of New Jersey, Department of Military and Veterans Affairs (Menlo Park Soldiers Home)

("State").[1] The charge alleged that the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., ("Act") specifically subsections 5.4(a)(1) and (5)[2] by violating the terms of a 1981 agreement that Human Services technicians and assistants will have every other weekend off.

On February 9, 1988, a Complaint and Notice of Hearing issued. On February 26, the State filed an Answer asserting that the charge was untimely filed, the 1981 agreement is unenforceable and was voided by later collective negotiations agreements and a 1985 oral agreement, and that AFSCME is estopped by laches and its "unclean hands."

On June 21, 1988, the State moved for summary judgment and a stay. The State urged dismissal, arguing that the charge was untimely filed because AFSCME failed to demand negotiations regarding weekend scheduling after receiving notice in 1985 of the State's scheduling plans and because of laches.

1/ When the charge was filed, the Soldiers Home was under the jurisdiction of the Department of Human Services. The Department has had several name changes.

2/ 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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

On August 12, 1988, AFSCME filed an amendment and affidavit asserting, among other matters, that certain employees had been required to work a no weekends off schedule during the six months preceeding the original charge. It argued that the State's alleged acts are a continuing violation and therefore, instances of the alleged offending conduct occurring within six months of the filing of the charge and amendment are timely.

On August 19, 1988, the State filed a reply emphasizing that employees in "existing positions" were covered by the 1981 agreement and that AFSCME had been notified of the unilateral change in 1985.

On September 28, 1988, AFSCME filed amendments alleging that on September 19 the State announced weekend work schedule changes affecting about 118 employees who previously had every other weekend off. It further alleged that the changes made it appear that officers and supporters of AFSCME had benefited because they were among a group of senior employees given every other weekend off. These charges allegedly violated Subsections 5.4(a)(1), (2), (3), (4) and (5).[3/]

3/ 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

Footnote Continued on Next Page

On September 29, 1988, I recommended that summary judgment be granted. H.E. No. 89-13, 14 NJPER 661 (¶19280 1988).

On September 30, 1988, a Commission Designee denied AFSCME's application for a temporary restraining order concerning the second amendment. On October 6, he denied a request for interim relief. On October 12, he issued a brief written decision confirming the denial. I.R. No. 89-7, 14 NJPER 676 (¶19282 1988).

On October 5, 1988, AFSCME requested special permission to appeal the summary judgment recommendation. On October 7, the Chairman granted special permission to appeal.

On January 10, 1989, the Commission denied the motion for summary judgment in P.E.R.C. No. 89-76, 15 NJPER 90 (¶20040 1989). Finding the original charge timely for the allegations occurring within six months of the filing, the Commission stated: "The [State] has a continuing obligation to abide by the terms of the [1981] agreement and the union has a continuing right to file an unfair practice charge if the agreement is repudiated." It also rejected the laches argument. The Commission remanded the case to

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3/ Footnote Continued From Previous Page

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."

me to incorporate the second amendment, develop a more complete record, and determine the viability of the 1981 agreement.

On February 8, 1989, the Director of Unfair Practices issued an Order Consolidating Cases.

On June 5, 6 and 7, 1989, I conducted a hearing in this matter. The parties examined witnesses and presented exhibits. The record was closed on November 3, 1989.

Upon the record, I make the following:

FINDINGS OF FACT

1. The State of New Jersey, Department of Military and Veterans Affairs (Menlo Park Soldiers Home) is a public employer within the meaning of the Act (1T 12-14).[4/]

2. The American Federation of State, County and Municipal Employees, Council No. 1 is an employee representative within the meaning of the Act and represents the health, care and rehabilitation services negotiations unit (1T 12-14). Included in the unit are the Human Services technicians, Human Services assistants, therapy assistants or aides, food services workers, dental assistants and practical nurses employed at the Menlo Park facility.

3. The State and AFSCME signed a series of collective negotiations agreements covering the health, care and rehabilitation

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4/ 1T refers to the transcript of June 5, 1981; 2T refers to the transcript of June 6; and 3T refers to the transcript of June 7.

services unit. The contracts ran from July 1, 1979 to June 30, 1981 (J-1); July 1, 1981 to June 30, 1983 (J-2); July 1, 1983 to June 30, 1986 (J-3); and July 1, 1986 to June 30, 1989 (J-4).

The contracts contain a grievance procedure ending in binding arbitration for a "claimed breach, misinterpretations, or improper application of the terms of [the] contract..." Claimed violations, misinterpretations, or misapplication of rules or regulations, existing policies...affecting terms and conditions of employment are "non-contractual" and cannot proceed to binding arbitration. (Art. VII). Generally, step one grievances are presented to supervisors; step two grievances are presented to "the highest operational management representative"; step three grievances are appealed to department heads; and step four is arbitration.

The contracts also have an "hours of work" provision (Art. XVII) stating:

> B. All employees shall be scheduled to work a regular shift as determined by the appointing authority which work shift shall have stated starting and quitting times. Employees shall be given maximum possible notice but no less than five (5) days notice of any stated starting and quitting time change, except in an emergency. The work shift will consist of eight (8) consecutive hours interrupted by a meal period unless the nature of a particular operation makes it unfeasible to do so.
>
> C. An employee whose scheduled days off are changed shall be given maximum advance notice which will be at least five (5) days, except in the case of an emergency. Should such advance notice not be given, an employee affected shall not be deprived of the opportunity to work the

> regularly scheduled number of hours in his work week. The use of a notification period of less than five (5) days shall not be abused.

J-4 adds this sentence to paragraph C: "Work schedules that are used to indicate changes in days off, shift changes, etc., will be posted at the same location in work unit where employees sign in and off the shift."

The agreements also contain "effect of contract" and "complete contract" (Art. XLIII) provisions:

B. Effect of Contract

> Regulatory policies initiated by the various institutions and agencies where these employees are working which have the effect of work rules governing the conditions of employment within the institution or agency and which conflict with any provision of this Contract shall be considered to be modified consistent with the terms of this Contract, provided that if the State changes or intends to make changes which have the effect of eliminating such terms and conditions of employment, the State will notify the Union and post such changes if requested by the Union within ten (10) days of such notice or of such change or of the date on which the change would reasonably have become known to the employees affected. The State shall within the twenty (20) days of such request enter negotiations with the Union on the matter involved, providing the matter is within the scope of issues which are mandatorily negotiable under the Employer-Employee Relations Act as amended and further, if a dispute arises as to the negotiability of such matters, that the procedures of the Public Employment Relations Commission shall be utilized to resolve such dispute.
>
> [J1-J4].
>
> Complete contract
>
> The State and the Union acknowledge this to be their complete Contract, except as may be

> added hereto by particular reference in memorandum of understanding predating the date of signing of this Contract, and inclusive of all negotiable issues whether or not discussed and hereby waive any right to further negotiations on any issues presented except that any rights or obligations of either party to negotiate as set forth within the New Jersey Employer-Employee Relations Act (Ch. 303 L. 1968 and Ch. 123, L. 1974 and as amended) are acknowledged and not waived.
>
> [J1-J4].

J-1 does not contain any memoranda of understanding; J-2, J-3 and J-4 contain them.

4. The New Jersey Veterans Memorial Home at Menlo Park houses about 400 long-term patients whose median age is about 73 years. Almost 200 are confined to wheelchairs and about 175 are incontinent (3T 3-4).

5. About 400 direct care and support staff work at the facility. About 150 Human Services technicians and Human Services assistants feed, bathe, diaper, dress and undress patients and take them to recreational activities, therapy sessions, and physician appointments at the Home (1T27; 3T48). Nurses give the technicians and assistants "Briggs" or assignment sheets listing patient names and the services each is expected to receive (3T11). On weekends, patients are not given tub baths nor taken to physical therapy (3T14). Technicians, assistants and nurses work three shifts: 6:45 a.m. to 3:15 p.m.; 2:45 p.m. to 11:15 p.m.; and 11:00 p.m. to 7:00 a.m. (3T5). Schedules for the upcoming month are normally distributed ten days in advance (3T6).

The facility is divided into nine units of about 30, 40 and 50 patients. Technician and assistant "staffing limits" during the week for each 50-patient unit are 5 on the first shift, 4 on the second shift and 3 on the late shift. Only when staffing falls 2 below the prescribed number on each shift is an employee reassigned or instructed to work overtime (3T9, 20, 46). Staffing is "more than adequate" during the week (3T12).

6. Before 1981, the technicians, assistants, and practical nurses worked seven or eight days without a day off; they had no weekends off and their days off varied (1T30). In 1979, 1980 and early 1981, AFSCME Local 979 President Delores Reese, a Human Services technician for 14 years, tried to secure every other weekend off for the employees by proposing to change the Saturday-to-Sunday schedule to a Monday-to-Friday schedule (1T33). Chief shop steward Jill Juhass also tried unsuccessfully to resolve the matter with Office of Employee Relations Director Mason and with Department of Human Services Personnel Director Zaleski (2T8).

7. On March 24, 1981, the technicians and assistants walked off the job during the morning shift in protest of their no weekends off schedules (1T34; 2T11, 108). The job action was not authorized by AFSCME (1T35; 2T11).

An emergency meeting of the State and AFSCME was held in Trenton later that day. The State's representatives were General William Doyle, then Director of Veterans' Programs in the Department of Human Services, Lee Lanning, then Superintendent of the Home and

Zaleski (1T38; 39). The AFSCME representatives were Reese, Juhass, Ethel Zavorski, and field representative Susan Ragland.

All the representatives signed CP-1, an "understanding" granting every other weekend off to Human Services technicians, Human Services assistants and practical nurses on three conditions: (1) employees would work as scheduled except for valid reasons; (2) those who could not work would arrange for substitutes; and (3) no more than 5% of employees in all three titles scheduled to work on the weekends would fail to report even for valid reasons. CP-1 also states that if the conditions were not met, the every other weekend off schedule was "subject to cancellation," and that the Home would notify AFSCME if it was deemed "necessary" to change the schedule. Finally, the agreement stated that the Home intended to revert to an every third weekend off schedule if the conditions were not met.

The job action ended in the late afternoon (2T141).

8. The every other weekend off benefit in CP-1 required that technician and assistant staffing limits on weekends for each 50-patient unit be set at 4 on the first shift, 3 on the second shift and 2 on the late shift.[5/] When staffing fell 1 below the prescribed number on each shift an employee was reassigned or instructed to work overtime (3T9, 15).

9. On March 25, 1981, Zaleski sent a memorandum and a copy of CP-1 to John Koerwer, then deputy director of the Office of

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5/ This fact implies that before March 24, 1981, weekday and weekend optimal staffing levels were identical.

Employee Relations. The memorandum states that CP-1 "ended the job action" (CP-2).[6/] Koerwer could not recall if he ever informed Zaleski that CP-1 was invalid (2T112). CP-1 was never discussed in collective negotiations for the health, care and rehabilitation unit (2T97). Koerwer also did not know if a grievance resolved at step 2 of the Article VII grievance procedure "survives" through the succeeding agreement (2T126).

10. On July 14, 1981, Melvin Friedman, then administrative assistant to the Home Superintendent,[7/] sent Reese a letter advising that "coverage" for the July 11-12 weekend "greatly exceeded" the 5% callout rate (CP-2). The letter also stated that the quality of the care was "well below acceptable limits" and that the facility was in "total non-compliance with health care standards essential for licensure." The last paragraph warned that "any future reoccurrence of this nature could compromise our agreement." The parties did not meet concerning CP-2 (1T42).

11. From 1981 to 1986, the technician and assistant absentee rates on weekends exceeded 5% numerous times[8/] (2T145; 3T15, 17).

6/ Koerwer testified that he had no reason to believe he did not receive CP-2 (2T105).

7/ Friedman is now chief executive officer at the Home, where he had been employed since 1980 (2T136).

8/ Although Friedman testified that weekend absenteeism exceeded 5% through 1989, he stopped monitoring the percentages in 1986 (3T37). AFSCME never monitored the 5% limit and did not rebut Friedman's testimony (1T106).

12. In 1983 or 1984, Friedman sent a "confidential memorandum" to Victor Moura, Assistant Commissioner of the Department of Human Services (at that time the Home was under the auspices of the Department) (CP-14). It stated that every other weekend off scheduling was a "problem area" not in the "public interest," and that AFSCME's "arrogance" might spread to other facilities if left unchecked. Friedman anticipated progress after a "long hard battle" and warned that the "local union president has, on a daily basis, historically threatened to strike over any numbers of issues...".

CP-14 also states that on weekends, "more of the care staff historically tend to call off sick" resulting in the "union's complete disregard of [the 5% weekend absentee rate in CP-1]." Friedman also wrote that overtime costs were too high and "rarely, if ever, does a weekend go by that we meet the minimum coverage standards acceptable to the State Health Department."

13. On January 17, 1984, Warren Davis, Director of Veterans Programs sent a memorandum to Moura "strongly recommend[ing] that the option previously addressed for the local union president be considered as the number one priority." The memorandum states that "if this action is accomplished...[other] actions could be executed..." One "action" was to "implement 8 1/2 vs. 8-hour work day schedule along with with every other weekend off policy" (CP-15).

Davis offered Reese a secretary position sometime after March 1, 1985. Reese told him that she had no secretarial skills but would accept the offer if he agreed in writing that she would have the job until she retired. Davis declined and Reese rejected the offer (1T102).

Friedman offered Reese a job as the Home's affirmative action officer. Reese replied that she would accept the offer if he agreed in writing that she would have the job until she retired. Friedman declined and Reese rejected the offer (1T103-104).

14. From 1981 to 1985, Human Services technicians, assistants and practical nurses had every other weekend off duty (1T45).

15. On January 23, 1985, Zaleski sent a memorandum to Moura summarizing "key decisions" of a January 21 meeting of executives (including Friedman) concerned with the Home. One decision was to attempt to "isolate the local union president from obtaining support from the Union Council...." Another confirmed "the availability of funds so that the 15 positions at Menlo Park could be filled by direct care staff." Another decision was that "5 positions" would be "transferred to Menlo Park from Trenton Psychiatric Hospital with accompanying funds." Another decision was to inform the AFSCME council president and OER deputy director Koerwer of several employment changes at the Home. The changes, to be announced by Friedman included:

> "a) fifteen (15) positions will be immediately filled and five (5) more positions will be filled

in the future and that these positions will not have weekend days off for a six (6) month period.

b) present employees will continue to have every other weekend off...."

[CP-16].

16. On February 8, 1985, Friedman sent a memorandum to Reese summarizing their meeting that day (CP-3). It stated that the facility "will be recruiting the 20 new positions in the health care area." The positions "will be assigned [regular days off] when hired and within a six-month period of time will be transferred to one of the existing every other weekend off positions." The memo advised, "it should be clearly understood that under no circumstances will any existing staff be required to give up their present every other scheduled weekend off...."

By February 1985, the State had budgeted 153 Human Services technicians and assistants positions for the Home. 148 people filled the positions (3T79-80). Friedman denied that the "20 new positions" meant that the facility would have 168 technicians and assistants (3T80). In earlier cross-examination, Friedman agreed that a reasonably accurate description of the dispute was that if 140 technicians and assistants were employed and 150 such positions were budgeted, the State could comply with CP-1 by adding 20 employees (totalling 160 technicians and assistants) (3T76-77). Although I cannot reconcile this apparent inconsistency, I find it logically necessary to conclude (given the State's difficulties in filling <u>budgeted</u> positions), that the fewer employees the State

would have to hire to comply with CP-1 was the State's interpretation of CP-1.

17. Reese was concerned that CP-3 undermined CP-1 (the 1981 agreement), and she asked Sheryl Gordon, AFSCME associate director, for help (2T56). Gordon asked Davis, Director of the Division of Veterans Programs to further explain Friedman's memorandum.

On February 28, 1985, Davis sent Gordon a letter stating that a "fixed cadre of 20 paraprofessional direct care employees [will be] assigned to work weekends with scheduled days off during mid-week high staff days" (CP-11). It also confirmed that the "new employees" would "remain in the group until regular weekend off vacancies occurred."

AFSCME representatives, including the Executive Directors of Councils 1 and 73, Gordon and Reese met to discuss CP-3 and CP-11 (2T58, 59). In that meeting and in others with State officials, Gordon emphasized AFSCME Local 979's concern that the "new employees" plan should not "attempt to get rid of their every other weekend off" (2T61).[9/]

18. On March 1, 1985, Reese received CP-4, a memorandum from the facility's personnel officer advising that on February 19, four Human Services assistants, two practical nurses and one food

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9/ AFSCME local representative Juhass assumed that AFSCME agreed to the 20 new positions (2T18). AFSCME did arbitrate a portion of the State's plan requiring employees "to take a half-hour lunch break without pay" (2T60).

service worker had been hired. It also stated that effective March 4, six assistants and three practical nurses will be hired. The memorandum listed the names of all the new employees. Reese doubted that the new employees were filling the "new positions" and thought they were filling vacancies (1T51).

19. On April 16, 1985, Reese and another AFSCME representative filed a grievance protesting the "20 position concept" because of inadequate "coverage on weekends." Vacation requests were allegedly denied (CP-6).

On April 26, the grievance was denied at step one; the hearing officer labelled it "non-contractual" and wrote that staffing is management's responsibility (CP-6). AFSCME did not advance the grievance to step two.

20. On August 21, 1985, the parties met to discuss many employment issues, including "staffing, 20 new positions, [and] every other weekend concept." CP-7 is the minutes of the meeting[10/] In it, AFSCME summarized the 1981 agreement: 20 additional workers would be hired at the Home and would have no weekends off; if an employee resigned "who was not part of the '20,' the new employees were given every other weekend off. AFSCME also

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10/ Reese testified that she thought Victor Moura, assistant commissioner of the Department of Human Services, prepared the exhibit. No other witness testified about its authorship. CP-7 lists Moura's name first among 12 state representatives attending the meeting and states the last page: "Mr. Moura thanked everyone for attending the meeting..." Accordingly, I credit Reese's testimony. Gordon's testimony corroborates CP-7 (2T 66-67).

asserted that fewer than one-half of the positions listed in a March 5, 1985 notice of position vacancy had been filled. Finally, AFSCME requested and did not receive a list of people hired from the posting.

The State responded that the March 1985 agreement "would not reflect 'new' positions; rather 20 vacant positions to be filled." CP-7 continued:

> Mr. Wurf [AFSCME Council Executive Director] asked for a definition of new positions. It seems there was a different interpretation of the wor[d] [sic] 'new.' Mr. Wurf then stated he would file a[n] unfair labor practice [charge] against Mr. Davis personally. Mr. Wurf again requested a table of organization of line items and number of positions prior to 5/23/85 and one to date. Mr. Friedman will provide union with names of individuals hired into the 20 new positions.

At the meeting, Moura told Wurf: "You'll get the 20 new positions right away."[11/] Moura wrote on the last page of CP-7 under "Comments": "Mr. Wurf would not proceed with the unfair labor practice [charge] against Col. Davis, but does not accept Col. Davis' explanation of the 20 new positions."

21. On September 19, 1985, October 31, November 1, and April 7, 1986, Reese received notices of "new hires" and position vacancies (CP-8(a)-(d)). She routinely speaks with new employees (1T71). Two named Human Services assistants hired in late August

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11/ Reese attended the meeting and recalled Wurf's anger when he threatened to file an unfair practice charge. Moura and Wurf caucused and upon their return, Moura assured Wurf (1T60).

1985 did not have every other weekend off (CP-8(a); 1T66, 69). Other assistants hired in late October 1985 received no weekends off; one named assistant did (CP-8(c); IT69). Reese stated that the new employees were hired into "existing posts" (1T70). The November 1 "notice of position vacancy" lists three assistant/technician positions; two have "every other weekend" off (CP-8(b)). The April 7 "Notice of Position Vacancy" lists four assistant positions on different shifts; two positions had "every other weekend off" and two had no weekends off (CP-8(d)).

22. On October 23 1986, Friedman, Reese and other representatives attended a "labor/management" meeting at which AFSCME complained that the State was not complying with the 1981 agreement. Reese was concerned that the hiring of new employees with no weekends off was eroding the benefit (CP-9, 1T72-73).

23. J-7 reports the July 1987 work schedules for nurses, technicians and assistants. Units 2 south, 3 east, 3 west, 4 east and 4 west had the largest number of assigned technicians and assistants on the morning shifts; most had 9 of them assigned. Weekend coverage sometimes dropped to 3 and 4 employees; weekday coverage was often 6 employees.

Neither party presented testimony about J-7 and I cannot decipher the meaning of numerous lines, marks, and numbers on the document. J-7 is not inconsistent with Friedman's general testimony about scheduling at the facility (see, e.g., findings 26 and 30).

24. From October 15, 1987 to March 18, 1988, the personnel officer at the Home notified Reese of the names and hiring dates of 7 Human Services assistants, 2 practical nurses and 2 food service workers. The new assistants had no weekends off (CP-10; 1T76-77). The notices also included the names of 6 assistants, a practical nurse and a food service worker who "left State service" (CP-10).

25. In January 1988, the Department of Military and Veterans Affairs "assumed responsibility" for the facility (3T61; J-5).

26. On May 9, 1988, Friedman sent a memorandum to Department Director Thomas Waskovitch asking him to review some "options" concerning the "agreement between AFSCME and [Department of Human Services]" (R-2). Friedman wrote that the 1981 agreement did not work, AFSCME did not comply with it, and the veterans were receiving "less than adequate care." He compared a "standard post trick analysis" with the "Menlo Park schedule" to reveal that his facility was understaffed on weekends. He specifically condemned the "4, 3, 2" schedule (see finding 8) and complained about "excessive absenteeism" on weekends.

The options in R-2 state: 1) rescind the 1981 agreement; 2) provide overtime money to "bring the staffing level up to the weekday levels"; 3) hire more staff to "bring weekend coverage up to par. Should the additional staff also be afforded every other weekend off, the finding requirements would be prohibitive"; and 4) do nothing. Finally, Friedman wrote: "To provide a double care

standard for out veterans is, I believe, unconscionable and although PERC is presently reviewing a tangential matter, I fear that the larger issue of HSA/HST weekend schedules will not be addressed at this particular forum."

27. On May 19, 1988, the Office of Management and Budget issued an audit of the Division of Veterans Services which included a section on the Menlo Park facility. The facility purportedly suffered a "lack of formal training," a divisive union/management relationship, and poor supervision of technicians and assistants. The reported noted that an agreement was "apparently signed assuring [technicians, assistants and practical nurses] every other weekend off" (CP-13).

28. Between May and September 1988, Friedman had a "myriad of discussions" with Waskovitch and other State officials about the "serious problem" at the Home. Friedman was given approval to implement a new schedule for technicians and assistants in October 1988 (3T25-26, 41-42). No negotiations were held concerning the proposed change (3T42).

29. J-6 reports the September 1988 work schedules for nurses, technicians, and assistants. Most of the larger units (see finding 23) had 8 assigned technicians and assistants on the morning shift. Weekend coverage dropped to 4 and occasionally 3 employees. Weekday coverage was usually 7 and 6 employees and in one unit, coverage was 5 and 4 employees.

Neither party presented testimony about J-6, which is consistent with Friedman's testimony about weekday and weekend scheduling at the facility before October 1988.

30. On or about September 20, 1988, Waskovitch, Friedman and other State representatives gave Reese J-5, employee work schedules with an attached cover memorandum (1T83, 85). The memorandum confirmed that the "Department of Veterans Affairs and Defense assumed responsibility for...the operation of the...Home" and stated that "...residents will more appropriately be served through instituting the accompanying change in regular days off for direct care employees." The schedule was implemented on October 1, 1988 (J-5; 1T85).

31. J-5 is the October 1988 work schedules for 144 named technicians and assistants (one scheduled position had no accompanying name). In copying the "standard post trick analysis" (see finding 26 and R-2), Friedman intended the new schedules to show that "every day, seven days a week," staffing limits for each

50-patient unit are 5 on the first shift, 4 on the second shift and 3 on the late shift (3T46-47, 27)[12/][13/]

Human Services technician Juhass is one of seven technicians and assistants assigned to the afternoon shift in a 50-patient unit (J-5; 238). Her experience is that fewer than the five scheduled employees report to work on the shift (2T38, 48).

J-5 "staggers" two consecutive days off for technicians and assistants every week. Friedman used employee seniority to determine which days off each employee would have. The most senior person in each unit had Saturday and Sunday off; the next senior person had Sunday and Monday off; the next senior person had Friday and Saturday off; and the remaining least senior technicians and

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12/ For units with 7 and 8 technicians and assistants assigned to the first shift, J-5 shows that coverage below 5 occurred 10 times (not counting the holiday), 4 of which fell on weekends. Weekday coverage in these units was often 6 technicians and assistants. Friedman's "every day, seven days a week" plan is substantially realized in J-5.

13/ Friedman testified that under the "old" schedule, the "established practice" was "5, 4 and 3" during the week (3T46-47). He also testified that the old weekday schedule had as many as 6 technicians and assistants on duty in a 50-patient unit (3T27). R-2 corroborates that in any two weeks, (before October 1988), 6 technicians and assistants worked the first shift in 50-patient units on 6 weekdays, and 5 worked the first shift on the remaining 4 weekdays. Weekend morning coverage was alternately 4 and 3 technicians and assistants.
AFSCME did not rebut R-2. I conclude that while the State's "policy" under the old schedule may have been 5, 4 and 3 weekday morning coverage in 50-patient units, the actual schedule was 6 and 5 weekday coverage.

assistants were "merely plugged in," receiving consecutive weekdays off (3T20).[14/]

The new schedule caused some technicians and assistants to quit and the shortage has resulted in the denial of vacation requests (1T88, 89).

32. Between October 1988 and March 1989, the number of technicians and assistants employed at the Home declined from about 146 to about 141 (3T128). CP-7 is the March 1989 work schedules for nurses, technicians and assistants. Weekday morning coverage on the larger units was generally 5 and 6 employees. Weekend coverage was generally 4 employees. After March 1989 the number of technicians and assistants employed at Home dropped to about 131 (3T135).

ANALYSIS

AFSCME alleges that the State violated the 1981 understanding after 1985, particularly during the six month period before it filed its December 1987 charge. It also alleged that in September 1988 the State again violated the understanding and unilaterally changed terms and conditions of employment. Finally, it alleged that the changes "appeared" to benefit AFSCME representatives only.

14/ AFSCME presented no facts concerning the relative seniority of Human Services technicians and assistants in any unit. It also failed to present any facts specifically rebutting Friedman's motives for using seniority to determine which days off each employee would have. Reese's testimony that her current weekends off schedule creates the "appearance" that union officers receive special treatment is not inconsistent with my finding.

The State argues that the charge is untimely, the 1981 understanding is unenforceable, staffing is a managerial prerogative and that it acted without union animus (or favoritism) in September 1988.

In remanding the case to me for a plenary hearing, the Commission urged that I determine the viability of the 1981 agreement. The 1981 "understanding" is not viable as a matter of law. Although the document modified J-1 (which ran from July 1, 1979 to June 30, 1981), all subsequent State/AFSCME collective negotiations agreements contained provisions conflicting with the every other weekend off benefit. Specifically, Articles 17 and 43 reserved to the State the right to determine employee scheduled days off. Nothing in CP-1, J-2, J-3 and J-4 preserved the 1981 benefit.

In N.L.R.B. v. Operating Engineers Local 12, 323 F2d 545, 54 LRRM 2314, 2316 (9th Cir. 1963),[15/] the court discussed the problem of construing inconsistent contracts signed at different times:

> Since both contracts were in force the question arises as to which took precedence...The provisions of these two contracts are inconsistent with each other and since the contracts were entered into by the same parties and cover the same subject matter, it is a well settled principle of law that the later contract

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15/ In Lullo v. Int'l Assn. of Firefighters, 55 N.J. 409 (1970) the New Jersey Supreme Court approved the Commission's use of federal sector precedent in New Jersey public sector unfair practice litigation.

> supercedes the former contract as to inconsistent provisions (citations omitted).16/

This principle has been applied in other labor cases; in Teamsters Local 389 v. Bekins Van and Storage Co., 288 P.2d 181, 37 LRRM 2052 (Cal. Dist. Ct. of App. 1955), a "letter agreement" modifying a then current collective bargaining contract "expired" as a matter of law when a new written contract took effect; in Nat. Assn of Letter Carriers, Clyde Kelly Branch v. U.S. Postal Service, 346 F. Supp. 1058, 81 LRRM 2671 (Dist. Ct. of PA. 1972), a "local agreement" entered after the national contract expired was "terminated and supplanted" by a new national contract.

A party may contractually waive its right to bargain about a mandatorily negotiable subject if the language is "clear and unequivocal." State of New Jersey, P.E.R.C. No. 77-40, 3 NJPER 77 (1978); Ador Corp., 150 NLRB 1658, 588 LRRM 1280 (1965); and Morris, "The Developing Labor Law) (2nd ed. 1983) at 640; 641.

16/ For example, 6 Corbin, Contracts §1296 (2d ed 1962) states:

> The new agreement may make no reference to the previous contract or claim; and yet it may operate as a substituted contract. If the new agreement contains terms that are clearly inconsistent with the previously existing contract or claim, the fact of inconsistency is itself a sufficient indication of intention to abrogate the old and substitute the new. The inconsistency may exist as to the whole of the former contract or claim or only as to a part. It operates as a discharge by substitution only so far as the inconsistency extends. See also Winan v. Asbury Park Nat. Bank & Trust Co., 81 A.2d 33, 13 N.J. Super. 577 (1951).

The disputed term and condition of employment is scheduled days off. CP-1 conditionally grants technicians and assistants every other weekend off; J-2, J-3 and J-4 contain provisions which, "...on [their] face allow the State to change starting and stopping times" (Article 17B); see State of N.J., P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985).[17/] Article 17C permits the State to change scheduled days off, provided that employees receive "maximum advance notice..." I find that Article 17C is "clearly inconsistent" with CP-1 and reveals the parties' intent to "abrogate the old and substitute the new." Had AFSCME intended the language in CP-1 to modify Article 17C it should have sought to include the benefits in J-2 to J-4. The posting requirement added to J-4 reveals that in 1986 the State and AFSCME negotiated in fact over the scheduled days off provision. AFSCME did not try to or was unsuccessful in having an every other weekend off provision included in the agreement. I conclude as a matter of law that the three later statewide agreements (J-2, 3 and 4) supersede CP-1.

Other provisions in J-2, J-3 and J-4 confirm that AFSCME contractually waived its right to the every other weekend off benefit. The "complete contract" provision in Article 43 states that each contract "inclu[des] all negotiable issues whether or not discussed..." Whether the "particular reference" exception must

17/ In State of New Jersey, the Commission interpreted a contract provision identical to the first sentence of 17B to operate as a waiver.

appear in the contract or in the memorandum is an academic concern -- neither CP-1 nor the contracts incorporate or "refer" to the every other weekend off benefit.

The "effect of contract" provision states that institutional conditions of employment "which conflict with any provision of this contract shall be considered to be modified consistent with the terms of this Contract..." provided that the State gives AFSCME adequate notice of the change. The State's duty to negotiate "the matter" in the following sentence is triggered by an AFSCME request.

In February 1985 AFSCME was informed that 20 "new" positions would be added and that no currently employed technicians and assistants would lose the 1981 benefit. AFSCME essentially agreed to the proposal. In April, when Reese (with good reason) doubted that the State was adding "new" positions, AFSCME filed and then abandoned a grievance at Step 1.[18/] In August 1985, the State reaffirmed its promise to hire 20 "new" positions, and reneged on it over the next few months (see finding 21). AFSCME did not request negotiations nor file a grievance. Similarly, in September 1988, when the State formally rescinded the 1981 understanding, AFSCME filed an unfair practice charge and did not seek to negotiate the matter.

18/ In view of the fact that AFSCME filed a concurrent grievance concerning a change in the lunch period and pursued the matter to arbitration, I infer that AFSCME knowingly abandoned the "20 new position" grievance.

Any past practice of providing every other weekend off must yield to contrary contract provisions. New Jersey Sports and Exposition Authority, P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987); Randolph Tp. School Bd., P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980). Even if Friedman, and other Departments of Human Services and Defense officials considered the State bound by the 1981 agreement for seven years, they did not waive the State's contractual right to change scheduled days off set forth in J-2, J-3 and J-4.

In Sports and Exposition Authority, the union alleged that the employer violated a long-standing practice by changing the work week from Monday to Friday (with Saturday at an overtime rate) to Monday to Sunday (with days off during the week). The Commission dismissed the complaint and, citing the pertinent contract provision, found that the employer had the contractual right to change the workweek.

Although the State and AFSCME modified the 1979-1981 collective negotiations agreement to include CP-1, the successor contracts did not include the "understanding" and the benefit continued (at best) as a "practice." The State followed the practice inconsistently in 1985, 1986 and 1987 and substantially rescinded it in September 1988 (Moura's 1985 oral assurance that the "new" positions were forthcoming, does not, under the parol evidence rule, bind the State in successor agreements (J-4) See Mercer Cty. Vo-Tech Schools, P.E.R.C No. 85-90, 11 NJPER 142 (¶16063 1985)).

The State retained the right to change scheduled days off in Articles 17 and 43; a public employer meets its negotiations obligation when it acts pursuant to its collective agreement. Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554 (¶11280 1980). Accordingly, I dismiss AFSCME's a(5) and (1) allegation.[19/]

The State also argues that the charge is untimely filed. Having determined that the State had a contractual right to change scheduled days off and that the right prevails over any contrary past practice, I find that the timeliness issue is moot.[20/]

N.J.S.A. 34:13A-5.4(c) states that "no complaint shall issue based upon any unfair practice occurring more than six months prior to the filing of the charge unless the party aggrieved thereby was prevented from filing such charge...."

19/ The State also argued that the termination of an illegal strike is invalid consideration for the 1981 understanding, which in turn is not a binding agreement. I dismiss this defense because the State had and missed the opportunity in 1981 to seek a decision stating that the agreement was invalid and that the job action was unlawful. Furthermore, the "understanding" may have resolved an employment dispute and not merely a "job action." Finally, the legality of the strike was never litigated and cannot, retrospectively, form the basis for unilateral changes in terms and conditions of employment.
The State also argued that AFSCME's failure to comply with the 1981 understanding discharged its obligations under that agreement's terms. The State had ample opportunity to enforce the 1981 agreement by filing an unfair practice charge with the Commission. AFSCME's failure to comply with CP-1 does not necessarily release the State from its contractual obligations.

20/ If the Commission determines that the State was contractually obligated to maintain the 1981 benefit, then AFSCME has "a continuing right to file an unfair practice charge if the agreement is repudiated" State of New Jersey, 15 NJPER 90.

Assuming that the right to every other weekend off endured as a "past practice" until 1985, I find that the six month period began on or around November 1, 1985, when Reese was informed that newly hired named technicians and assistants had and did not have every other weekend off (see finding 21). On that date, the same acts which preceded the filing of the grievance and the August 1985 meeting were renewed and left unchallenged until October 1986 (see finding 22). Since the State continued to "fill vacancies" and inconsistently provide the every other weekend off benefit to newly hired employees through December 1987, I find that AFSCME failed to timely file its original charge and first amendment.[21/]

The State also argues that it has a managerial prerogative to change staffing levels at the Home. I agree that the State has a prerogative to determine staffing needs Irvington PBA Loc. 29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979) certif. den. 82 N.J. 296 (1982); City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). But that right does not necessarily mean that the State can change terms and conditions of employment - the scheduling of time off is mandatorily negotiable so long as the agreed-upon system does not prevent the employer from fulfilling its staffing requirements City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), aff'd App. Div. Dkt. No. A-4636-81T3

21/ AFSCME's charge concerning weekend schedule changes in September 1988 is timely, notwithstanding my recommendation that the State had the contractual right to make the changes.

(3/23/84). A public employer must negotiate over hours, compensation and days off. Tp. of Mt. Laurel, P.E.R.C. No. 86-72, 12 NJPER 23 (¶17008 1985), aff'd 215 N.J. Super. 108 (App. Div. 1987).

In the absence of a contract provision setting a term and condition of employment, a public employer has the obligation to negotiate at least severable issues after changing staffing levels pursuant to its managerial prerogative. Here, the State had the contractual right to change scheduled days off and was not obligated to negotiate over what are ordinarily severable issues. See Local 195, IFPTE v. State, 88 N.J. 393 (1982).

AFSCME did not establish a prima facie case that protected activity was a substantial or motivating factor in the State's decision to change the method by which employees were assigned consecutive days off. In re Bridgewater Tp., 95 N.J. 235 (1984). The circumstantial evidence of union animus concerned 1985 job solicitations to Reese and memoranda complaining of AFSCME's relative strength as a representative at the home. The memoranda further suggested ways to undermine AFSCME's strength. Although this evidence could have supported a finding (upon the filing of a timely charge) that in 1985 the State engaged in acts which interfere with the exercise of protected rights, AFSCME did not show that the alleged interference or animus was causally connected to the State's decision to change scheduled days off in September 1988. The three-year period between the State's allegedly unlawful

acts and the schedule change suggest only a tenuous causal connection. See Downe Tp. Bd. of Ed., P.E.R.C. No. 86-6, 12 NJPER 2 (¶17002 1985).

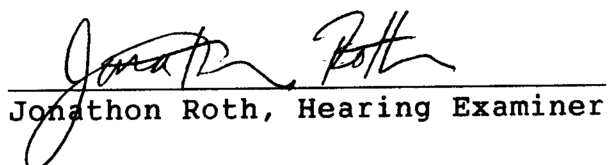
Assuming that AFSCME established a prima facie case that protected activity was a motivating factor in the State's decision to change scheduled days off, I find that the State would have changed the scheduled days off anyway. Friedman's memoranda from 1981 to 1988 reveal his dissatisfaction with CP-1 because it left patients inadequately attended on weekends (see findings 10, 12, 26 and 28). Overtime costs for weekend coverage were relatively high. The State's efforts to hire other employees failed and it wished to overcome AFSCME's resistance to change weekend scheduling. Friedman regarded AFSCME strength as an impediment to greater weekend coverage. The circumstances of which Friedman complained in 1981 did not improve between 1985 and September 1988.

AFSCME did not rebut the State's contention that Friedman gave the most senior technician or assistant on each shift Saturdays and Sundays off or that the next senior employee received Sundays and Mondays off, etc. AFSCME did not rebut the State's argument that it used employee seniority to determine who received the "preferred" days off. Furthermore, some employees who received the preferred days off were not AFSCME representatives. Under these circumstances, I find that AFSCME did not prove that the State

violated subsections (a)(1) and (a)(3) of the Act when it changed scheduled days off in September 1988.[22/]

RECOMMENDATION

I recommend that the Complaint be dismissed.



Jonathon Roth, Hearing Examiner

DATED: February 21, 1990
Trenton, New Jersey

22/ The record does not show that the State violated Subsections (a)(2) and (4) of the Act. Accordingly, I recommend that the Commission dismiss those allegations.