P.E.R.C. NO. 86-64

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and- Docket No. CO-84-164-86

COMMUNICATIONS WORKERS OF AMERICA,

Charging Party.

STATE OF NEW JERSEY,

Respondent,

-and- Docket No. CO-84-170-87

IFPTE, LOCAL 195,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses two complaints based on unfair practice charges that the Communications Workers of America and IFPTE, Local 195, filed against the State of New Jersey. The charge alleged the State violated the Act when it changed the work day of certain Department of Transportation employees represented by either the CWA or IFPTE from 7:30 a.m.-4:00 p.m. to 8:00 a.m. to 4:30 p.m. The Commission holds, however, that the change did not violate the Act because it was authorized by the parties' respective collective negotiations agreements.

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Appearances:

For the Respondent
Hon. Irwin I. Kimmelman, Attorney General
(Michael L. Diller, D.A.G., of Counsel)

For the Charging Party - CWA
Steven P. Weissman, Associate Counsel

For the Charging Party - IFPTE, Local 195
Oxfeld, Cohen and Blunda, Esqs.
(Nancy I. Oxfeld, of Counsel)

DECISION AND ORDER

On December 20 and 29, 1983, the Communications Workers of America ("CWA") and the International Federation of Professional and Technical Engineers ("IFPTE") filed unfair practice charges against the State of New Jersey ("State") with the Public Employment

Relations Commission. CWA and IFPTE alleged, respectively, that the State violated subsections 5.4(a)(1) and (5) and 5.4(a)(1),(3) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally changed the work hours of certain Department of Transportation employees represented by either the CWA or IFPTE from 7:30 a.m. - 4:00 p.m. to 8:00 a.m. - 4:30 p.m.

Simultaneous with filing its charge, CWA sought a restraining order against the implementation of the work schedule change. IFPTE also moved for interim relief. Following a hearing, these applications were denied. New Jersey Department of Transportation, I.R. No. 84-6, 10 NJPER 95 (¶15049 1983). That decision stated, in part:

> The charging parties have made a persuasive case that the dominant issue herein involves mandatorily negotiable terms and conditions of employment. See Galloway Township Board of Education, 78 N.J. 1 (1978). However, the principal defense of the State is that it has a reserved right under the respective collective negotiated agreements to alter the working hours of these unit employees. In fact, the agreements specifically include, inter alia, provisions governing management rights, shift schedules, and hours of work of unit employees. Thus, it is at least arguable that the State has a contractual

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; (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 (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."

> right to so alter these employees' work hours. While N.J.S.A. 34:13A-5.3 does not permit unilateral alterations in terms and conditions of employment without prior negotiations, it is well established that there is no unlawful unilateral change where a collectively negotiated agreement permits such a change during the term of an agreement. See, e.g., Town of Irvington, P.E.R.C. No. 82-63, 7 NJPER 94 (¶13038 1982). While I am not concluding that the State has such a right pursuant to the labor agreements, I am not satisfied at this point on the record before me that the charging parties have established a likelihood of success on the merits of the charges.
> Id. at 96.

On February 2, 1984, the Administrator of Unfair Practice Proceedings issued Complaints and Notices of Hearings.

On February 20, 1984, the State filed its Answer. It admitted changing the starting and stopping times of certain employees in the Division of Construction and Maintenance, but asserted that it acted pursuant to the respective collective negotiations agreements and a non-negotiable managerial prerogative.

On March 16, April 24, May 11, June 11, and August 13, 14 and 15, 1984, Hearing Examiner Arnold H. Zudick conducted hearings. The parties examined witnesses, introduced exhibits and argued orally. They also filed post-hearing briefs.

On March 4, 1985, the Hearing Examiner issued his report and recommended decision. H.E. No. 85-30, 11 NJPER 179 (¶16079 1985). First, he found that the State had the managerial prerogative to set the "roadwork core hours," the time period when the bulk of roadwork needs to be performed, but that the scheduling of the workday in relationship to those hours was mandatorily negotiable. The Hearing Examiner further found, however, that the

State had the contractual authorization under its contracts with both the CWA and IFPTE to make the changes. Accordingly, he recommended dismissal of both Complaints.

All three parties have filed exceptions. The State excepts to the Hearing Examiner's holding that the starting and quitting times of the affected employees are mandatorily negotiable, even though "core hours" are not.

IFPTE excepts to the Hearing Examiner's conclusion that the "core hours" for performing work is a managerial prerogative and non-negotiable. It does not, however, except to the finding that the State had the contractual right to make the change.

The CWA excepts to the finding that it waived its right to negotiate with the State over the change in starting and stopping times. It asserts that waivers must be "clear and unequivocal" and the State did not produce evidence sufficient to meet that burden.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-23) are accurate. We adopt and incorporate them here.

We first consider the State's claim that the change in starting and stopping times is a managerial prerogative and therefore not a mandatory subject of negotiations and the IFPTE's cross-exception that the core hours is also mandatorily negotiable. Both the Commission and the Supreme Court have consistently held that the hours an employee works is a fundamental term and condition of employment. Thus, in one of the earliest cases interpreting our

Act, Burlington Cty. College Fac. Assoc. v. Bd. of Trustees, 64 N.J. 10 (1973), the Supreme Court held that the days and hours of work of individual faculty members are mandatory subjects of negotiations. See also Bd. of Ed. Englewood v. Englewood Teachers, 64 N.J. 1 (1973). A more recent case, Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 1 (1978), is also directly applicable. There, the Court approved the Commission's determination that the unilateral change in starting and stopping times, even though the aggregate number of hours fo work remained the same, violated subsection 5.4(a)(5) of the Act. See also, among other cases, In re IFPTE Local 195 v. State, 88 N.J. 393 (1982); Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER ___ (¶_____ 1985); Cape May County, P.E.R.C. No. 83-98, 9 NJPER 97 (¶4053 1983); North Brunswick Twp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978); Township of Willingboro, P.E.R.C. No. 78-20, 3 NJPER 369 (1977); Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975).

The State argues, however, that it has the prerogative to determine when an operation is to be performed and, as a corollary, it must have the right to require that the work schedule conform to the hours of operation it unilaterally sets. It is true that the State has an interest in determining that work must be performed at certain times and may order overtime, if necessary. See City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). But this interest may not be considered in a vacuum. The Courts have specifically instructed that the Commission must balance the interests of the employer and the employees. In Bd. of Ed. Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980), the court said:

> Logically pursued, these general principles -- managerial prerogatives and terms and conditions of employment -- lead to inevitable conflict. Almost every decision of the public employer concerning its employees impacts upon or affects terms and conditions of employment to some extent. While most decisions made by a public employer involve some managerial function, ending the inquiry at that point would all but eliminate the legislated authority of the union representative to negotiate with respect to "terms and conditions of employment." N.J.S.A. 34:13A-5.3. Conversely to permit negotiations and bargaining whenever a term and condition is implicated would emasculate managerial prerogatives.
> [Id. at 589].

Applying this balancing test convinces us that the change in starting and stopping times is a mandatory subject of negotiations. While the State has an interest in scheduling work hours, so do the employees. It is for this reason that matters concerning hours and days of work are, in general, mandatory subjects of negotiations. Thus, in Cape May County, P.E.R.C. No. 83-98, 9 NJPER 97 (¶14053 1983), we held that a unilateral change in work hours of maintenance workers from a 6:00 a.m. to 2:00 p.m. shift to a 3:00 p.m. to 11:00 p.m. shift was a mandatory subject of negotiations. In pertinent part, we said:

> In the instant case, we believe that the employees' interest in preserving their existing hours of employment is the dominant issue. As the Supreme Court said in Englewood, working hours was surely one of the items most evidently in the legislature's mind when it extended the New Jersey Employer-Employee Relations Act to public employees. See also Galloway (Alteration of reporting and departing times of two secretaries and reduction of working day from seven hours to

> four violates the Act). The change in work hours here essentially turns daytime employees into nighttime employees. Balanced against this dramatic change is the County's interest in increasing the amount of time the maintenance crew spends cleaning offices outside normal working hours from 2 1/2 hours to 5 1/2 hours per day. While we recognize that this increase may facilitate the cleaning of County buildings, we do not believe that to permit negotiations or arbitration concerning the hours of work of the affected employees would constitute a significant interference with the determination of governmental policy.
> Id. at 98.

These considerations are applicable here. There is nothing in the record that indicates that the State cannot have the work performed during the existing workhours. Thus, we do not believe that to require negotiations would significantly interfere with a determination of governmental policy. We need not consider IFPTE's cross-exception concerning "core hours" since neither schedule implicates that issue.

Finding that the State's change in the starting and stopping times was a mandatory subject of negotiations does not, however, compel a finding that the change violated the Act. While N.J.S.A. 34:13A-5.3 does not permit unilateral alterations in terms and conditions of employment without prior negotiations, it is well established that there is no unlawful unilateral change where a collectively negotiated agreement permits such a change. E.g., Elmwood Park, supra; Irvington, P.E.R.C. No. 82-63, 7 NJPER 94 (¶13038 1982). However, to establish waiver, the contract must clearly and unequivocally authorize the change. E.g., Sayreville

Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138; North Brunswick, supra; State of New Jersey, P.E.R.C. No. 77-40, 3 NJPER 77 (1978). In Deptford Board of Education, P.E.R.C. NO. 81-78, 7 NJPER 35 (¶12015 1980) we stated "the trier of fact is permitted to look at a variety of factors, such as the history of negotiations over the disputed contract provision, to determine if, in fact, there was a waiver of the right to negotiate. Id. at 36. We also cited with approval the Hearing Examiner's analysis in State of New Jersey, H.E. No. 77-6, 2 NJPER 332 (1976):

> ...in determining the existence of a waiver of statutory rights prescribing bargaining responsibilities the Board will look to a variety of factors, including the precise wording of the relevant contractual clauses or agreements under consideration, the evidence of the negotiations that occurred leading up to the execution of the provisions that are being asserted as constituting a waiver, and the completeness of the clause or agreements, that are being scrutinized, as an "integration" [to determine the applicability of the parol evidence rule]. [Id. at 333, footnote omitted].

The parties do not dispute that this is the law concerning waiver. Rather, the dispute is over whether the Hearing Examiner properly applied the law to the record in determining that both IFPTE and CWA waived their right to negotiate over changes in starting and stopping times.

We first consider whether IFPTE waived its right to negotiate changes in starting and stopping times. IFPTE represents approximately 1600 rank and file employees at the Department of

Transportation, Division of Construction and Maintenance in its operations, maintenance and service and crafts unit. Article 10 of its agreement with the State provides:

> Hours of Work
>
> A. The work week for each job classification within the unit shall be consistent with its designation in the State Compensation Plan.
>
> B. 1. All employees shall be scheduled to work on a regular shift as determined by the appointing authority which work shift shall have stated starting and quitting times. The specific work shifts shall be posted within the work unit.
>
> 2. When schedule changes are made, the maximum possible notice shall be given and the employee's convenience shall be given consideration.
>
> C. An employee whose shift is changed shall be given adequate advance notice which normally will be at least one (1) week and which shall not be less than forty-eight (48) hours, 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 work week.
> (Emphasis added)

This clause, on its face, allows the State to change starting and stopping times. (See particularly (B)(1) and (C)). The Hearing Examiner so found and IFPTE has not excepted to this conclusion. Accordingly, we hold that the State's actions in changing the starting and stopping times was authorized by the collective negotiations agreement and therefore the change did not violate the Act.

We next consider whether the collective negotiations agreement between the State and CWA authorized a change in starting

and stopping times. CWA represents about 400 employees in the Division of Construction and Maintenance in its two supervisory units, professional unit and administrative and clerical unit. The collective negotiations agreement provides:

ARTICLE I(B)

Management Rights

1. The State, its several Departments and subordinate functions retain and may exercise all rights, powers, duties, authority and responsibilities conferred upon and vested in them by the laws and constitutions of the State of New Jersey and of the United States of America.

2. Except as specifically abridged, limited or modified by the terms of this Agreement between the State and the Union, all such rights, powers, authority, prerogatives of management and responsibility to promulgate and enforce reasonable rules and regulations governing the conduct and the activities of employees are retained by the State.

ARTICLE IX

HOURS AND OVERTIME

A. Hours of Work

1. The number of hours in the workweek for each job classification within the unit shall be consistent with its present designation in the State Compensation Plan.

2. Hours of work for "NL" employees may be adjusted by the responsible agency official in keeping with existing regulations and procedures.

3. Where practicable the normal workweek shall consist of five (5) consecutive workdays.

B. Rest and Lunch Period

1. The work schedule shall provide for a fifteen (15) minute rest period during each one-half (1/2) shift.

2. For the purpose of this provision a shift shall constitute the employee's normal scheduled work day. For example, an employee working from 9 a.m. to 5 p.m. will be entitled to a rest period in the forenoon and in the afternoon as determined by the appointing authority.

3. The normal schedule shall include a provision for an unpaid lunch period during the mid-portion of the work day. There shall be a minimum of one-half (1/2) hour provided for the lunch period. This is not intended to suggest that existing lunch periods of longer than one-half (1/2) hour must be changed.

ARTICLE XL

C. Complete Agreement

The State and the Union acknowledge this and any Memoranda of Understanding attached hereto to be their complete Agreement inclusive of all negotiable issues whether or not discussed and hereby waive any right to further negotiations except as may otherwise be provided herein or specifically reserved for continued negotiation by particular reference in memorandum of understanding pre-dating the date of signing of the Agreement and except that proposed new rules or modifications of existing rules governing working conditions shall be presented to the Union and negotiated upon the request of the Union as may be required pursuant to Chapter 303 of the Laws of New Jersey, as amended.

This contract, unlike IFPTE's, does not, on its face, clearly and unequivocally authorize the State to change the starting and stopping times of the employees' work day. There is, however, a broad management rights clause. Further, there is a settled labor contract principle that, except where specifically restricted by the contract, management generally has been held to have the right to change the work week and work shifts. As stated in Elkouri and Elkouri, How Arbitration Works:

> where the contract contain[s] no express restriction on the employer's right to determine the starting time for work shifts, the employer has been permitted unilaterally to change the starting and stopping time.
> [Id. at 483].

The issue here, however, is whether the contract's silence concerning the starting and stopping times establishes that CWA and the State recognized this principle. In determining this issue, it is necessary to resort to negotiations history and past practice. First, it is clear that the New Jersey Civil Service Association/New Jersey State Employee Association (NJCSA/NJSEA), the predecessor majority representative, recognized the State's right to make such changes. According to the uncontradicted and credited testimony of the State's chief negotiator, the State rejected NJCSA/NJSEA demands to negotiate changes in starting and stopping times and the union dropped these demands in exchange for an oral commitment that the State provide notice of such changes. The necessary conclusion is that the NJCSA/NJSEA waived its right to negotiate changes in starting and stopping times in return for a notice agreement. Although the NJSCA/NJSEA pressed in later negotiations for limitations on this scheduling right, it did not obtain such agreement.

The issue here, of course, is not whether NJCSA/NJSEA waived its right to negotiate such charges, but whether the CWA did. The mere fact that a predecessor majority representative waived a right in the past certainly could not constitute a waiver in negotiations with a new majority representative. Here, however,

there is specific, unrebutted evidence that the CWA waived this right. The Hearing Examiner found:

> At the time the CWA became the majority representative of the four units in 1981, Mason informed Morton Bahr, the Vice-President of District 1 of the CWA, that in taking over those units the CWA was inheriting the contracts which had been negotiated in the past by the CSA/SEA covering those units. Mason further informed Bahr that the State was willing to renegotiate any elements of the CSA/SEA agreements, but that where the parties incorporated previous contract language into the CWA agreement, the CWA was agreeing to that language and the meaning it had as it was negotiated with CSA/SEA with the considerations that were made at that time, and the understandings of the parties as they were in reaching those agreements. Finally, Mason testified that the CWA understood that the State had negotiated with CSA/SEA a number of times over the scheduling of work.

This testimony was not contradicted by any CWA negotiators and was credited by the Hearing Examiner. Nevertheless, CWA asserts that this understanding does not bind it to the earlier agreement between the State and NJCSA/NJSEA because there is no evidence that CWA had any specific knowledge of the conversations of the NCJCSA/NJSEA chief negotiations spokesman. This contention is irrelevant under the circumstances of this case. The point is that the evidence establishes that CWA had specifically agreed to the meaning of language contained in the agreement based upon the negotiations with NJCSA/NJSEA and CWA presented no evidence to rebut this. This meaning, as has already been seen, clearly establishes that the State had a reserved right under the agreement to change starting and stopping times in exchange for notice of any changes.

CWA did not have to so agree. But the uncontradicted fact is it did. Beyond that, CWA after it became majority representative, sought to negotiate hours of work with its flex-time proposal. This demand was rejected and the State made known its position: the State retained the right under the collective negotiations agreement to change starting and quitting times for employees.

In sum, the parties' contract authorized this change. We base this determination upon: (1) an interpretation of the contract based upon the contracting parties' intent; (2) generally accepted principles of labor contract interpretation and (3) CWA's own conduct after it became majority representative. We must therefore dismiss the Complaint.

ORDER

The Complaints are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Suskin and Wenzler voted in favor of this decision. Commissioner Hipp was opposed. Commissioner Graves was not present.

DATED: Trenton, New Jersey
October 17, 1985
ISSUED: October 18, 1985

H. E. No. 85-30

STATE OF NEW JERSEY
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STATE OF NEW JERSEY,

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IFPTE, LOCAL 195,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the State of New Jersey did not violate the New Jersey Employer-Employee Relations Act by changing the starting and quitting times of certain employees in the Department of Transportation. The Hearing Examiner found that both labor organizations negotiated over starting and quitting times which resulted in the basis for the State's authority to make the instant changes.

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 Respondent
Hon. Irwin I. Kimmelman, Attorney General
(Michael L. Diller, D.A.G., of Counsel)

For the Charging Party - CWA
Steven P. Weissman, Associate Counsel

For the Charging Party - IFPTE, Local 195
Oxfeld, Cohen and Blunda, Esqs.
(Nancy I. Oxfeld, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

Unfair Practice Charges were filed with the Public Employment Relations Commission ("Commission") on December 20, 1983 in Docket No. CO-84-164-86 by the Communications Workers of America ("CWA"), and on December 29, 1983 in Docket No. CO-84-170-87 by the

International Federation of Professional and Technical Engineers, Local 195 ("IFPTE"), alleging that the State of New Jersey, Department of Transportation ("State" or "DOT"), engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Charging Parties alleged essentially the same charge, that the State unilaterally changed the workhours of certain employees at the Department of Transportation from 7:30 a.m.-4:00 p.m. to 8:00 a.m.-4:30 p.m.[1/] The CWA alleged that the State thereby violated subsections 5.4(a)(1) and (5) of the Act, and IFPTE alleged that the State violated subsections 5.4(a)(1), (3) and (5) of the Act. [2/]

The State denied committing any violations of the Act and argued that it had negotiated the right to make such changes, that

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1/ When the CWA filed its charge on December 20, 1983 it also filed an application for interim relief seeking an order restraining the State from changing the hours of the instant employees. An Order to Show Cause was executed on that date by the Chairman of the Commission and a hearing was conducted on December 29, 1983 at which time the Chairman permitted IFPTE to participate. The Chairman issued a decision on December 30, 1983 denying the request for interim relief. In re State of N.J., DOT, I.R. No. 84-6, 10 NJPER 95 (para. 15049 1983).

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 the 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 terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

it provided advance notice of the change, that neither CWA nor IFPTE demanded negotiations over the change, and, as an alternative argument, that the modification of the workhours was a non-negotiable managerial prerogative.

It appearing that the allegations of the Unfair Practice Charges may constitute unfair practices within the meaning of the Act, a consolidated Complaint and Notice of Hearing was issued on February 2, 1984. The Answer denying any violations was received on February 20, 1984. Hearings were held in these matters on March 16, April 24, May 11, June 11, and August 13, 14, and 15, 1984 in Trenton, New Jersey, at which time the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. All parties submitted post-hearing briefs the last of which was received on January 21, 1985.

Unfair Practice Charges having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing, and after consideration of the post-hearing briefs, these matters are appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record I make the following:

Findings of Fact

1. The State of New Jersey is a public employer within the meaning of the Act and is subject to its provisions.

2. The CWA and IFPTE, Local 195, are employee representatives within the meaning of the Act and are subject to its provisions.

3. The State has a collective negotiations relationship with both the CWA and IFPTE covering a variety of employees many of whom work for the DOT. Effective January 3, 1984, the State changed the work hours of employees who work in the DOT, Division of Construction and Maintenance, about 400 of whom are included in one of the CWA units; either the higher level supervisors unit, the primary level supervisors unit, the professional unit, or the administrative and clerical unit; and about 1600 of whom are in IFPTE's operations, maintenance and services and crafts unit. The facts show that the State changed the starting and quitting times of the affected employees, but that there was no change in the number of hours worked per day or per week, no change in the employees' lunchtime or breaktime, and no change in their workload. The State showed that it altered the starting and quitting times of the affected employees in order to have the road working and highway crews perform most of their work between 9:00 a.m. and 4:00 p.m. (Transcript "T" 5 pp. 28-29). That time was determined to be the core hours for road work based upon an analysis of traffic patterns throughout the State. (T 5 pp. 29-31).[3/]

4. CO-84-164-86

a. On December 9, 1983, Raymond Colanduoni, Director of Employee and Support Services for DOT, and Charles Edson, DOT

3/ In order to be consistent, the State changed the hours of road crew support or supervisory personnel, most of whom are in CWA's units, to match the hours of road crew personnel who are in IFPTE's unit.

Chief Engineer, went to the CWA offices and informed Alfred Woodrow, President of CWA Local 1032, and Alan Kaufman, a CWA National Representative, that the State was changing the hours of employees in the DOT, Division of Construction and Maintenance, from 7:30 a.m. through 4:00 p.m. which had, for the most part, been in effect for a long period of time, to 8:00 a.m. through 4:30 p.m. (T 1 pp. 29-30, 44). Colanduoni indicated that the change was non-negotiable (T 1 p. 44, T 6 p. 75), but Kaufman argued it was negotiable and he sought negotiations over the change, but Colanduoni still maintained that the change was non-negotiable (T 1 p. 45). Woodrow testified that employees were then notified of the change shortly after the meeting of December 9 (T 1 pp. 48-49).

Subsequently, by letter dated January 6, 1984 (Exhibit R-1), Kaufman informed Frank Mason, the State's Director of the Office of Employee Relations ("OER") which is responsible for contract negotiations on behalf of the State, that the CWA demanded to negotiate the instant change in hours.[4/] However, no specific

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4/ Woodrow's testimony shows that Kaufman had, on or about December 9, 1983, sought from Colanduoni, the opportunity to negotiate over the change in hours. There was no evidence to contradict that part of Woodrow's testimony, thus I credit the same.

(Footnote continued on next page)

negotiations were ever held regarding the change after January 6, 1984.

b. The pertinent part of Article 9, the hours of work clause of CWA's 1983-86 collective agreement with the State (Exhibit J-2), is as follows:

> A. Hours of Work
>
> 1. The number of hours in the workweek for each job classification within the unit shall be consistent with its present designation in the State Compensation Plan.
>
> 2. Hours of work for "NL" employees may be adjusted by the responsible agency official in keeping with existing regulations and procedures.5/

(Footnote continued from previous page)
The record does not show, however, whether Colanduoni communicated Kaufman's request to OER on or about December 9, 1983. Thus, Kaufman decided on or about January 6, 1984 to personally inform Mason of his request to negotiate and he drafted R-1 which contained the following pertinent language:

> It appears that our request to the Department to negotiate these changes in terms and conditions of employment was not conveyed to you.
>
> To avoid any possible misunderstanding in this regard, we are requesting to sit down and negotiate the changes in hours of work, and the proposed change in the weekly work schedule."

Although R-1 was not sent until January 1984, I credit Woodrow's testimony that Kaufman had requested negotiations over the hours change in December 1983.

5/ Article 1 Section C(14) of J-2 defines "NL" as "(no limit) employee - an employee who is not in a fixed workweek job classification as prescribed in the State Compensation Plan."
(Footnote continued on next page)

> 3. Where practicable the normal workweek shall consist of five (5) consecutive workdays.
>
> B. Rest and Lunch Period
>
> 1. The work schedule shall provide for a fifteen (15) minute rest period during each one-half (1/2) shift.
>
> 2. For the purpose of this provision a shift shall constitute the employee's normal scheduled work day. For example, an employee working from 9 a.m. to 5 p.m. will be entitled to a rest period in the forenoon and in the afternoon as determined by the appointing authority.
>
> 3. The normal schedule shall include a provision for an unpaid lunch period during the mid-portion of the work day. There shall be a minimum of one-half (1/2) hour provided for the lunch period. This is not intended to suggest that existing lunch periods of longer than one-half (1/2) hour must be changed.6/

The language in that clause is the same as the language in CWA's first collective agreement (Exhibit J-8 1981-83), and is also the same as the language in Article 8 of Exhibit R-3, which was the 1976-1978 collective agreement of the New Jersey Civil Service Association and New Jersey State Employees Association ("CSA/SEA") which was the labor organization which preceded the CWA in representing separate units of state administrative and clerical

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However, there does not appear to be any dispute that the instant CWA employees are "fixed" employees, therefore, Art. 9 Sec. A(2) would not apply herein.

6/ The language in J-2 is the same for all four CWA units.

employees, professional employees, primary level supervisors, and higher level supervisors. Prior to 1977 the CSA/SEA hours of work clause was the same as the CWA's hours of work Article except that it did not contain subsection B(3). (See Exhibit R-4). In addition to the hours of work clause, the CWA's collective agreement , J-2, contains a management rights clause which is Art. 1 Sec. B, and a complete agreement clause which is Art. 40 Sec. C.[7/]

The history of the parties' negotiations, particularly with respect to the hours of work clause, shows that in 1976, David Fox, the CSA/SEA negotiator, sought to negotiate the hours of work in a week, the work shifts, whether shifts would be changed, and that shifts could only be changed by agreement (T 3 p. 104). Mason responded to those demands at that time by indicating that with respect to starting and quitting times and the setting of shifts, that the State did not want to establish limits that would affect

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7/ The complete agreement clause, Art. 40 Sec. C is as follows:

> The State and the Union acknowledge this and any Memoranda of Understanding attached hereto to be their complete Agreement inclusive of all negotiable issues whether or not discussed and hereby waive any right to further negotiations except as may otherwise be provided herein or specifically reserved for continued negotiation by particular reference in memorandum of understanding pre-dating the date of signing of the Agreement and except that proposed new rules or modifications of existing rules governing working conditions shall be presented to the Union and negotiated upon the request of the Union as may be required pursuant to Chapter 303 of the Law of New Jersey, as amended.

its ability to provide services to the public (T 4 p. 51, T 3 p.104). Mason also testified that he informed Fox that the State wanted to protect itself against rigid settings, and he stated that whether or not all or some of those matters were negotiable, the State's position was that it would only negotiate with respect to notice provisions, and would not otherwise compromise. (T 3 pp. 104-105).

Mason then testified that Fox agreed to drop the CSA/SEA demand to negotiate over shift schedule changes in order to avoid a hearing on the negotiability of such changes, and in exchange for a commitment to provide notice of such changes. (T 4 pp. 56, 58-59). The State agreed to that offer, and although it was willing to place a notice provision in the agreement, Mason indicated that Fox subsequently preferred not to actually place a notice provision in the agreement. (T 4 pp. 72-74).[8/]

8/ In its post-hearing brief the CWA vigorously argued that Mason's testimony regarding his conversations with Fox should not be credited. The CWA maintained tht although Mason recalled on direct examination that Fox had allegedly agreed to forego negotiations over the hours of work in exchange for a notice provision in the event of an hours change, it argued that such testimony could not be credited because Mason did not recall until re-direct examination that Fox allegedly agreed not to place any reference to the notice provision in the agreement. The CWA further argued that it was not believable that Fox would refuse the State's offer to place a written notice provision in the agreement, but the CWA offered no independent evidence to support that argument. Finally, the CWA argued that Mason's testimony regarding Fox could not be credited because Mason could not produce minutes from negotiation sessions with Fox for negotiations subsequent to 1976.

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In the negotiations subsequent to 1976 the CSA/SEA again attempted to negotiate over the time of work. The CSA/SEA submitted its demands in Exhibit R-6 which contained the following proposal in item 8(3).

> There shall be no change in work hours, days of work, time of work, or work week without prior negotiations and agreement of the parties.

However, that language never appeared in the contract and the wording of the hours clause has essentially remained unchanged.

At the time the CWA became the majority representative of the four units in 1981, Mason informed Morton Bahr, the

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I find the CWA's arguments regarding Mason's testimony of his negotiations and conversations with Fox to be without sufficient merit to discredit the witness. I had the opportunity to observe the witness throughout his lengthy testimony and found him to be a very forceful and confident witness. He testified as if he had a very good command of the facts and he did not appear to waiver in his testimony. With respect to the notice provision testimony, the CWA offered no evidence contradicting Mason's testimony, and it is entirely believable that Fox would forego a notice provision because he believed that such a provision might precipitate a lot of grievances which he otherwise preferred to avoid (T 4 p. 73). With respect to Mason's inability to produce minutes of other negotiations with Fox, I note that the CWA objected to the admission into evidence of minutes concerning the 1976 negotiations (Exhibits 5A-5D and 7A-7D)(T 4 pp. 95, 97), and I admitted those documents only to show that they existed, not for the truth or accuracy of the documents. Since it is not likely that minutes of other sessions would have been admitted for their accuracy, the State's inability to find or produce such minutes is of little consequence.

Noting the lack of any evidence contradicting Mason's testimony, I specifically credit his recollection of the negotiations and conversations with Fox.

Vice-President of District 1 of the CWA, that in taking over those units the CWA was inheriting the contracts which had been negotiated in the past by the CSA/SEA covering those unit (T 3 p. 87). Mason further informed Bahr that the State was willing to renegotiate any elements of the CSA/SEA agreements, but that where the parties incorporated previous contract language into the CWA agreement, the CWA was agreeing to that language and the meaning it had as it was negotiated with CSA/SEA with the considerations that were made at that time, and the understandings of the parties as they were in reaching those agreements. (T 4 pp. 25-26, T 3 p. 88). Finally, Mason testified that the CWA understood that the State had negotiated with CSA/SEA a number of times over the sheduling of work. (T 4 p. 88).9/

Stuart Reichman, a former OER official who negotiated J-2 on the State's behalf, testified that in the negotiations leading up

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9/ In its post-hearing brief the CWA also argued that Mason's conversations/negotiations with Bahr should not be credited. The CWA maintained that Mason did not explain how Bahr would have known about verbal understandings between himself (Mason) and Fox, and it maintained that Mason could not recall whether he advised Bahr that he (Bahr) could review the State's minutes of negotiations sessions with the CSA/SEA. However, I find the CWA's arguments to be without merit. The CWA did not offer any evidence to contradict or rebutt Mason's recollection of the conversation with Bahr. Moreover, the CWA did not deny that Bahr was--or may have been--aware of the verbal understandings between Mason and Fox, rather, it only suggested that Mason did not explain how Bahr would have known of the verbal understandings.

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to J-2 (the most recent negotiations), the CWA demanded to negotiate for all four units a flex-time program which involved changes in the starting and quitting times of employees. Reichman responded that the State retained the right to change starting and quitting times for the employees under the mangement rights article of J-2, and as a matter of past practice (T 4 p. 107). He also responded that certain elements of the CWA demand might be non-negotiable (T 4 pp. 107, 121-124). The CWA disagreed with Reichman's position, but there were no further discussions regarding that demand and the CWA eventually agreed to a new contract which did not include any changes in the hours of work clause. (T 4 pp. 108, 117).10/

(Footnote continued from previous page)
In reviewing the testimony I once again found Mason to be a knowledgeable and confident witness thus I credit his testimony regarding his conversation/negotiations with Bahr.

10/ The CWA argued that its witness, Kathy King, testified that the State, through Reichman, never claimed that the flex-time matter was non-negotiable or that there was any discussion regarding the management rights clause. The CWA relied upon T 4 p. 77 where King testified that the State (i.e., Reichman) did not respond specifically in terms of the negotiability of the starting and quitting times, and she further testified that there was no discussion involving the management rights clause. However at T 4 p. 76 King testified that the State did take the position that "although some aspects of the proposal might be negotiable, the operational need was a consideration." Then King acknowledged that the State's position "was that certain aspects might be negotiable." That testimony, at least by inference, is an acknowledgement that the State had reservations about whether certain aspects of the proposal were negotiable, and it in fact supports Reichman's testimony where he responded that certain aspects of the proposal might be non-negotiable. Finally, I note that at T 4 p. 77 King could not recall whether the State (Reichman) raised a past practice argument regarding its right to change hours.

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Consequently, the facts show that despite the change in representation of the four units involved herein from CSA/SEA to CWA, the language in the hours of work clause has not changed. 11/

c. The language in the hours of work clause in the parties' agreement has recently been interpreted by an arbitrator in a grievance where the facts are similar to the facts in the instant matter (Exhibit R-16f). Although the arbitrator found that the State had the right to change the quitting time of employees in that case, that arbitration involved "NL" employees and was decided primarily on the basis of Art. 9 Sec. A(2) of J-2. Since the instant employees are not classified as "NL," then R-16f is not dispositive of the instant matter.

d. The evidence also shows that the State has, on many occasions, made changes in the starting and quitting times affecting certain employees employed by DOT in units now represented by the CWA. See Exhibits R-15A-15H, R-15J and L. The CWA maintains that those exhibits do not establish a past practice of the

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Having reviewed both Reichman's and King's testimony on this subject I fully credit Reichman's testimony because he demonstrated a much better command of the facts.

11/ The CWA's prosecution of this Charge primarily consisted of testimony by CWA officials regarding the events surrounding the instant change. The CWA did not present any evidence on the history of the work hours clause either while CSA/SEA was majority representative or after it became the majority representative of the four units involved herein.

unilateral changes in hours in the Division of Construction and Maintenance because in some cases the employees volunteered for the change, and in other cases the change did not involve the Division of Construction and Maintenance. However, there were some situations involving changes in the Division of Construction and Maintenance which did not appear to involve volunteers. (Exhibits R-15C and D). 12/ It is also apparent that in all of those situations, including those cases involving volunteers, that the State made the decision to change the hours without negotiations over the specific changes. Moreover, there is no evidence that the CSA/SEA or CWA actually notified the State of any objection to the State making and announcing those changes prior to negotiating the same with, or at the very least, notifying, the majority representative.13/

12/ The CWA indicated that Exhibits R-15C and D involved employees working contractor hours and it argued that those employees traditionally worked such hours. However, an examination of those exhibits shows that the DOT was unilaterally changing employees from daytime hours to nighttime hours for particular periods of time. The nighttime hours were not their "traditional hours," and there was no showing that the CSA/SEA (the majority representative at that time) ever contested the changes.

13/ The CWA argued that since employees had volunteered for several of the prior changes in hours that those changes do not demonstrate a past practice. However, the mere fact that employees volunteered for a change in hours does not prevent a majority representative from objecting to a public employer's unilateral change in a term and condition of employment assuming the employer had not obtained the right to make such changes in prior negotiations. The majority representative could certainly have voiced its objection to the

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In addition to the changes in the DOT, the facts show that the State has made unilateral changes in the starting and quitting times of employees in other departments of the State covered by the same CSA/SEA or CWA collective agreements involved herein. See Exhibits 16A, B, and R. The CWA admitted that it acquiesced to the changes in R-16B and R because the employees were not opposed to the changes. But the CWA failed to demonstrate that it ever objected to the changes in R-16A. In that matter the Department of Human Services notified a CWA representative in writing on September 26, 1983 that starting and quitting times of certain employees were being changed. There was no showing that the CWA objected to the change. 14/

5. CO-84-170-87

a. On December 9, 1983, Raymond Colanduoni, Director of Employee and Support Services for DOT, telephoned the officers of IFPTE and informed its President, Dominick Critelli, and other officers, that effective January 3, 1984 the State was changing the workhours of certain DOT employees from 7:30 a.m. to 4:00 p.m. to

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(Footnote continued from previous page)
unilateral nature of the change, but not sought to prevent its implementation because the employees did not object to the change. Here, at the very least, there is a history of both CSA/SEA and CWA acquiescing to the State's otherwise unilateral changes.

14/ I am not finding that R-16A demonstrates a past practice of unilateral changes by the State for the DOT, Division of Construction and Maintenance. However, I am finding that R-16A supports a finding that the CWA has, at the very least, acquiesced to changes by the State in the hours of work of unit employees.

8:00 a.m. to 4:30 p.m (T 1 p. 81, T 2 pp. 5-6, T 3 pp. 33-34, 60, T 6 p. 29). Colanduoni did not offer to specifically negotiate over the change in hours, but he did offer to meet with IFPTE to discuss the change. (T 3 p. 43). However, IFPTE wanted to negotiate the change. (T 3 pp. 56, 60, 62). 15/

Colanduoni followed up on his telephone conversation of December 9 by sending Critelli a letter on the same date (Exhibit CPI-1) notifying him of the change in hours and expressing a willingness to meet with him. As a result of the telephone notification, Critelli, also on December 9, prepared a memorandum to IFPTE chapter presidents (Exhibit CPI-2) notifying them of the change and asking for the members' input regarding the effects of the change.

Subsequent to the circulation of CPI-2, IFPTE received numerous petitions from its membership (Exhibit CPI-3) objecting to the change in hours. Having received the petitions, Critelli, by letter dated December 15, 1983 (Exhibit CPI-4), informed Colanduoni that the membership objected to the change because of the affect the

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15/ In its post-hearing brief the State argued that IFPTE did not demand to negotiate over the instant change. I disagree. On December 9 when Colanduoni called IFPTE he first informed Len Davis and Don Buchanan of the DOT's intent to change the hours. The record shows that Davis told Colanduoni that it should be negotiated (T 3 pp. 60 and 62). President Critelli also testified that he wanted to"discuss" the entire matter prior to the change but that the State was evading any such discussions (T 3 p. 56). Based upon the circumstances surrounding the telephone call I believe Critelli meant to "negotiate" and not "discuss" in the labor relations sense.

change would have on their personal lives, and he requested the DOT to rescind the planned change. Colanduoni responded to that letter on December 30, 1983 (Exhibit CPI-5) and informed Critelli that since the matter had been brought to the Commission, the DOT had reviewed the situation, but decided to go ahead with the change.

In late December 1983, Charles Edson, the DOT's Chief Engineer, circulated a newsletter to construction and maintenance personnel (Exhibit R-12) notifying them of the change in hours and indicating that the reason for the change was to increase the amount of productive time for working on the roads between 9:00 a.m. and 4:00 p.m. Another newsletter was issued in June 1984 (Exhibit R-13) clarifying the need for the change.

b. The pertinent part of Article 10, the hours of work clause of IFPTE's 1983-86 collective agreement with the State (Exhibit J-1) is as follows:

> Hours of Work
>
> A. The work week for each job classification within the unit shall be consistent with its designation in the State Compensation Plan.
>
> B. 1. All employees shall be scheduled to work on a regular shift as determined by the appointing authority which work shift shall have stated starting and quitting times. The specific work shifts shall be posted within the work unit.
>
> 2. When schedule changes are made, the maximum possible notice shall be given and the employee's convenience shall be given consideration.
>
> C. An employee whose shift is changed shall be given adequate advance notice which normally will be at least one (1) week and which shall not be

> less than forty-eight (48) hours, 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 work week.
>
> D. Work schedules shall provide for a fifteen (15) minute rest period during each one-half shift (except for employees of the Motor Vehicle Division within the Inspection and Security Unit where the present practice and procedure concerning work break will be observed).
>
> Employees who are required to work beyond their regular quitting time into the next shift shall receive a fifteen (15) minute rest period when the period of work beyond their regular shift exceeds two (2) hours.

The language in that clause has been the same in every IFPTE agreement beginning with the 1972-74 agreement, Exhibit J-7.[16/]

The history of the parties' negotiations, particularly with respect to the work hours clause, shows that during the negotiations presumably leading to J-7, IFPTE, on or about June 23, 1971, submitted a proposal to the State regarding work schedules (Exhibit R-2)(T 3 p. 70). That work schedule proposal stated as follows:

> The regular work day shall consist of seven (7) hours and the regular work week shall consist of five days, Monday through Friday.
>
> No change shall be made in the regular work day or work week during the life of this Agreement. The staring time, lunch time and quitting time to be spelled out in the contract.

16/ Although the hours of work clause has always used the same language, it has not alway been designated as Article 10. In the 1981-83 agreement (Exhibit J-3) it was Art. 10, but in the 1977-79 agreement (Exhibit J-4), and the 1976-78 agreement (Exhibit J-5) it was Art. 13, and in the 1973-75 agreement (Exhibit J-6) it was Art. 12, and in J-7 it was Art. 11.

However, that terminology did not find its way into the agreement. Frank Mason, the State's Director of OER who negotiated J-7 on behalf of the State testified, that he responded to R-2 by indicating that the State needed flexibility in scheduling and would not be limited to rigid times (T 3 p. 72). He further testified that IFPTE eventually abandoned its demands on starting and quitting times in favor of other proposals (T 3 p. 74). Finally, Mason testified that IFPTE's concern was to receive advanced notice of changes, and the State was willing to comply with that request which resulted in the language contained in Art. 10 Sec. B(2) and Art. 10 Sec. C. (T 3 pp. 74-75, 81-84).[17/] Consequently, IFPTE in J-7 abandoned its attempt to limit the State to specific starting and quitting times and agreed instead to allow the State to make changes in exchange for providing adequate notice.[18/]

The facts also show that during the negotiations that led to J-3, the 1981-83 agreement, IFPTE again attempted to change the work hours language by submitting a proposal on or about February 6, 1981 (Exhibit R-8) to change Art. 10. That proposal contained the following pertinent proposals.

> B.(1) The work week shall consist of five (5) days, Monday through Friday, with each day

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17/ The language in Art. 10 Sec. B(2) and Art. 10 Sec. C of J-1 is the same language as contained in J-7. However, the hours clause in J-7, Art. 11, was not outlined by letter or number.

18/ Noting that there was no evidence to contradict Mason, I fully credit his testimony regarding the parties' negotiations history.

> consisting of two (2) periods of four (4) consecutive hours of duty time.
>
> D. All work schedules shall be established or changed at least two (2) pay periods prior to the work schedule's implementation. Such work schedules shall be prominantly posted in the work unit, and the employees and the appropriate Union Representative(s) shall be supplied a copy of such schedules by the State.

Edwin Evans, the OER repreentaive who negotiated J-3 on behalf of the State, testified regarding R-8 and stated that he told Critelli that the State:

> ...reserved through negotiations the right to schedule employees and to change their hours and that we [the State] needed to maintain that flexibility in order to operate in an effective and efficient manner and that I [Evans] felt with the notice and everything in there that their employees had sufficient protection and that as far as movement, we [the State] didn't have any movement and then, eventually, we [the parties] reached an agreement which contained the same hours of work clause that was in all previous agreements. (T 4 p. 139)

Eventually, the parties, in negotiating J-3, agreed to keep the original work hours language that they always had which indicated that, as in J-7, IFPTE again abandoned its attempt to limit the State's ability to change work schedules in exchange for the notice requirement.

Finally, the facts show that during the negotiations that led to J-1, IFPTE again attempted to change the work hours language. On or about November 18, 1982 IFPTE submitted non-economic demands to the State (Exhibit R-9) which included the following proposed changes for Article 10.

ARTICLE 10

B.1. ADD: Employees will have two days off in a row.

C. Eliminate 48 days, except in an emergency.

D. All employees shall have a half hour lunch break in the middle of the shift. The State will not lengthen the work day of any bargaining unit employee during the term of this agreement.

Thereafter on or about December 1, 1982, IFPTE submitted its economic demands to the State (Exhibit R-10), which included the following proposal:

> 8. Every Employee shall receive a ten percent (10%) Shift Differential if the Employee is scheduled to work for more than five (5) consecutive days, if the Employee is scheduled to work split shifts, if the Employee's work schedule involves shift overlapping, if the Employee is assigned seven (7) day coverage, or if the Employee is assigned to second or third shift or to any shift involving work outside the daytime hours of 6 a.m. to 6 p.m. Employees entitled to a Shift Differential will receive it for all hours worked.

Evans testified that with respect to these proposals he told the IFPTE negotiator that the State reserved the right in the contract to change the hours and the days of the week employees worked, that it wanted to maintain that right, and that with the notice provisions the employees would have sufficient time to change their personal schedules (T 4 p. 145). 19/ The State rejected the

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19/ I credit Evans' testimony regarding the history of IFPTE negotiations.

proposed changes to Art. 10 listed in R-9, and rejected proposal number 8 of R-10. Eventually the parties again agreed to the same work hours language as set forth in Art. 10 of J-1.

IFPTE did not present any evidence regarding the history of Art. 10, nor did it present evidence to contradict the testimony by Mason and Evans. The only testimony by IFPTE regarding Art. 10 was by IFPTE's vice president, Don Buchanan, who testified that Art. 10 Sec. C was not meant to apply to whole departments (T 2 p. 27). However, he did not provide any testimony regarding the intent of Art. 10 Sec. B.

c. On December 28, 1983, prior to the effective date of the instant change, IFPTE filed a grievance with the State (Exhibit CPI-6) alleging that the proposed change must be negotiated. A third step grievance hearing was held on that grievance on January 12, 1984, before an internal hearing officer of DOT. On February 24, 1984 the hearing officer issued his decision (attached to CPI-6) and held that Art. 10 was clear and that the DOT had the right to change starting and quitting times. The hearing officer held in pertinent part that:

> It is the interpretation of this Hearing Officer that the language of B1 is clear, inclusive and gives management the right to determine the starting and quitting times of its employees. Supporting this interpretation is the fact that there is no reference, direct or indirect, that the issue is in any way negotiable.
>
> Insofar as the notification and consideration issues (B2 and C), at the hearing management introduced evidence to show that employees were given two weeks notice (posted) of the impending change. Management also introduced into evidence a letter to the Union dated Decembe 9, 1983 notifying the Union of the impending change and

> making themselves available for three weeks prior to the change date to discuss it....
>
> Upon review of this information, it is the conclusion of this Hearing Officer that the requirements of Section B2 and C of Article X have been met.

In addition to the hearing officer decision in CPI-6 wherein he interpreted the language of Art. 10, an arbitrator in a previous matter also interpreted the language in Art. 10 and found that the wording therein was clear and that it permitted the Employer to establih the beginning and ending of a work week (Exhibit R-11). The issue in R-11 was whether the Employer could change certain employees' work week from a Monday through Friday week to a work week which included Saturday and Sunday, without paying overtime for Saturday and Sunday. The arbitrator, after interpreting Sections B(1), B(2), and C of Art. 13 of either J-4 or J-5 (the same as Article 10 of J-1) held that:

> ...neither the Agreement nor the regulations prohibit the Authority from exercising its managerial prerogative in establishing the particular beginning and ending of a work-week.

d. The evidence further shows that the State has made changes in the starting and quitting times affecting IFPTE unit members. Exhibits R-15H and R-15I. However, it is not clear whether the parties negotiated over the changes in R-15H, and it is not clear whether IFPTE was aware of R-15I. 20/

20/ IFPTE's prosecution of this Charge primarily consisted of testimony from DOT employees and IFPTE officers regarding the effects of the change in starting and quitting times on their jobs, and on their personal lives. (T 1 pp. 87-89, T 2 pp. 32-78, T 3 pp. 7-17, 63). IFPTE did not present any evidence on the history of the parties' negotiations regarding Art. 10. Although I am sympathetic to the personal needs of the employees, the decision in this case, as in every case, must be based upon the facts and the law, and not upon the personal preferences of the employees.

ANALYSIS

Negotiability of Work Hours - Starting and Quitting Times

As an alternative defense to the instant Charges the State argued that its decision to change starting and quitting times of the instant DOT employees was a non-negotiable managerial prerogative. The State primarily relied upon the State Supreme Court's decision in Local 195, IFPTE v. State, 88 N.J. 393, 8 NJPER 285 (para. 13129 1982) to support its position. In that case, and prior cases, 21/ the Court held that, generally, workweek and hours of work provisions were mandatorily negotiable. Local 195, supra, 88 N.J. at 404, 412. However, the Court in Local 195 also recognized the need to balance the interests of public employees with those of public employers, i.e. Woodstown-Pilesgrove, supra, and it, therefore, established a three part test to determine the negotiability of a given subject. That test provides that a subject is negotiable when:

> ...(1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the

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21/ Englewood Bd.Ed. v. Englewood Ed.Assn., 64 N.J. 1, 6-7 (1973); Galloway Twp. Bd.Ed v. Galloway Twp.Assn. Ed. Secs., 78 N.J. 1 (1978); Bd.Ed Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed.Assn., 81 N.J. 582, 589 (1980).

> public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. 88 N.J. at 404-405.

In application of the above test, the Court in Local 195 went on to consider the negotiability of a clause seeking a work week of five consecutive work days. The Court held that clause to be negotiable because it did not interfere with the State's power to determine the number or class of employees working at a given time, nor did it interfere with the determination of hours or days during which a "service" would be operated. Id. at 412. The State herein relied upon the "service would be operated" language to support its position.

The CWA and IFPTE, also relying upon Local 195, argued that the hours of work for the instant employees was negotiable, and that such negotiation would not significantly interfere with governmental policy.

There is no dispute that the first two parts of the Local 195 test have been met. Starting and quitting times intimately and directly affect the work and welfare of the instant employees, and, the subject has not been preempted. The issue here, then, is whether negotiations over starting and quitting times would "significantly" intefere with governmental policy. I conclude that it would not. My conclusion is not meant to suggest that negotiations over the relevant employees' starting and quitting times would not, to some extent, impinge upon the State' power to

establish the core hours. The Court acknowledged that possibility in Local 195. Id. at 412. Rather, in this case negotiations over whether the workday should begin at 7:30, or 8:00, or some other alternative within the framework of the core hours would not "significantly" affect the establishment of those core hours.

In reaching this result I first concluded that the governmental policy involved herein was the determination of the roadwork core hours, and not the scheduling of the workday. The State has the managerial right to determine or identify the core hours in which the bulk of the roadwork needs to be performed, but, in the abstract, and absent contractual authorization, it does not have the right to unilaterally schedule the workday in relationship to those core hours.22/ For example, in In re Old Bridge Municipal Utility Authority, P.E.R.C. No. 84-116, 10 NJPER 261 (para. 15126 1984), a labor organization objected to the Employer's determination that a flushing program could only be performed after midnight. The Commission held that it was a managerial prerogative

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22/ IFPTE presented considerable testimony challenging the length of the core hours. Basically, IFPTE maintains that those hours should end by 3:00 p.m. and not 4:00 p.m. For the reasons set forth in this decision the establishment of the core hours is a managerial prerogative and this Commission does not have the jurisdiction to determine whether IFPTE is correct in arguing that the core hours should end at 3:00 p.m. However, I do note that DOT's own policy statements, Exhibits R-14A, B, and C, establish the core time as 9:00 a.m. to 3:00 p.m., and R-14A was issued on January 3, 1984. Although DOT officials clearly referred to the core hours as 9:00 a.m. to 4:00 p.m. in Exhibits R-12 and R-13, there may be some validity to IFPTE's claim that core hours really should end at 3:00 p.m. The State should clarify this matter without delay.

to determine when the program should be implemented, and since there was contractual authorization for work scheduling changes, no violation was committed.[23/]

Second, the general negotiability of the change in the instant case is similar to early Commission decisions finding that the unilateral alteration of work hours, even if total hours worked remained the same, related to negotiable terms and conditions of employment and were violations of the Act. In re Hillside Bd.Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975); and, In re Galloway Twp. Bd.Ed. ("Galloway Secretaries"), P.E.R.C. No. 76-31, 2 NJPER 182 (1976) which was affirmed by both the Appellate Division (in relevant part) 149 N.J. Super. 346, and by the Supreme Court 78 N.J. 1 (1978). In Galloway Secretaries the Board had changed the starting and quitting times of two secretaries to coincide with the altered school day. The Commission made it clear that where the Board could unilaterally alter the school day, it was required to negotiate over any change in employees' hours in relationship to the school day. The result in the instant matter is the same. The State has the authority to determine the core hours, but it must, absent contractual authorization (to be discussed infra), negotiate the work hours in relationship to those core hours.[24/]

23/ See also In re City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (para. 13211 1982); In re Ocean County Bd. of Health, P.E.R.C. No. 82-6, 7 NJPER 441 (para. 12196 1981).

24/ See also In re Clementon Sewerage Authority, P.E.R.C. No. 84-49, 9 NJPER 669 (para. 14291 1983).

Finally, I find that the State's reliance upon the "service would be operated" language in Local 195 to support its position is misplaced. I believe that that language was intended to mean a service provided by the State to the public, i.e., the repair and maintenance of State roads. It was not intended to establish the workday of employees. Thus, the State has determined that the core hours to perform roadwork service for the public is 9:00 a.m. to 4:00 p.m. (or perhaps 3:00 p.m.) and that decision is not negotiable. But the employees' workday in relationship to the core hours is negotiable.25/

Having found that the change in starting and quitting times for the instant employees is generally negotiable, I must next examine whether the State had contractual authorization to make the changes.

CWA Charge -CO-84-164-86

The CWA argued that it did not negotiate away or waive the right to negotiate over the instant changes, that only clear and unmistakable language may constitute a waiver, and that there was no

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25/ I am aware that the courts have established an exception to the negotiability of work hours in some situations. See Town of Irvington v. Irvington PBA Local 29, 179 N.J. Super. 532 (App. Div. 1979), petition for certif. den. 82 N.J. 296 (1980); Borough of Atlantic Highlands v. Atlantic Highlands PBA Local 242, 192 N.J. Super. 7 (App. Div. 1983), pet. for certif. den. 96 N.J. 293 (1984). However, those cases involve police employees and para-military operations and are therefore distinguishable from the instant Charges.

clear waiver in its collective agreement(s). In asserting that no waiver existed herein the CWA also maintained that there was no relevant history of work hour changes in the past practice of the construction and maintenance division.

The CWA is correct that only "clear and unequivocal" language in a collective agreement shall constitute a waiver. In re State of New Jersey, P.E.R.C. No. 77-40, 3 NJPER 78 (1977); In re Deptford Bd.Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (para. 12015 1980). However, a mere reading of a collective agreement is not necessarily enough to determine whether a waiver exists. It may be necessary to consider other factors before reaching such a determination.

The Commission in the above-cited cases adopted language by the respective hearing examiners who, having reviewed decisions of the National Labor Relations Board held, that evidence of the parties' negotiations might need to be considered in determining whether a waiver exists. In re State of New Jersey, H.E. No. 77-6, 2 NJPER 332 (1976); In re Deptford Bd.Ed., H.E. No. 81-13, 6 NJPER 538 (para. 11273 1980). In State of N.J., for example, the Hearing Examiner held that:

> The National Labor Relations Board and the Courts have generally held, as a matter of legal principle, that majority representatives may waive certain rights guaranteed to employees by the NLRA, including the right to bargain over mandatory subjects for bargaining, if such a waiver is "clear and unmistakable" and indicates an acquiescence, agreement or conscious yielding to a demand....In recent decisions the National Labor Relations Board has taken the position that while in some situations, the rule of "clear and unequivocal" waiver may be a realistic, practical

> appraisal of a bargain reached between an employer and a union, in other situations it may not be. The Board has stated that in determining the existence of a waiver of statutory rights prescribing bargaining responsibilities the Board will look to a variety of factors, including the precise wording of the relevant contractual clauses or agreements under consideration, the evidence of the negotiations that occcurred leading up to the execution of the provisions that are being asserted as constituting a waiver, and the completeness of the clause or agreements, that are being scrutinized, as an "integration" [to determine the applicability of the parol evidence rule]. 12/
>
> 12/ See, e.g. Bancroft-Whitney Co., 87 LRRM 1226 (1974); Valley Ford Sales, 86 LRRM 1047 (1974), petition to review Board order denied, 91 LRRM 2832 (1976); and, Radioear Corp., 81 LRRM 1402 (1972).

2 NJPER at 335-336.

Subsequently, in In re Deptford the Commission clearly acknowledged that:

> ...the "clear and unequivocal waiver test" was modified to allow the trier of fact to look at a variety of factors, such as the history of negotiations over the disputed contract provision, to detemine if, in fact, there was a waiver of the right to negotiate. 7 NJPER at 36.

In the instant case there is no obvious "clear and unequivocal" waiver on the face of CWA's collective agreement regarding the scheduling for starting and quitting times other than for "NL" employees (Art. 9 Sec.A(2)) which does not apply herein. However, the State has argued that the CWA (and CSA/SEA) negotiated away or waived its (their) right to any additional negotiations regarding scheduling changes. Thus, in order to determine whether a waiver exists herein I must, pursuant to In re State of New Jersey,

supra, and In re Deptford, supra, review the negotiations history of the CSA/SEA and CWA agreements.

This result is also consistent with the meaning and intent of the parol evidence rule. The Courts of this State, as well as the Commission, have held that parol evidence, evidence outside the wording of the agreement, cannot be used to otherwise change the meaning of, alter or contradict the "clear" terms of a written agreement. Casriel v. King, 2 N.J. 45 (1949); Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293 (1953); Cherry Hill Bd. Ed. v. Cherry Hill Assoc. School Administrators, App. Div. Docket No. A-26-82T2, December 23, 1983; In re Borough of Bergenfield, P.E.R.C. No. 82-1, 7 NJPER 431 (para. 12191 1981); In re Twp. of Vernon, P.E.R.C. No. 84-41, 9 NJPER 655 (para. 14283 1983); In re Raritan Twp. M.U.A., P.E.R.C. No. 84-94, 10 NJPER 147 (para.15072 1984). However, where, as here, the language in the agreement does not clearly cover the issue, then parol evidence is admissible to aid in determining what the parties had agreed upon or whether a waiver exists.

For example, in In re Twp. of Vernon supra, the union alleged that the parties had agreed to continue a longevity clause, but their collective agreement contained no such clause. Parol evidence was admitted and it demonstrated that during negotiations the union had waived the inclusion of the clause. The parol evidence demonstrated that the parties had negotiated over longevity, but that the union agreed to a contract which did not include the same.

the shift, then the State has the right to determine the starting and quitting times of the shift. Finally, that Article states that when schedule changes are made advance notice must be provided, and a specific notice requirement is included in the agreement. This last portion of the Article clearly contemplates that the State will make schedule changes in exchange for complying with the notice requirement.

IFPTE argued that the word "shift" in Article 10 was intended to mean day, afternoon and night, or, first, second, and third shifts, and was not intended to cover starting and quitting times. However, that interpretation is not expressed in the agreement. Rather, the word shift as used in the context of Article 10 is defined as "a scheduled period of work or duty." Webster's New Collegiate Dictionary (1981). Since the State must, by agreement, determine the shift, i.e., the scheduled work period, and since the work period must have stated starting and quitting times, then, ipso facto, the State must determine those starting and quitting times.

IFPTE has attempted to give Article 10 a meaning which is different from the commonly accepted meaning and one which is unexpressed in the agreement. But in this case the parol evidence rule must apply because Article 10 is clear on its face and parol evidence cannot be used to change that clear meaning. The Supreme Court in Casriel v. King, supra, held that parol evidence is not admissible:

As a result of the above decisions, and noting that J-2 does not clearly cover the scheduling of the starting and quitting times of the instant employees, I must consider the history of the CSA/SEA and CWA negotiations in order to resolve the instant dispute. That history shows quite clearly that the CSA/SEA negotiated away or waived the right to subsequent negotiations over changes in starting and quitting times in exchange for advance notice of the changes. Although a specific notice provision did not appear in the CSA/SEA agreement(s), the uncontradicted evidence was that the CSA/SEA preferred not to have a notice provision in the agreement for fear it would generate too many grievances. Rather, the CSA/SEA was content to have a verbal agreement regarding notice.

Subsequently, when CWA became the majority representative of the instant employees it continued to use the same hours of work language in its agreement(s) as previously contained in the CSA/SEA agreements. Once again, the uncontradicted evidence shows that the CWA understood that where it agreed to utilize the same language used by CSA/SEA it was also agreeing to the same understandings and considerations that previously existed regarding that language. Thus, the CWA was agreeing to waive negotiations over changes in starting and quitting times in exchange for advance notice of such changes. In addition, the CWA attempted to negotiate over the starting and quitting times for a flex-time program in the negotiations leading up to J-2. But, the CWA dropped that demand during negotiations and the hours of work clause remained the same.

That result demonstrated, at least in part, that the CWA had failed to negotiate a change in the pre-existing work scheduling agreement.

Finally, even if the CWA's past practice argument was accurate, that there have never been any changes in the starting and quitting times in the DOT construction and maintenance division, the instant change would not be a violation of the Act. The State had negotiated for the right to make the instant changes, and even assuming it had not made such changes in the construction and maintenance division prior to January 3, 1984, it never waived or lost its negotiated right to make such changes.[26/]

Based upon all of the above the CWA's Charge must be dismissed.

IFPTE Charge - CO-84-170-87

In this case a clear and unequivocal waiver exists which must result in the dismissal of IFPTE's Charge. Article 10 of IFPTE's collective agreement, J-1, clearly and unequivocally provides that the appointing authority, i.e., the State, shall determine the regular work shift to which employees shall be scheduled. That Article further provides that the shift shall have stated starting and quitting times, and since the State determines

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26/ In any case, I do not agree with the CWA's past practice argument. The evidence shows that the State has made several changes in the starting and quitting times affecting employees in the CWA units, including employees in DOT, and in some instances, employees in the Division of Construction and Maintenance.

> ...for the purpose of giving effect to an intent at variance with any meaning...to the words. 2 N.J. at 50.

That Court further held that:

> So far as the evidence tends to show not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant. 2 N.J. at 51.27/

Thus, IFPTE's attempt to distinguish the word "shift" herein is without merit.28/ Rather, Art. 10 Sec B(1) is a clear and unequivocal waiver of any right IFPTE may have had to negotiate over starting and quitting times and is similar to waivers in other cases.29/

27/ See also Atlantic Northern Airlines, Inc. v. Schwimmer, supra, where the Court discussed contract interpretation and the parol evidence rule at length and citing from Corbin on Contracts held:

> The "parol evidence rule" purports to exclude testimony"only when it is offered for the purpose 'varying or contradicting' the terms of an 'integrated' contract..." 12 N.J. at 302.

28/ It appears that IFPTE was trying to obtain through the unfair practice forum what it could not obtain through negotiations, that is, the right to negotiate over starting and quitting times. However, the Supreme Court in Washington Construction Co. Inc. v. Spinella, 8 N.J. 212, 217 (1951), held:

> ...the court will not make a different or a better contract than the parties themselves have seen fit to enter into.

29/ See In re Borough of Moonachie, P.E.R.C. No. 85-15, 10 NJPER 509 (para. 15233 1984); In re Old Bridge Municipal Utility

(Footnote continued on next page)

Assuming, arguendo, that Art. 10 of J-1 was unclear and that parol evidence was necessary to interpret its meaning, the overwhelming weight of the evidence shows that IFPTE negotiated away the right to subsequently negotiate over the starting and quitting times in exchange for the notice provision in Art. 10 Sec. C. In fact, during negotiations for its last two agreements, J-3 and J-1, IFPTE attempted to negotite language changes to the work hours clause. However, the record shows that IFPTE failed to negotiate any changes to that language. Thus the State's right to continue determining the starting and quitting times of employees in IFPTE's unit continues to exist.

Finally, I note that the Commission has frequently held that an employer has met its negotiations obligation when it acts pursuant to its collective agreement, e.g., In re Borough of Moonachie, supra, In re Randolph Twp. Bd.Ed., supra; In re Bound Brook Bd.Ed., P.E.R.C. No. 83-11, 8 NJPER 439 (para. 13207 1982); In re Pascack Valley Bd.Ed., P.E.R.C. No. 81-61, 6 NJPER 554, 555 (para. 11280 1980). Such is the result herein. The State has merely acted pursuant to the collective agreement and IFPTE's Charge must therefore be dismissed.

(Footnote continued from previous page)
Authority, supra; In re Raritan Twp. Municipal Utilities Authority, P.E.R.C. No. 84-94, 10 NJPER 147 (para. 15072 1984); In re Randolph Twp. Bd.Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (para. 13282 1982); In re Borough of Bergenfield, P.E.R.C. No. 82-1, 7 NJPER 431 (para. 12191 1981); In re Delaware Valley Reg. Bd.Ed., P.E.R.C. No. 81-77, 7 NJPER 34 (para. 12014 1980).

Accordingly, based upon the entire record I make the following:

Conclusions of Law

The State did not violate N.J.S.A. 34:13A-5.4(a)(1), (3), or (5) by changing the starting and quitting times of employees in the DOT, Division of Construction and Maintenance.

Recommended Order

I recommend that the Commission ORDER that both Complaints be dismissed in their entirety.

Arnold H. Zudick
Hearing Examiner

Dated: March 4, 1985
Trenton, New Jersey