

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEST WINDSOR,

Respondent,

Docket No. CO-78-275-11

-and-

WEST WINDSOR PBA, LOCAL 271,

Charging Party.

SYNOPSIS

In the absence of exceptions filed by either party, the Commission adopts the findings of fact and conclusions of law contained within the Hearing Examiner's Recommended Report and Decision in an unfair practice proceeding. The Hearing Examiner found, and the Commission affirms, that the Township, having contractually agreed to provide certain benefits to members of the PBA, could, without violating N.J.S.A. 34:13A-5.4(a)(1) and (3) grant additional benefits, i.e., snow emergency holidays, to other Township employees, while denying these additional benefits to members of the PBA.

Further, the Township did not violate N.J.S.A. 34:13A-5.4(a)(5) by unilaterally altering a term and condition of employment since, as the Hearing Examiner found, and the Commission affirms, there was no past practice or contractual provision providing that additional holidays, other than those enumerated in the contract between the PBA and the Township, would be granted to police officers in the event that the Township granted additional holidays to other Township employees.

Nor did the Township violate N.J.S.A. 34:13A-5.4(a)(5) by refusing to negotiate over the subject of compensation for the police officers for three snow days in January and February 1978 when they worked and other Township employees were granted a holiday or given compensatory time off if they did work. The Hearing Examiner found, and the Commission affirms, that during negotiations for the 1977-78 contract the Township had negotiated with the PBA over a provision relating to the possibility of additional holidays, if they were granted to other Township employees. The PBA was unable to obtain such a provision during negotiations and the contract contains a "Fully Bargained Provision" which, in effect, relieves the Township of any obligation to negotiate further over any negotiable issues which were the subject of negotiations. Based on these facts the Hearing Examiner concluded, and the Commission affirms, that the Township fulfilled its obligation to negotiate.

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Charging Party.

Appearances:

For the Respondent, Schragger, Schragger & Lavine, Esqs.
(Frederick J. Schragger, of Counsel)

For the Charging Party, Stark and Stark, Esqs.
(Eric J. Ludwig, of Counsel)

DECISION AND ORDER

On May 17, 1978 West Windsor PBA, Local 271 (the "PBA") filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the Township of West Windsor (the "Township") had engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (the "Act"). Specifically, the PBA alleges that the Township violated N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) ^{1/} when after a March 6, 1978 demand to negotiate by the PBA, the Township on March 20, 1978 refused to negotiate over the subject of

1/ These subsections prohibit employee organizations, their representatives or agents from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission."

additional compensation for police officers who worked during three snow emergency days, January 20, February 6 and February 7, 1978 when many other Township employees, who did not work those days due to the emergency, were compensated at their regular rate of pay.

It appearing that the allegations, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on August 2, 1978.

Pursuant to the Complaint and Notice of Hearing, a hearing was held before Alan R. Howe, Hearing Examiner of the Commission, on January 30, 1979 at which time the parties were given the opportunity to examine witnesses, present relevant evidence and argue orally. Post-hearing briefs were submitted by the PBA on February 14, 1979 and by the Township on March 9, 1979. On March 23, 1979 the Hearing Examiner issued his Recommended Report and Decision, which Report included findings of fact and conclusions of law and a recommended order. The original of the Report was filed with the Commission and copies were served upon all parties. A copy is attached hereto and made a part hereof.^{2/}

None of the parties has filed exceptions to the Hearing Examiner's Recommended Report and Decision. See N.J.A.C. 19:14-7.3.

Upon careful consideration of the entire record herein, the Commission adopts the findings of fact and conclusions of law rendered by the Hearing Examiner, substantially for the reasons cited by him.

Initially the Commission finds that the Township, having contractually agreed to provide certain benefits to members of the PBA, could, without violating N.J.S.A. 34:13A-5.4(a)(1) and (3), grant additional benefits, i.e. snow emergency holidays, to other Township employees, while denying these additional benefits to members of the PBA. As the Hearing Examiner noted, this is not the type of "discrimination" contemplated within the meaning of (a)(1) and (a)(3).

Further, the Commission finds that the Township did not violate N.J.S.A. 34:13A-5.4(a)(5) by unilaterally altering a term and condition of employment since there was no past practice or contractual provision providing that additional holidays, other than those enumerated in the contract between the PBA and the Township, would be granted to police officers in the event that the Township granted additional holidays to other Township employees.

Nor did the Township violate N.J.S.A. 34:13A-5.4(a)(5) by refusing to negotiate over the subject of compensation for police officers for three snow days in January and February 1978 when they worked and other Township employees were granted a holiday or given compensatory time off if they did work. The Commission finds that during negotiations for the 1977-78 contract the Township had negotiated with the PBA over a provision which would have provided that, in addition to those holidays enumerated in the contract, the PBA would receive any additional holidays granted by the Township to other employees. The PBA was unable to obtain such a provision during negotiations and the contract contains a "Fully Bargained Provision" which, in effect relieves the Township

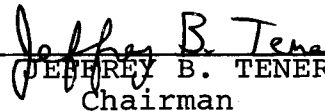
of any obligation to negotiate further over any negotiable issues which were the subject of negotiations.

Accordingly, the Commission dismisses the complaint in its entirety.

ORDER

For the reasons hereinabove set forth, the Commission hereby adopts the aforementioned Hearing Examiner's Recommended Order and it is ordered that the Complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION


JEFFREY B. TENER
Chairman

Chairman Tener, Commissioners Graves, Hartnett, Hipp, Newbaker and Parcels voted for this decision. None opposed.

DATED: Trenton, New Jersey
April 26, 1979
ISSUED: May 1, 1979

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

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- and -

Docket No. CO-78-275-11

WEST WINDSOR PBA LOCAL 271,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices filed by the PBA against the Township, which alleged that the Township illegally refused to negotiate with the PBA, upon demand, with respect to compensatory time for three snow days in January and February 1978, on which the members of the PBA collective negotiations unit worked and did not receive compensatory days off while other unrepresented Township employees did not work on the snow days and were nevertheless paid for those days. The PBA further alleged that this disparate treatment on the part of the Township constituted discrimination against members of the PBA collective negotiations unit within the meaning of the New Jersey Employer-Employee Relations Act.

With respect to the alleged discrimination against PBA members, the Hearing Examiner found that the PBA failed to prove that the Township acted with anti-union animus or that its conduct was inherently destructive of important employee rights under the standards of the Commission in its decisions in Haddonfield Borough Board of Education, P.E.R.C. No. 77-36, 3 NJPER 71 (1977) and City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977).

The Hearing Examiner further found, with respect to the alleged violation by the Township of its obligation to negotiate regarding the three snow days, that no such obligation existed under the Act and that, additionally, the Township was relieved of any obligation to negotiate by a comprehensive "zipper" clause in the collective negotiations agreement between the parties. The "zipper" clause provided that neither party was obligated to negotiate during the term of the agreement any matter which was in the knowledge or contemplation of the parties during negotiations or at the time of the signing of the agreement.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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Appearances:

For the Township of West Windsor
Schragger, Schragger and Lavine, Esqs.
(Frederic J. Schragger, Esq.)

For the West Windsor PBA Local 271
Stark and Stark, Esqs.
(Eric J. Ludwig, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on May 17, 1978 by the West Windsor PBA Local 271 (hereinafter the "Charging Party" or the "PBA") alleging that the Township of West Windsor (hereinafter the "Township" or the "Respondent") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Township had on January 20, February 6 and 7, 1978 declared a state of emergency due to heavy snow conditions, as a result of which all unrepresented Township employees except certain employees of the Police Department, represented by the PBA, were compensated for the aforesaid three days that were not worked whereas certain employees of the Police Department worked without additional compensation; and on March 6, 1978 the PBA made a demand to negotiate the question of compensation for snow days but on March 20, 1978 the Township refused to negotiate, all

of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act. ^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on August 2, 1978. Pursuant to the Complaint and Notice of Hearing, a hearing was held on January 30, 1979 ^{2/} in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The Charging Party filed a post-hearing brief on February 14, 1979 and the Respondent filed a post-hearing brief on March 9, 1979.

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists

1/ These Subsections prohibit employers, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

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

At the hearing counsel for the PBA moved to amend the charge to allege a violation of Subsection (a)(3) of the Act, which was granted. This Subsection provides: "(3) Discriminating in regard to hire or tenure of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act."

Also, at the hearing, counsel for the Township moved to amend its answer to allege affirmatively the defense of "waiver" by the PBA of the instant charge of unfair practices since it had resorted to and then abandoned the grievance procedure under the collective negotiations agreement. The amendment to the answer was granted.

2/ The reason for the delay in hearing date is as follows: At a pre-hearing on August 28, 1978 it appeared to the Hearing Examiner that a stipulation of facts could be agreed upon by the parties and the case submitted directly to the Commission on briefs with waiver of a Hearing Examiner's Recommended Report and Decision pursuant to N.J.A.C. 19:14-6.7. Accordingly, the hearing date of September 18 was cancelled pending the preparation of a stipulation of facts. By the latter part of November it became apparent that a stipulation of facts could not be agreed upon and a hearing was scheduled for December 18. However, as a result of several unopposed requests by counsel for the Township the Hearing Examiner granted postponements of hearing date until January 30, 1979 when the hearing was held.

The Township's motion to dismiss at the conclusion of the PBA's case is deemed disposed of by the instant Decision.

and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

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

FINDINGS OF FACT

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

2. The West Windsor PBA Local 271 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The PBA and the Township have had a collective negotiations relationship since 1974 or 1975. The most recent collective negotiations agreement was effective during the term January 1, 1977 through December 31, 1978 (J-1), the Recognition clause of which covers all patrolmen and sergeants in the Police Department. ^{3/} The secretaries and dispatchers in the Police Department are not covered by the collective negotiations agreement and enjoy the same terms and conditions of employment, including fringe benefits, as other unorganized Township employees.

4. On January 20, February 6 and 7, 1978, ^{4/} the Township, acting through its Mayor, closed all Township administrative offices due to heavy snow conditions on those three days (hereinafter "snow days").

5. All patrolmen and sergeants represented by the PBA worked on the three snow days in accordance with their normal work schedule with the exception of Patrolman Thomas M. Ricigliano, who did not work on January 20 and was paid since he was excused by Lt. Frank J. Cox.

6. All employees of the Township except the patrolmen and sergeants represented by the PBA were given compensatory days off for the three snow days without regard to whether or not they worked on the said snow days. This includes Road Department employees, who worked on the three snow days, and the two dispatchers

^{3/} It was stipulated at the hearing that the PBA is the collective negotiations representative for "all patrolmen and sergeants" (Tr. 18). However, Article I of the collective negotiations agreement (J-1) refers only to "sergeants" and is deemed by the Hearing Examiner to be in error.

^{4/} All dates hereinafter are in 1978 unless otherwise indicated.

in the Police Department who worked on at least two of the three snow days. ^{5/}

7. The "Personnel Policies and Practices Relating to Municipal Employees of West Windsor Township", dated January 1, 1973, provides on page 1 that "Employees of the West Windsor Township Police Department are exempt and subject to the personnel policies and practices established by the management of the Police Department." The Hearing Examiner finds that the secretaries and dispatchers of the Police Department are not covered by the aforesaid exemption.

8. On March 6 Frank Coyle, the Negotiations Chairman of the PBA, wrote a letter to the Mayor of the Township requesting that the members of the PBA collective negotiations unit be given two and one-half days of compensatory time to be taken at the discretion of the officer (C-1).

9. On March 20 the Township Committee considered Mr. Coyle's letter and denied the request and this is reflected in the minutes of the meeting (R-1, para. 10).

10. The instant charge of unfair practices was filed with the Commission on May 17.

11. Under date of July 3 Eugene F. Swanhart, on behalf of the PBA, wrote to the Mayor of the Township advising that pursuant to Article XVII of the agreement (J-1) the PBA was formally grieving the refusal of the Township to grant compensatory time to PBA members for the snow days (CP-2).

12. On July 11 the Mayor responded to Mr. Swanhart, stating that the grievance was not instituted "within ten days of the occurrence of the grievance" and, therefore, was deemed abandoned under the provisions of Article XVII, Section G(a)(Step One) (see R-2). The Mayor also stated in R-2 that the alleged grievance ~~was not a "grievance"~~ within the definition of the agreement (see J-1: Article XVII, Section B). ^{6/}

^{5/} The record is silent as to whether the Township has ever previously granted compensatory days off to Township employees, either including or excluding patrolmen and sergeants, and thus no finding can be made with respect to the existence of a past practice in this regard.

^{6/} The Respondent urges "waiver" as an affirmative defense by virtue of the PBA having sought in an untimely manner to pursue the grievance procedure under the collective negotiations agreement. It is noted that the Unfair Practice Charge was filed on May 17, prior to the July 3 letter (CP-2) seeking to pursue the matter under the grievance procedure of the agreement. In view of the charge of unfair practices having been filed first, and the position of the Mayor in his letter of July 11 (R-2), plus the position of counsel for the Respondent in its brief (pp. 9, 10), the Hearing Examiner finds that the PBA has not waived its right to proceed with the Unfair Practice Charge, as to

(continued next page)

13. In the negotiations for the 1977-78 collective negotiations agreement (J-1) the PBA sought, but did not obtain, a provision that, in the event that the Township grants a holiday in addition to those enumerated in the agreement, "Police Officers shall be granted such additional holiday" (R-3).

14. The collective negotiations agreement (J-1) contains a "zipper" clause in Article XVI, entitled "Fully Bargained Provisions", which provides in pertinent part as follows:

"This Agreement represents and incorporates the complete and final understanding and settlement by the parties on all bargainable issues which were or could have been the subject of negotiations. During the term of this Agreement neither party will be required to negotiate with respect to any such matter, whether or not covered by this Agreement, and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement..."

THE ISSUE

Did the Respondent Township violate the Act when it unilaterally granted compensatory time for the three snow days in 1978 to all Township employees, except those patrolmen and sergeants represented by the PBA, and thereafter refused to negotiate with the PBA with respect to the PBA's demand that its members receive compensatory days off in the same manner as other Township employees?

DISCUSSION AND ANALYSIS

Positions of the Parties

Essentially, the Charging Party contends that compensatory days off for the three snow days is "compensation" and is, therefore, a term and condition of employment, as to which, upon demand, there must be mandatory negotiations. The Charging Party cites Township of West Windsor v. P.E.R.C. et al., 78 N.J. 98 (1978). The Charging Party further contends that there was no waiver of the unfair practice charge by virtue of filing for arbitration. ^{1/} The Charging Party argues that

^{6/} (continued from page 4)

which the Commission has exclusive jurisdiction. Thus, deferral to the instant grievance procedure of the agreement would be inappropriate. See Mayor and Council of Sayreville, P.E.R.C. No. 79-60 (pp. 9-12), 5 NJPER _____ (1979).

^{1/} The Hearing Examiner has previously rejected the defense of waiver (footnote 6, supra).

Subsection (a)(3) was violated in that the Township discriminated against the PBA within the meaning of this Subsection by granting compensatory time to unrepresented employees while denying it to the members of the PBA. Finally, the PBA contends that the unilateral conferring of a benefit upon Patrolman Ricigliano, a member of the PBA collective negotiations unit, while not conferring the same benefit on other members of the negotiations unit was an unfair practice.

The Respondent denies the foregoing and urges its affirmative defense of waiver, citing Township of West Windsor v. P.E.R.C. et al., supra. Respondent also cites the case of Board of Education, Woodstown-Pilesgrove Regional School District v. Woodstown-Pilesgrove Regional Educational Association, 164 N.J. Super 106 (App. Div. 1978) for the proposition that there was no duty to negotiate since there existed no binding past practice.

The Township Did Not Violate The Act When It Granted Compensatory Time To Unrepresented Employees of The Township, and Not The PBA, and When It Refused To Negotiate With The PBA With Respect To a Request For Compensatory Time For Members Of The PBA Collective Negotiations Unit

The Hearing Examiner finds and concludes that the Township has not violated the Act on the facts established by the instant record. The Township was under contract with the PBA only and was, therefore, free to confer benefits upon unrepresented employees while denying such benefits to the collective negotiations unit represented by the PBA. Plainly, this does not constitute "discrimination" against the PBA collective negotiations unit within the meaning of Subsection (a) (3) of the Act. ^{8/}

With respect to Subsection (a)(5), and derivatively Subsection (a)(1), the Hearing Examiner finds and concludes that the Township did not violate these Subsections of the Act when, upon demand by the PBA, it refused to negotiate the matter of compensatory time for members of the PBA collective negotiations unit

^{8/} The PBA has failed to establish the existence of anti-union animus or that the actions of the Township were inherently destructive of important employee rights as required for the finding of a violation of Subsection (a)(3) of the Act: Haddonfield Borough Board of Education, P.E.R.C. No. 77-36, 3 NJPER 71 (1977) and City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977). Further, the Hearing Examiner cites two decisions of the Director of Unfair Practices, refusing to issue complaints on analagous allegations: Township of Springfield et al., 5 NJPER 15 (1978) and Red Bank Board of Education et al., 5 NJPER 56 (1979).

for the three snow days. First, the Hearing Examiner bases this finding and conclusion upon the fact that the claimed compensatory time for members of the PBA collective negotiations unit was not a term and condition of their employment. There was not established on the record any past practice in this regard, nor is there anything contained in the collective negotiations agreement (J-1) which would give rise to or support a claim for compensatory time for the three snow days. Clearly, in a snow emergency situation, the Township properly expected the members of the collective negotiations unit represented by the PBA to work on the three snow days without additional compensation. The members of the PBA unit, with the exception of Patrolman Ricigliano, worked the three snow days and were compensated at their usual rate of pay. Any unilateral conferring of a benefit on Patrolman Ricigliano was de minimis and was plainly not an action of the Township, it having been done on the first snow day without Township authorization by Lt. Cox. The Charging Party has failed to cite any case to the Hearing Examiner which would constitute valid precedent for a contrary finding and conclusion by the Hearing Examiner.

Further, the Hearing Examiner bases his finding and conclusion that there was no violation of Subsections (a)(1) and (5) of the Act upon the fact that the contract contains in Article XVI ^{2/} a comprehensive "zipper" clause which precludes either party to the agreement from demanding negotiations on any "bargainable issues which were or could have been the subject of negotiations" during the term of the agreement. The said "zipper" clause further states that negotiations are precluded "whether or not covered by this Agreement, and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement."

Although no prior instance of the Township closing in the event of a snow emergency has been cited by the parties, it was clearly within the "contemplation" of the parties to the agreement that such an event might occur. In this regard see Finding of Fact No. 13, supra, where the PBA contemplated the possibility that the Township might grant additional holidays to other Township employees, in which event the PBA wanted the members of its negotiations unit to receive such additional holidays. If the PBA could contemplate the fact of the granting to other employees of additional holidays then plainly it could have contemplated the facts which occurred herein, namely, that other Township employees might receive

^{2/} See Finding of Fact No. 14, supra.

compensatory time off in a snow emergency.

In so finding and concluding, the Hearing Examiner is aware of the rule that contractual waiver of statutory rights is subject to a very stringent Commission test, namely, "To be given effect, any such waiver must be clearly and unequivocally established and contractual language alleged to constitute such a waiver will not be read expansively." ^{10/} It is clear to the Hearing Examiner that, on the instant record, there was clearly a waiver by the PBA to negotiate during the term of the instant agreement with respect to the demand made herein by the PBA upon the Township with respect to compensatory time for the three snow days.

For all of the foregoing reasons, the Hearing Examiner will recommend dismissal of alleged violations by the Township of Subsections (a)(1), (3) and (5) of the Act.

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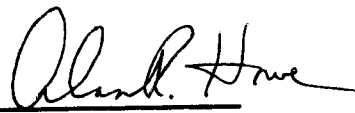
CONCLUSIONS OF LAW

The Respondent Township did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) when in a snow emergency it granted compensatory time to unrepresented employees of the Township, while denying it to members of the PBA collective negotiations unit, and when the Township later refused to negotiate with the PBA with respect to compensatory time for the three snow days.

RECOMMENDED ORDER

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

Dated: March 23, 1979
Trenton, New Jersey


Alan R. Howe
Hearing Examiner

10/ North Brunswick Township Board of Education, P.E.R.C. No. 79-14, 4 NJPER 451, 452 (1978), citing United Steelworkers of America v. NLRB, 536 F.2d 550, 555 (3rd Cir. 1976). See also, Red Bank Regional Educational Association v. Red Bank Regional High School Board of Education, 78 N.J. 122, 140 (1978).