P.E.R.C. NO. 2002-28

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-H-2001-123

NEWARK COUNCIL NO. 21,
NJCSA, IFPTE, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants a motion for summary judgment filed by Newark Council No. 21, NJCSA, IFPTE, AFL-CIO. The Commission finds that the City of Newark violated the New Jersey Employer-Employee Relations Act when it implemented a new work schedule for police aides represented by Council No. 21. The union alleges that since the City did not file an Answer, the allegations set forth in its unfair practice charge are deemed to be admitted to be true. The Commission denies the City's request that its statement of position be accepted as its Answer. The Commission finds that the City has not offered any good cause for not deeming the allegations in the Complaint to be true. The Commission further concludes that there is no genuine issue of material fact because the City has not submitted any evidence by way of affidavit or document to sustain a judgment in its favor and that the charging party is entitled to its requested relief as a matter of law. Work hours are generally mandatorily negotiable and the employer has not submitted any evidence to show that negotiations over work hours would have significantly interfered with governmental policy determinations.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Joanne Y. Watson, Corporation Counsel (Michelle Blake-Smith, Assistant Corporation Counsel)

For the Charging Party, Fox and Fox LLP, attorneys (Craig S. Gumpel, of counsel)

DECISION

On November 8, 2000, Newark Council No. 21, NJCSA, IFPTE, AFL-CIO filed an unfair practice charge against the City of Newark. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5),[1/] by unilaterally implementing a new work schedule for police aides.

1/ These provisions 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 November 16, 2000, the Director of Unfair Practices wrote to the parties. Among other things, he indicated that the case was assigned to a staff agent and the respondent was requested to submit a copy of the parties' contract and a statement of position why the allegations in the charge, if true, would or would not constitute unfair practices. He further indicated that the staff agent might request additional materials and schedule an exploratory conference to clarify the issues and to explore the possibility of voluntary resolution.

On November 29, 2000, the employer filed a statement of position denying that it violated the Act. The statement asserts that the contract does not require negotiations before changing tour schedules; the police department must be able to move these employees as department needs change; and the department has routinely transferred aides and changed their work schedules.

On February 28, 2001, a Complaint and Notice of Hearing issued. The cover letter to the parties reminded the respondent of its obligation to file an Answer and that, if no Answer was filed, all allegations in the Complaint would be deemed to be admitted to be true, unless good cause to the contrary was shown. The cover letter also reminded the respondent that a statement of position does not automatically constitute an Answer and that should a respondent desire that a statement of position constitute an Answer, it must so inform the Hearing Examiner in writing.

The respondent did not file an Answer. Nor did it write the Hearing Examiner.

On October 18, 2001, the charging party moved for summary judgment.[2/] It argues that, because the respondent did not file an Answer, the allegations set forth in the charge are to be considered true. Those allegations are:

> Newark Council No. 21, NJCSA, IFPTE, AFL-CIO and the City of Newark are parties to a collective negotiations agreement which expired on December 31, 1999. Newark Council No. 21 is the exclusive bargaining representative for all white collar and professional employees employed by the City including employees in the title of Police Aide.
>
> On or about May 10, 2000, the City unilaterally changed the work schedule of Police Aide Danielle Smith from 8:00 a.m. to 5:00 p.m. to 10:00 a.m. to 7:00 p.m. This change was made unilaterally without negotiations. By letter dated May 12, 2000, Newark Council No. 21 demanded negotiations over this unilateral change. A copy of the May 12, 2000 correspondence is attached hereto as Exhibit A. To date, the City has failed and/or refused to negotiate with Newark Council No. 21 over the unilateral change in work schedule.
>
> In or about June 2000, the City unilaterally changed the work schedule for a group of Police Aides. Rhona Harris' schedule was changed from Monday through Friday to Tuesday through Saturday. Jana Cline's schedule was changed from Sunday through Thursday, 8:30 a.m. to 4:30 p.m. to Sunday through Thursday, 8:00 a.m. to 5:00 p.m. Other police employees whose work schedules were changed include the following: Yvonne Edwards, Gwen Rouse, Beverly Snider, Tahira

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2/ We deny the charging party's request for oral argument.

> Andrews, Gisell Rivera, Dorothy Willam, Chenita Estes, Raijona Boyd, and Hubert Davis. By letter dated July 6, 2000, Newark Council No. 21 demanded negotiations regarding this unilateral schedule change. A copy of the July 6, 2000 correspondence is attached hereto as Exhibit B. To date, the City has failed and/or refused to negotiate over this unilateral change in work schedule.
>
> The City has unilaterally implemented work schedule changes without negotiations with Newark Council No. 21. Any change in work schedule is a mandatory subject of negotiations. The City's unilateral action in implementing a work schedule change is a violation of N.J.S.A. 34:13A-5.4a(1) and (5).

On October 29, 2001, the employer filed a cross-motion, brief and certification. The cross-motion seeks to have the City's statement of position accepted as its Answer. Its counsel's certification asserts that the statement of position denied the allegations in the charge and therefore placed the Commission and the charging party on notice that the City was not conceding anything.

The City's brief argues that summary judgment should be denied because there are genuine issues of material fact and law to be determined. It contends that the police chief is empowered to prescribe duties and a public employer has the prerogative to determine staffing levels and the hours that facilities are available. It further contends that there are material issues of fact and law in light of these powers and the issue of whether the police department had sufficient employees to meet its coverage needs.

On November 8, 2001, the charging party filed a response to the cross-motion. It argues that the cross-motion is untimely, the respondent has not demonstrated that it is entitled to have its statement of position be adopted as its Answer, and the respondent has not demonstrated that summary judgment is inappropriate.

On November 15, the Chair referred the motion to the full Commission. N.J.S.A. 34:13A-4.8.

The cross-motion is timely. It was due ten days after service of the motion. Ten days after October 18 is October 28, a Sunday. The cross-motion was therefore due and was filed on Monday, October 29.

N.J.A.C. 19:14-3.1 provides that if a respondent in an unfair practice proceeding does not file an Answer, "all allegations in the complaint ... shall be deemed to be admitted to be true and shall be so found by the hearing examiner and the Commission, unless good cause to the contrary is shown." This procedural requirement of filing an Answer and the consequences of not filing one are established parts of our jurisprudence. Compare R. 4:5-5; Ballantine v. Haight, 16 N.J.L. 196 (Sup. Ct. 1837) (whatever in one pleading is not denied in the subsequent one is in law admitted).

The respondent did not file an Answer or timely request that its statement of position constitute its Answer. Nor has it offered any explanation for why it did not comply with the Answer requirement in a timely manner. The respondent was put on notice

that failure to file an Answer had consequences and that a statement of position would not automatically constitute an Answer.

The failure to file an Answer triggers the requirement that the allegations in the Complaint be deemed admitted to be true, unless good cause to the contrary is shown. The respondent has not offered any reason for overcoming that presumption. Its only argument is that it filed a statement of position putting the charging party and the Commission on notice that it was not conceding anything. That argument, however, would apply whenever a party files a statement of position and would effectively invalidate the requirement that an Answer be filed. The respondent's argument does not constitute good cause for not deeming the allegations admitted to be true.

Given the admissions, we grant summary judgment. N.J.A.C. 19:14-4.8(d) provides that:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

The first question is whether there exists any genuine issue of material fact. The charging party, through the admissions discussed above, has presented evidence that the respondent changed employees' work hours and failed or refused to negotiate over those changes. There is no genuine issue of material fact because the respondent has not submitted any

evidence by way of affidavit or document to sustain a judgment in its favor. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995).

The next question is whether, given the undisputed facts in this record, the charging party is entitled to its requested relief as a matter of law. The answer is yes.

Work hours are, in general, mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J. 393 (1982); Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106, 113 (¶28054 1997). An employer that unilaterally changes work hours violates N.J.S.A. 34:13A-5.4(a)(1) and (5) unless the particular facts of a case establish that it had a managerial prerogative or a contractual right to make the changes without negotiations. See, e.g., Gloucester Cty., P.E.R.C. No. 89-70, 15 NJPER 69 (¶20026 1988). To prove that it had a managerial prerogative to change work hours, the employer would have to show that negotiations over work hours would significantly interfere with a governmental policy determination. Absent any facts suggesting such interference, we cannot find that the employer had a prerogative to act. Similarly, to find that the employer had a contractual right to act unilaterally, the employer would have had to present evidence of such a contractual right. It did not do so.

Under all these circumstances, we conclude that the employer violated its obligation to negotiate in good faith. We will order the employer to restore the status quo concerning the

employees specified in the charge and to negotiate before changing these employees' work hours. We would have preferred considering any defenses the respondent may have had. However, the respondent had four opportunities to put those defenses before us. It could have filed an Answer, timely asked that its statement of position constitute its Answer, shown good cause why it did not file a timely Answer, or filed an affidavit or document in response to this motion adding facts beyond those specified in the charge. It did not take advantage of any of these opportunities. The finding of a violation is therefore appropriate.

ORDER

The City of Newark is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing the work hours of particular employees.

2. Refusing to negotiate in good faith with Newark Council No. 21, NJCSA, IFPTE, AFL-CIO concerning terms and conditions of employment of employees in its unit, particularly by unilaterally changing the work hours of particular employees.

B. Take this action:

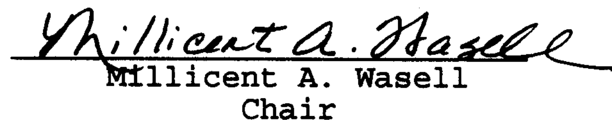
1. Restore the work hours of Danielle Smith to the schedule in effect before May 10, 2000 and the work hours of Rhona Harris, Jana Cline, Yvonne Edwards, Gwen Rouse, Beverly Snider,

Tahira Andrews, Gisell Rivera, Dorothy Willam, Chenita Estes, Raijona Boyd, and Hubert Davis to the schedules in effect before June 2000.

2. 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.

3. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. Commissioner Buchanan abstained from consideration. None opposed.

DATED: November 29, 2001
Trenton, New Jersey
ISSUED: November 30, 2001

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 cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing the work hours of particular employees.

WE WILL cease and desist from refusing to negotiate in good faith with Newark Council No. 21, NJCSA, IFPTE, AFL-CIO concerning terms and conditions of employment of employees in its unit, particularly by unilaterally changing the work hours of particular employees.

WE WILL restore the work hours of Danielle Smith to the schedule in effect before May 10, 2000 and the work hours of Rhona Harris, Jana Cline, Yvonne Edwards, Gwen Rouse, Beverly Snider, Tahira Andrews, Gisell Rivera, Dorothy Willam, Chenita Estes, Raijona Boyd, and Hubert Davis to the schedules in effect before June 2000.

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CITY OF NEWARK
(Public Employer)

Date: ____________________ 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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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