P.E.R.C. NO. 90-68

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF POMPTON LAKES,

Respondent,

-and- Docket No. CO-H-89-194

POMPTON LAKES BOROUGH EMPLOYEES ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Borough of Pompton Lakes violated the New Jersey Employer-Employee Relations Act by refusing to negotiate with the Pompton Lakes Employees Association, the initial salaries and hours of work for the positions of park maintenance worker and equipment operator; and by informing Department of Public Works employees that they were fired for refusing to work overtime.

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POMPTON LAKES BOROUGH
EMPLOYEES ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Frank M. Santora, Esq.

For the Charging Party, Eric M. Bernstein, Esq.

DECISION AND ORDER

On January 20 and April 24, 1989, the Pompton Lakes Borough Employees Association filed an unfair practice charge and amended charge against the Borough of Pompton Lakes. The charge, as amended, alleges that the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3), (5), (6) and (7),[1/] by

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1/ These subsections prohibit public employees, 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) 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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning

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unilaterally establishing the salaries and hours of work for the new positions of park maintenance worker and equipment operator; by assigning non-unit members to collect garbage during a garbage emergency and firing employees of the Department of Public Works ("DPW") for refusing to work overtime; by subcontracting leaf collection during a leaf emergency declared by the mayor, and by demonstrating a pattern of anti-union conduct.[2/]

On March 21, 1989, a Complaint and Notice of Hearing issued. On May 31 and June 1, 1989, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On November 22, 1989, the Hearing Examiner issued his report and recommendation. H.E. No. 90-25, 16 NJPER ___ (¶____ 1989). He found that the Borough had violated the Act when it failed to negotiate the salaries and hours of work of the park maintenance workers and equipment operator, and when its agent informed DPW employees that they were fired for refusing to work overtime. He recommended dismissal of the remaining allegations.

1/ Footnote Continued From Previous Page

terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

2/ The parties stipulated to the dismissal of an allegation concerning subcontracting for snow removal.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due December 6, 1989. Neither party filed exceptions or requested an extension of time.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 4-9) are accurate. We incorporate his factual findings here. We find that the Borough violated the Act when it failed to negotiate the initial salaries and hours of work for the positions of park maintenance worker and equipment operator and when under the particular facts of this case its agent informed DPW employees that they were fired for refusing to work overtime. The Association did not to prove the remaining allegations in the Complaint.

ORDER

The Borough of Pompton Lakes is ordered to:

A. Cease and Desist from:

1. Interfering with, restraining or coercing its employees in the exercise of their rights guaranteed by the Act, particularly by refusing to negotiate with the Pompton Lakes Employees Association, the initial salaries and hours of work for the positions of park maintenance worker and equipment operator; and by informing Department of Public Works employees that they were fired for refusing to work overtime.

B. Take the following affirmative action:

1. Negotiate in good faith with the Association over the initial salaries and hours of work for the positions of park maintenance worker and equipment operator.

2. Expunge from the personnel files of affected Department of Public Works employees any reference to their refusal to work overtime or their firing on September 30, 1988.

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 on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by Respondent's authorized representative, shall be 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 (20) days of receipt what steps the Respondent has taken to comply herewith.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
January 31, 1990
ISSUED: February 1, 1990

NOTICE TO ALL 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 their rights guaranteed by the Act, particularly by refusing to negotiate with the Pompton Lakes Employees Association, the initial salaries and hours of work for the positions of park maintenance worker and equipment operator; and by informing Department of Public Works employees that they were fired for refusing to work overtime.

WE WILL negotiate in good faith with the Association over the initial salaries and hours of work for the positions of park maintenance workers and equipment operator.

WE WILL expunge from the personnel files of affected Department of Public Works employees any reference to their refusal to work overtime or their firing on September 30, 1988.

Docket No. CO-H-89-194

BOROUGH OF POMPTON LAKES

(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. 90-25

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

In the Matter of

BOROUGH OF POMPTON LAKES,

Respondent,

-and- Docket No. CO-H-89-194

POMPTON LAKES BOROUGH EMPLOYEES ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner Examiner recommends that the Public Employment Relations Commission find that the Respondent Borough violated Sections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when, following the creation of the positions of Park Maintainence Worker (Park Laborer) and Equipment Operator, the Borough failed to negotiate with the Association the initial salaries and the hours of work for these positions. Also, the Respondent Borough independently violated Section 5.4(a)(1) of the Act when Vincent Cahill, its DPW foreman, told approximately twelve DPW employees on September 30, 1988 that they were fired for having refused to work overtime on that day on ten minutes notice at 3:50 p.m. However, the Hearing Examiner found that the Respondent did not violate Sections 5.4(a), (3) or (5) of the Act when it subcontracted the collection of leaves during a leaf emergency declared by the Mayor on or about November 28, 1988, nor did the Respondent otherwise violate Sections 5.4(a)(3),(6) or (7) of the Act by its conduct herein.

The Hearing Examiner recommended that the Commission order that the Respondent cease and desist from interfering with, restraining or coercing its employees as to the violations of the Act found above and, further, that, upon demand, the Respondent negotiate in good faith with the Association regarding the matters of initial salaries and hours of work for the two newly created positions. Finally, the Hearing Examiner recommended that the Commission order that the Respondent expunge from the personnel files of the affected DPW employees, any reference to their refusal to work overtime or their subsequent firing on September 30, 1988.

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. 90-25

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

In the Matter of

BOROUGH OF POMPTON LAKES,

Respondent,

-and- Docket No. CO-H-89-194

POMPTON LAKES BOROUGH EMPLOYEES ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Frank M. Santora, Esq.

For the Charging Party, Eric M. Bernstein, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on January 20, 1989, and amended on April 24, 1989, by the Pompton Lakes Borough Employees Association ("Charging Party" or "Association") alleging that the Borough of Pompton Lakes ("Respondent" or "Borough")") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that (1) on November 23, 1988, the Mayor authorized the Borough to bid for the purpose of subcontracting the plowing of snow on Borough streets, which had previously been done by employees represented by the Association, and the Mayor has refused to

on this issue;[1/] (2) on August 15, 1988, the Borough created the positions of Equipment Operator and Recycling Laborer, both positions falling within the Association's recognition clause and, as of this date, the Borough has unilaterally established salaries and other terms of employment for these positions without negotiations with the Association; (3) on September 30, 1988, and on December 3, 1988, the Mayor declared a garbage emergency contrary to law and the collective agreement with the Association, in which private landscapers were designated to pick up leaves rather than members of the Association, who were entitled to overtime and, also, volunteers, including the Mayor and his wife, were permitted to perform such work, in alleged violation of the collective agreement between the parties; (4) on September 10, 1988, the Borough and the Association concluded a collective agreement for the period of January 1, 1988 through December 31, 1990, which agreement has been reduced to writing but the Borough has refused to execute it since September 1988; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (3), (5)-(7) of the Act.[2/]

1/ At the hearing the parties stipulated the dismissal of ¶1 of the original and the amended Unfair Practice Charge, infra (2 Tr 5, 13).

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. (3) Discriminating in regard to hire or tenure of employment or any term or

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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 March 21, 1989. Pursuant to the Complaint and Notice of Hearing, hearings were held on May 31 and June 1, 1989 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by September 1, 1989.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

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

2/ Footnote Continued From Previous Page

condition of employment to encourage or discourage 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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

FINDINGS OF FACT

1. The Borough of Pompton Lakes is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Pompton Lakes Borough Employees Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The Association was established in 1962 and its collective negotiations unit during the period January 1, 1985 through December 31, 1987, included all employees in the Public Works Department, the municipal office staff and all police radio dispatchers, but excluding all supervisory employees of the rank of foremen and above (J-2, Art. I, §III, p. 2). For reasons apparent hereinafter, the collective negotiations unit was expanded in the current agreement [January 1, 1988 through December 1, 1990] to include all employees in the Public Works Department, the Parks and Recycling Division, municipal office staff, police radio dispatchers and parking violations officer, but excluding all supervisory employees of the rank of foreman and above (J-1, Art. I, §III, p. 2).

4. Collective negotiations for the successor agreement to J-2 [1985 through 1987] commenced during 1987, prior to the administration of John J. Sinsimer, Jr., who became Mayor on January 1, 1988 (1 Tr 73, 74; 2 Tr 13, 14). Sinsimer testified without contradiction that after becoming Mayor he attended four or five negotiations sessions and that since the negotiations on behalf of the Borough by the prior administration had been "very contentious" he sought to start "...the entire thing fresh..." (2 Tr 14, 15).

5. Sinsimer testified credibly that the Association's priority in the ranking of its demands was as follows: salaries and wages; an increase in the salary scale for police dispatchers; the changing of certain job titles; and a disability plan (2 Tr 17, 18).

6. Robert D. Farrell, a Police Dispatcher and the President of the Association, testified as did Sinsimer that there were about four negotiations sessions in the early part of 1988 and, according to Farrell, the last session was in March 1988[3/] prior to the introduction of a Borough ordinance in September, infra (1 Tr 69, 71, 73-75).

7. At or around the next negotiations session in mid-September (1 Tr 74; 2 Tr 18) the Borough on September 14, 1988, introduced and, adopted on September 28, 1988, an ordinance, which created a "Parks and Recycling Division" in the Department of Public Works, which included the positions of "Park Maintenance Worker"[4/] and "Equipment Operator" with a description of their respective

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3/ However, the Mayor testified credibly was that there were three negotiations sessions from January until the breaking off of negotiations in April 1988 and that there were one or two sessions in September with the concluding session in October (2 Tr 22, 23, 29, 30).

4/ Throughout the hearing the parties referred to this job title as "Park Laborer" and so, too, will the Hearing Examiner hereinafter.

duties and a retroactive provision that their salaries were fixed and became effective August 15, 1988 (CP-1; 1 Tr 76-79).[5/]

8. At the mid-September negotiations session, the Association objected to the above ordinance, as to which the Mayor responded that the seven Borough parks were in a "...terrible state of disrepair..." and that several monuments and memorials had to be cared for and groomed (2 Tr 18-21). The care and maintenance of the parks, monuments and memorials has been the responsibility of the Department of Public Works but the work had only been done when there was "extra time" (2 Tr 21).

9. The Hearing Examiner credits the testimony of Timothy D. Duffy, the Association's Shop Steward, and that of Farrell, that at the mid-September 1988 negotiations session Mayor Sinsimer responded to the Association's objection, regarding the Borough's unilateral establishment of the Park Laborer position that "...that was it..." (Duffy) and "...This is it, it is a take it or leave package..." (Farrell)" [1 Tr 18, 19, 79].[6/] Sinsimer's testimony was equivocal and does not constitute a denial (2 Tr 65, 66).

5/ There is no dispute but that the two Park Laborers, who were hired in August 1988, were David Dukich and Jeffrey Korowaj and that the Equipment Operator, who was not hired until early November 1988, was James Guillermain (CP-2, CP-9; R-1; 1 Tr 75, 81; 2 Tr 61-63).

6/ Farrell also testified credibly that the Borough never negotiated as to the salary or working hours of the Park Laborer or the Equipment Operator (1 Tr 129, 130).

10. The objection made by the Association to the Borough's unilateral establishment of the Park Laborer position and the salary was as stated by Duffy at the mid-September negotiations session, namely, that the salary of $14,000 per year was too low in relationship to the $20,000 per year salary of the regular DPW Laborer position (1 Tr 17-20) and would, therefore, be divisive (1 Tr 78, 79).[7/] Also, Duffy testified as to the difference in the hours worked per week by the DPW Laborers as opposed to the Park Laborer: the DPW Laborers, consistent with J-1,[8/] work Monday to Friday, 7:00 a.m. to 4:00 p.m. with no rotation while the Park Laborers work a rotating schedule with one Laborer working Tuesday through Friday while the other worked Monday to Saturday, 7:30 a.m. to 4:30 p.m. (1 Tr 19-22).

11. At about 7:15 a.m. on September 30, 1988, Mayor Sinsimer appeared at the DPW garage with counsel and advised Vincent Cahill, the DPW foreman, that he considered the lack of a garbage "pickup" during two consecutive weeks a health and safety hazard and the Mayor instructed Cahill that if all the garbage was not picked that day then the DPW employees would have to work overtime in order to complete the task (2 Tr 36, 37; 1 Tr 25, 89, 90). The uncontradicted testimony of Duffy was that at 3:50 p.m. Cahill advised all of the DPW employees present that they had to work

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7/ The Mayor's response was that the Council set the salaries.

8/ See Art. IV, "Hours of Work," Section I(a), p. 8.

overtime or they would be "...fired as of now..." (1 Tr 25). The approximately 12 DPW employees present refused to work and were fired (1 Tr 26).

12. However, shortly thereafter Farrell advised the "fired" employees that the Borough was not allowed to "fire" them and that he was going to hold a meeting with Mayor Sinsimer.[9/] Following a meeting in Sinsimer's office at about 5:30 p.m. on the same day, September 30th, the matter was resolved and the "firings" were rescinded (1 Tr 91, 92, 94; 2 Tr 40).[10/]

13. Following authorization by the Borough Council at a meeting on November 28, 1988, Mayor Sinsimer declared a leaf emergency on December 2nd or 3rd which continued through December 10, 1988 (2 Tr 85, 86; 1 Tr 96-100; 1 Tr 30, 31). Sinsimer testified without contradiction that since the latter part of October 1988, there had been a slow down by employees of the DPW in leaf collection, which caused the Borough to hire outside contractors, notwithstanding that overtime had been authorized for the DPW employees, which had been worked on almost a daily basis (2 Tr 73-76). This was announced publicly by Sinsimer (2 Tr 77). During the leaf emergency, several DPW laborers were joined by

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9/ Farrell had earlier learned of the firing from Cahill in a three-way telephone conversation with Cahill and Mayor Sinsimer (1 Tr 89, 90; 2 Tr 39).

10/ The Hearing Examiner rejects the Borough's attempt to prove that no "firings" occurred based upon the time records set forth in R-1 (2 Tr 40-47). The words and actions of Cahill govern the conclusions to be reached hereinafter.

Sinsimer, his wife, a councilwoman and her husband, an aide of the Mayor and his two children, and Equipment Operator Guillermain in the collection of leaves on December 3, 1988 (2 Tr 80-82). One or two contractors may have also worked on that date (2 Tr 83).[11/]

14. The Charging Party points to R-1 as indicating that: (1) during the period October 8 through November 28, 1988, 184 hours of overtime were worked; (2) between November 6 and November 28, 1988, only four hours of overtime were worked and two of those hours were worked by Superintendent Charles Gioia; (3) of the remaining 180 hours of overtime worked, 72.5 hours were worked by two non-Association members, Cahill and R. Fredericks; and (4) the 107.5 hours of overtime worked thereafter were spread over 24 members of the DPW, the majority of those hours having been worked between October 1 and October 18, 1988, some seven weeks before the emergency proclaimed by Sinsimer, supra.[12/]

DISCUSSION AND ANALYSIS

The Borough Violated Sections 5.4(a)(1) And (5) Of The Act When, After Creating The Positions Of Park Laborer And Equipment Operator, Effective In Or Around August 1, 1988, It Failed To Negotiate With The Association The Salaries For These Unit Positions.

It cannot be gainsaid but that the Borough had a managerial prerogative to establish by ordinance of September 28, 1988, a

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11/ The Association introduced into evidence a series of invoices from contractors for leaf pickup during the period between December 8 and 15, 1988 (CP-3 through CP-8; 1 Tr 100-102).

12/ The Charging Party also points out that during the emergency period, supra, only 97 overtime hours were worked and these included 18 overtime hours on December 3, 1988, when volunteers were sought by the Mayor.

"Parks and Recycling Division" in the Department of Public Works and at the same time creating two new positions, namely, "Park Maintenance Worker" (herein "Park Laborer") and "Equipment Operator" (CP-1). The reorganization of a department has been recognized by the Commission on many occasions as the exercise of a managerial prerogative: See Delaware Valley Reg. H.S. Bd. of Ed., P.E.R.C. No. 79-69, 5 NJPER 183 (¶10100 1979); Point Pleasant Boro Bd. of Ed., P.E.R.C. No. 80-145, 6 NJPER 299 (¶11142 1980); Cherry Hill Tp. Bd. of Ed., P.E.R.C. No. 81-90, 7 NJPER 98 (¶12040 1981); Toms River Bd. of Ed., P.E.R.C. No. 84-4, 9 NJPER 483 (¶14200 1983); Tenafly Bd. of Ed., P.E.R.C. No. 83-123, 9 NJPER 211 (¶14099 1983); Cty. of Passaic, P.E.R.C. No. 87-40, 12 NJPER 803 (¶17306 1986). However, the fact that the Borough lawfully exercised the right to create the Parks and Recycling Division within the Department of Public Works and the two related job titles of Park Laborer and Equipment Operator did not relieve the Borough from negotiating the initial salary for these positions with the Association.

The Commission has long held that initial salary placement is a mandatory negotiable subject: see Tp. of Gloucester, P.E.R.C. No. 87-42, 12 NJPER 805 (¶17308 1986); Somerset Cty, PERC No. 86-136, 12 NJPER 453 (¶17171 1986); North Brunswick Board of Education, P.E.R.C. No. 86-29, 11 NJPER 583 (¶16203 1985); Fairview Bd. of Ed., P.E.R.C. No. 84-59, 10 NJPER 10 (¶15006 1983);

Pequannock Tp. Bd. of Ed., P.E.R.C. No. 83-167, 9 NJPER 404 (¶14184 1983); Oakland Bd. of Ed., P.E.R.C. No. 82-125, 8 NJPER 378 (¶13173 1982); Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980); Eastern Camden Bd. of Ed., P.E.R.C. No. 80-158, 6 NJPER 348 (¶11174 1980); Dennis Tp. Bd. of Ed., P.E.R.C. No. 80-157, 6 NJPER 334 (¶11167 1980); New Jersey College of Medicine and Dentistry, P.E.R.C. No. 80-127, 6 NJPER 213 (¶11104 1980). The Appellate Division has affirmed that position in Belleville Bd. of Ed., 209 N.J. Super 93 (App. Div. 1986).

The Association also points out that the Borough is not relieved of its obligation to have negotiated with the Association with respect to the initial salary placement for the Park Maintenance Worker and the Equipment Operator by the fact that the current contract has been ratified and implemented since the harm done and the violation of the Act occurred prior to the contract ratification in September 1988. In Tp. of Gloucester, supra, the Commission adopted the decision of its Hearing Examiner (H.E. No. 87-18, 12 NJPER 671 (¶17254 1986)), who had concluded that the Township violated Sections 5.4(a)(1) and (5) of the Act when it unilaterally established the initial salary placement for a "legal stenographer" thereby avoiding its obligation to negotiate the initial salary. The Hearing Examiner then stated that "...The Township cannot meet its duty to negotiate after-the-fact..." (12 NJPER at 673).

Based upon the above-cited Commission precedent, the Hearing Examiner will make a recommendation with respect to the obligation of the Borough to negotiate in good faith with the Association regarding the initial salary placement of the Park Laborer and the Equipment Operator.

The Respondent Borough Violated Sections 5.4(a)(1) And (5) Of The Act When It Unilaterally Set The Hours of Work For The Park Laborer And The Equipment Operator Without Collective Negotiations With the Association.

Since at least the decision of the New Jersey Supreme Court in Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1 (1973), the law of this State has been settled that hours of work are mandatorily negotiable: "...Surely working hours and compensation are terms and conditions of employment within the contemplation of the Employer-Employee Relations Act. Those matters...would appear to be the items most evidently in the legislative mind..." (64 N.J. at 6, 7). In IFPTE Local 195 v. State, 88 N.J. 393 (1982) the Supreme Court restated the law as to mandatory negotiability of the work week, finding that it "...intimately and directly affects the work and welfare of public employees..." (88 N.J. at 411). The Court again noted that in Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10 (1973) although it was held that the establishment of a school calendar was a non-negotiable subject "...the days and hours worked by individual employees are negotiable..." (88 N.J. at 412). See also, Mt. Laurel Tp., 215 N.J. Super. 108, 115, 116 (App. Div.

1987); Hamilton Tp., P.E.R.C. No. 86-106, 12 NJPER 338, 339, 340 (¶17129 1986), aff'd App. Div. Dkt. No. A-4801-85T7 (1987), certif. den.. 111 N.J. 600 (1988); and N.J. Sports & Exposition Auth., P.E.R.C. No. 88-14, 13 NJPER 710, 711 (¶18264 1987).

In the instant case, the current collective negotiations agreement provides in Art. IV, "Hours of Work," Section I(a), that the work week for Department of Public Works employees shall be 7:00 a.m. to 4:00 p.m. 40 hours per week (J-1, p. 8). However, the hours of the Park Laborers were unilaterally set from 7:30 a.m. to 4:30 p.m., with one Laborer working Tuesday to Friday while the other worked Monday to Saturday.

The Hearing Examiner has scrutinized the current collective negotiations agreement and finds no provision which might constitute a contractual waiver by the Association of its right to negotiate with respect to hours of work for the Park Laborer and the Equipment Operator. The law is well settled in the public sector that for there to be a contractual waiver the language in the agreement must clearly and unequivocally sanction the unilateral change by the employer: Red Bank Reg. Ed. Ass'n v. Red Bank Bd. of Ed., 78 N.J. 122, 140 (1978); State of New Jersey, P.E.R.C. No. 86-64, 11 NJPER 723, 725 (¶16254 1985); and South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447, 448 (¶17167 1986).

Accordingly, the Hearing Examiner will recommend an appropriate remedy for this violation of the Act by the Respondent Borough.[13/]

Respondent Borough Did Not Violate Sections 5.4(a)(1), (3) Or (5) Of The Act By Subcontracting During The Leaf Emergency Declared By The Mayor On Or About November 28, 1988.

Mayor Sinsimer testified that there had been a leaf problem in the Borough since October 1988; that overtime had been authorized and worked; and that a slowdown by members of the Association had forced him to declare the leaf emergency. His testimony was essentially contradicted.

The Association argues that Exhibit R-1 paints a completely different picture but the Hearing Examiner is not persuaded that this exhibit undermines the credibility of the Mayor's testimony regarding his declaration of the leaf emergency. The Borough had a clear prerogative to determine when overtime was necessary to meet an emergent situation. The record is inconclusive on the question as to whether or not the members of the Association engaged in a "slowdown." During the period of the leaf emergency from November

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13/ The Hearing Examiner will not recommend any remedy with respect to alleged overtime pay due to the Park Laborers or the Equipment Operator due to the Borough's having unilaterally set their work hours per week since any such claim would necessarily be founded upon an alleged breach of contract. Thus, the appropriate remedy necessarily lies within the parties' grievance procedure: State of N.J. (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419, 421, 422 (¶15191 1984).

28 through December 10, 1988, Mayor Sinsimer hired five outside contractors to remove leaves at an expense to the Borough of $9,675.00 (CP-3 through CP-7). The Hearing Examiner finds totally irrelevant the fact that on December 3, 1988, the Mayor's wife and other volunteers performed leaf removal duties.

Thus, there is no credible evidence whatsoever that the Mayor's action in declaring a leaf emergency and engaging five subcontractors for that purpose constituted a violation of the Act. The Supreme Court made clear in IFPTE Local 195, supra, that a contractual provision, which includes negotiations on the ultimate substantive decision to subcontract "...is a non-negotiable matter of managerial prerogative..." (88 N.J. at 408). In the instant case there is, of course, no subcontracting contractual provision, which lends even greater force to the Borough's position that it had the right to subcontract. However, the Supreme Court in IFPTE Local 195 qualified its holding by stating that it did not intend to grant the public employer "limitless freedom to subcontract for any reason..." (88 N.J. at 411). Thus, a public employer cannot "...subcontract in bad faith for the sole purpose of laying off...employees or substituting private workers for public workers. State action must be rationally related to a legitimate governmental purpose..." (88 N.J. at 411).

In the case at bar, there is no evidence upon which an inference could be drawn that the Borough acted in bad faith in its subcontracting decision since there was no layoff of employees in

the Association's unit. Further, it cannot be said that the Borough's action was not rationally related to a legitimate purpose in having leaves collected, given the Mayor's perception that there was a slowdown even with overtime having been authorized. Thus, this case does not transgress the precepts of IFPTE Local 195.

Nor does the instant case have anything to do with anti-union animus insofar as the leaf emergency is concerned: Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984). This Hearing Examiner, in viewing the leaf emergency, finds and concludes that Mayor Sinsimer was exercising a legitimate managerial prerogative devoid of animus when he made the decision to subcontract leaf collection to the five subcontractors under the circumstances of: (1) overtime having been authorized and worked by employees in the Association's unit; and (2) the Mayor's good faith perception that there was a slowdown.

Accordingly, the Hearing Examiner will recommend dismissal as to these allegations in the Complaint.

The Respondent Borough Independently Violated Section 5.4(a)(1) Of The Act When Vincent Cahill, The DPW Foreman, Told Approximately 12 Employees In The Department On September 30, 1988, That They Were Fired For Having Refused To Work Overtime On That Day.

It will be recalled that Mayor Sinsimer spoke with Vincent Cahill, the DPW Foreman, at about 7:15 a.m., September 30, 1988, at which time the Mayor stated to Cahill that he wanted the DPW employees to work overtime that day since there was a backup in the collection of garbage which the Mayor considered a health hazard.

However, Cahill did nothing during the entire shift until 3:50 p.m. Notwithstanding that the DPW employees were scheduled to cease work at 4:00 p.m., Cahill issued a verbal directive to approximately 12 of the employees at 3:50 p.m. that they had to work overtime that day or that they would be "fired." When the 12 employees refused to work overtime as directed, Cahill told them that they were "fired." Although the dispute arising from Cahill's "firing" of the 12 DPW employees was ultimately resolved in the Mayor's office several hours later, the conduct of Cahill constituted an independent violation of Section 5.4(a)(1) of the Act. Cahill's conduct on September 30th interfered with, coerced, and restrained the affected employees in the exercise of their rights under the Act, namely, the protected activity of refusing to work overtime under the unreasonable circumstances of insufficient notice, i.e., ten minutes before the end of the shift.

The law is well settled that a public employer independently violates Section 5.4(a) of the Act if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification: Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988), adopting H.E. No. 88-49, 14 NJPER 293, 303 (¶19109 1988); UMDNJ--Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); Gorman, Basic Text on Labor Law, at 132-34 (1976). Also, the

Charging Party need not prove an illegal motive in order to establish this independent violation of §5.4(a)(1) of the Act: Morris, The Developing Labor Law, at 75-78 (2d ed. 1983).

My research of Commission decisions to date discloses no decision involving the refusal to work overtime. There are, however, many decisions of the National Labor Relations Board on the subject but these, in the main, deal with union activists who were punished for their exercise of protected activities as activists when they refused to work overtime. Thus, precedent from the NLRB does not appear to be helpful. However, one Board case of peripheral interest is that of E.B. Malone Corp., etc., 273 NLRB No. 16, 117 LRRM 1492 (1984) where an employer was held to have violated Section 8(a)(1) of the NLRA[14/] by having discharged three employees who refused to work overtime and who also walked out to protest a change in policy regarding the use of an office telephone, which was deemed protected activity. There the employees had worked overtime on the preceding day and they had expressed no intention to discontinue working overtime after their walkout. Some analogy might be drawn from the Malone case to the facts of the instant case.

However, even in the absence of relevant Commission precedent and only minimal NLRB precedent, the Hearing Examiner has no difficulty in applying the prior decisions of the Commission on

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14/ This Section is analagous to Section 5.4(a)(1) of our Act.

the requisites for establishing an independent violation of Section 5.4(a)(1) of the Act since, as stated above, the conduct of Cahill on September 30th clearly tended to interfere with the DPW employees' statutory right to resist a totally unreasonable request to work overtime. Cahill's conduct lacked a legitimate and substantial business justification since if he was constrained to follow Mayor Sinsimer's directive of 7:15 a.m. that employees were to work overtime on garbage collection on September 30th, then Cahill could have done so by issuing his directive earlier in the shift rather than waiting until ten minutes before the end of the shift. Also, the Association was under no obligation to prove an illegal motive in order to establish this independent violation of the Act, supra.[15/]

Thus, the Hearing Examiner finds and concludes that the Respondent Borough independently violated Section 5.4(a)(1) of the Act by the conduct of Cahill on September 30, 1988, in telling the approximately 12 employees of the DPW that they were "fired" for their refusal to work overtime. The fact that the Mayor subsequently overruled Cahill on the same day is immaterial and does not render the violation of the Act by Cahill de minimis.

15/ Since no anti-union animus was manifested by Cahill in the September 30th incident, the Borough did not violate Section 5.4(a)(3) of the Act: see Bridgewater, supra.

Therefore, the Hearing Examiner will recommend an appropriate remedy hereinafter.[16/]

* * * *

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

CONCLUSIONS OF LAW

1. The Respondent Borough violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when, after creating the positions of Park Maintenance Worker (Park Laborer) and Equipment Operator, it failed to negotiate their initial salaries and hours of work with the Association.

2. The Respondent Borough independently violated N.J.S.A. 34:13A-5.4(a)(1) when DPW foreman Vincent Cahill told approximately twelve DPW employees on September 30, 1988, that they were fired for having refused to work overtime on that day on ten minutes notice at 3:50 p.m.

3. The Respondent Borough did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) or (5) by subcontracting during the leaf emergency declared by the Mayor on or about November 28, 1988, nor did the Respondent otherwise violate N.J.S.A. 34:13A-5.4(a)(3), (6) or (7) by its conduct herein.

16/ The Charging Party having failed to adduce any evidence that the Respondent Borough violated Sections 5.4(a)(3), (6) and (7) of the Act, the Hearing Examiner will recommend hereinafter that these allegations in the Complaint be dismissed in their entirety.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Borough cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing and refusing to negotiate the initial salaries for the positions of Park Maintenance Worker (Park Laborer) and Equipment Operator and their hours of work with the Association and, additionally, by firing DPW employees for refusing to work overtime on unreasonably short notice, i.e., ten minutes before the end of the shift on September 30, 1988.

2. Failing and refusing to negotiate in good faith with the representatives of the Association with respect to the initial salaries and hours of work for the positions of Park Maintenance Worker (Park Laborer) and Equipment Operator.

B. That the Respondent Borough take the following affirmative action:

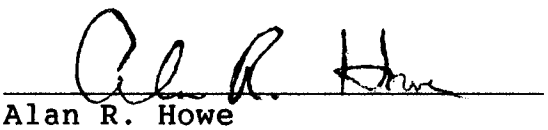
1. Upon request, negotiate in good faith with the representatives of the Association with respect to the initial salaries and hours of work for the positions of Park Maintenance Worker (Park Laborer) and Equipment Operator.

2. Expunge from the personnel files of the affected DPW employees any reference to their refusal to work overtime or their subsequent firing by Vincent Cahill on September 30, 1988.

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 on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be 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 herewith.

C. That the allegations that the Respondent Borough violated N.J.S.A. 34:13A-5.4(a)(3), (6) or (7) be dismissed in their entirety.



Alan R. Howe
Hearing Examiner

Dated: November 22, 1989
Trenton, New Jersey

Appendix "A"

NOTICE TO ALL 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 the Act, particularly, by failing and refusing to negotiate the initial salaries for the positions of Park Maintenance Worker (Park Laborer) and Equipment Operator and their hours of work with the Association and, additionally, by firing DPW employees for refusing to work overtime on unreasonably short notice, i.e., ten minutes before the end of the shift on September 30, 1988.

WE WILL NOT refuse to negotiate in good faith with the representatives of the Association with respect to the initial salaries and hours of work for the positions of Park Maintenance Worker (Park Laborer) and Equipment Operator.

WE WILL upon request, negotiate in good faith with the representatives of the Association with respect to the initial salaries and hours of work for the positions of Park Maintenance Worker (Park Laborer) and Equipment Operator.

WE WILL expunge from the personnel files of the affected DPW employees any reference to their refusal to work overtime or their subsequent firing by Vincent Cahill on September 30, 1988.

Docket No. CO-H-89-194 BOROUGH OF POMPTON LAKES
(Public Employer)

Dated _____ By _____
(Title)

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 St., CN 429, Trenton, NJ 08625 (609) 984-7372.