P.E.R.C. NO. 82-63

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF IRVINGTON,

Respondent,

-and- Docket No. CO-81-385-6

IRVINGTON MUNICIPAL EMPLOYEES ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint issued on a charge filed by the Irvington Municipal Employees Association ("Association") against the Town of Irvington ("Town"). The Association alleged that the Town violated subsections (a)(1), (2), (5) and (7) of the New Jersey Employer-Employee Relations Act when it unilaterally changed the summer month hours of Parks and Recreation Department employees. Although a decision to change work hours is within the scope of negotiations, the parties' contract gave the Town the right to make the change.

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Appearances:
For the Respondent, Henry E. Rzemieniewski, Esq., Town Attorney
(Salvatore Muscato, Esq., Asst. Town Attorney, of Counsel)

For the Charging Party, Cifelli & Davie, Esqs.
(Kenneth P. Davie, of Counsel)

DECISION AND ORDER

On June 24, 1981, the Irvington Municipal Employees Association (the "Charging Party") filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the Town of Irvington (the "Town") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act (the "Act"), as amended, by unilaterally changing the hours of the Parks and Recreation Department employees. This action was alleged to violate N.J.S.A. 34:13A-5.4 (a)(1), (2), (5), and (7).[1/]

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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms
(Continued)

Since the Charge contained an application for interim relief, this matter was assigned to Commission Hearing Examiner Alan R. Howe, who conducted an interim relief hearing on June 26, 1981 for the limited purposes set forth in N.J.A.C. 19:14-9.1 et seq. On July 2, 1981, the Hearing Examiner issued his interlocutory decision and order, I.R. No. 82-1, 7 NJPER 407 (¶12180 1981). He granted interim relief and ordered the Town not to implement the change in hours pendente lite.

It appearing that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued by the Director of Unfair Practices on July 10, 1981. A full plenary hearing was held on September 3, 1981 before Commission Hearing Examiner Edmund G. Gerber, at which the parties were given the opportunity to examine and cross-examine witnesses, present evidence and argue orally. Neither party filed a post hearing brief.

The Hearing Examiner's Recommended Report and Decision, H.E. No. 82-11, 7 NJPER 618 (¶12277 1981), a copy of which is attached hereto and made a part hereof, was issued on September 25, 1981. Exceptions to this decision were filed by the Charging Party on November 1, 1981, and a response was filed by the Town on November 18, 1981. The case is now properly before the Commission for determination.

The relevant facts in this matter show that on June 11, 1981, the Town unilaterally announced that it would change the hours of Parks and Recreation Department employees (for the summer months only) from 7:30 a.m.4:00 p.m. to 1:00 p.m.9:00 p.m.

effective June 26, 1981.[2/]

The Town argued that it had the right to impose the new work schedule under the contract,[3/] and that it had a managerial right to change the hours pursuant to Irvington PBA v. Town of Irvington, 170 N.J. Super. 539 (1979).

The Charging Party argued that Town of Irvington, supra, was not controlling herein and that no managerial right existed to make the change. Moreover, it argued that the contract language prohibited the Town from changing the scheduled hours of work.

1/ (Continued) and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

2/ The June 11, 1981 announcement is set forth below:
Due to the constant vandalism problem that has been costing thousands of dollars in repair and additional work for the maintenance personnel, the schedule (sic) working hours starting June 29th will be changed.
This change in working hours will enable us to better cover our parks and playgrounds and will be of benefit to the overall operating of the parks and recreation programs.
The new working schedule for all park employees will be from the hours of 1:00 p.m. until 9:00 p.m. This change in working hours will be until further notice."

3/ The pertinent contract language is as follows:

Article VI, Section 1
...[T]he Town possesses the sole right and responsibility to operate the ...department covered by this agreement... except as may be expressly qualified by the specific provisions of this Agreement. These rights include the right to...establish and change work schedules and assignments.

Article XVIII, Section 2(a)-Hours of Employment
All blue-collar employees...shall be required to work not more than eight hours, exclusive of a meal period of not less than one-half hour nor more than one hour, as per present departmental practice.

Article XV, Section 1 - Overtime
[Overtime] shall be paid at the rate of one and one-half (1-1/2) times an employee's straight time rate of pay for all work performed in excess of the employee's regularly scheduled quitting time, or performed prior to the employee's regularly scheduled starting time, or performed on an employee's scheduled day off.

For the reasons stated in his opinion, we find that the Hearing Examiner correctly concluded that Town of Irvington did not apply here and that the Town's decision to change the work hours was not a managerial prerogative to the exclusion of any statutory negotiations obligation. We further agree with the Hearing Examiner that while working hours are mandatorily negotiable, the Town proved its contract defense and thereby established that it had discharged its negotiations obligation on this issue during the term of the instant agreement. In particular, we agree with the Hearing Examiner that the plain meaning of the clauses in question gave the Town the right to establish and change work schedules without negotiations so long as the number of working hours did not exceed the contractual limitations set forth in Article XVIII, sec. 2(a).

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the Complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Hipp, Newbaker and Suskin voted in favor of this decision. Commissioner Graves voted against the decision.

DATED: Trenton, New Jersey
January 12, 1982
ISSUED: January 13, 1982

82-63

H. E. No. 82-11

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

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Respondent,

-and-

Docket No. CO-81-385-6

IRVINGTON MUNICIPAL EMPLOYEES ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a complaint in an unfair practice charge filed by the Irvington Municipal Employees Association. The Association alleged that a change in scheduled working hours was an (a)(5) violation. The Hearing Examiner however found that the contract gave the Town the right to change said working hours; hence, there was no violation of the Act.

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. 82-11

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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In the Matter of

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Appearances:

For the Respondent, Henry E. Rzemieniewski, Esq.

For the Charging Party, Cifelli & Davie, Esqs.
(Kenneth P. Davie, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On June 24, 1981, the Irvington Municipal Employees Association (Association) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Town of Irvington (Town) committed an unfair practice when on June 11, 1981, it unilaterally and without negotiations issued a directive which would change the hours of the Parks and Recreation Department employees from 7:30 a.m. til 4:00 p.m. to 1:00 p.m. til 9:00 p.m. effective June 26, 1981, in violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (5) and (7) of the Act. [1/] This directive was

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; (2) dominating or interfering with the formation, existence or administration of any employee organization; (5) refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and condi-

(continued)

scheduled to take effect within five days. The Association also made an emergent application to restrain the Town from implementing this directive. An Order to Show Cause was issued by Commission Hearing Examiner Alan Howe. The Hearing Examiner restrained the Town from implementing their directive "pending the disposition of the instant unfair practice." In re Town of Irvington, I.R. No. 82-1, 7 NJPER ___ (1981).

On July 10, 1981, the Director of Unfair Practices issued a Complaint in this matter and on September 3, 1981, a hearing was held before the undersigned wherein both parties were given an opportunity to introduce evidence, examine and cross-examine witnesses and argue orally. Both sides waived their respective rights to file briefs.

The Irvington Municipal Employees Association represents the employees of the Parks and Recreation Department of the Town. A current collective negotiations agreement was in effect at the time of the filing of the instant charge and will remain in effect until June 30, 1982. For no less than seven years these employees have always worked from 7:30 a.m. to 4:00 p.m. 2/ Since the summer of 1975 or 1976 the Town also had CETA employees and part-time employees working in the parks. These employees worked shifts from 4:00 p.m. to 12 midnight and 12 midnight to 8:00 a.m. The job title of these employees was "security guard" although they performed

1/ (continued...tions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (7) violating any of the rules and regulations established by the commission."

2/ There was one exception to this which will be discussed below.

maintenance work in the parks. The number of CETA employees dropped significantly through 1980 and 1981 so that in the spring of 1981 there was only one CETA employee left with the Parks and Recreation Department. One employee Hofter, a former CETA worker, was hired to work from 1:00 p.m. to 9:00 p.m. and still does.

On June 11, 1981, the Town promulgated the following directive:

> "Due to the constant vandalism problem that has been costing thousands of dollars in repair and additional work for the maintenance personnel, the schedule (sic) working hours starting June 29th will be changed.
>
> "This change in working hours will enable us to better cover our parks and playgrounds and will be of benefit to the overall operation of the parks and recreation programs.
>
> "The new working schedule for all park employees will be from the hours of 1:00 p.m. until 9:00 p.m. This change in working hours will be until further notice."

The parties stipulated that this revised work schedule was to be in effect for the summer months only and by mid-September the parties would return to their old schedule.

Several employees testified that if this schedule revision would go into effect they would be exposed to increased physical danger, for some of the parks are in bad neighborhoods; their family lives would be disrupted, one employee would be forced to give up a part-time position and in general they would be subject to increased inconvenience.

The Town argued at the hearing that they had a right to

impose the new work schedule under the contract. [3/] The Association argues that the contract language prohibits the Town from revising the scheduled hours of work. In the negotiations leading to the current agreement, there was no discussion as to a change in the scheduled hours of work of the Parks and Recreation employees.

The pertinent contract language is as follows:

Article VI, Section 1

> ...[T]he Town possesses the sole right and responsibility to operate the...department covered by this agreement...except as may be expressly qualified by the specific provisions of this Agreement. These rights include... establish and change work schedules and assignments.

Article XVIII, Section 2(a)
Hours of Employment

> All blue-collar employees...shall be required to work not more than eight hours, exclusive of a meal period of not less than one-half hour nor more than one hour, as per present departmental practice.

Article XV, Section 1
Overtime

> [Overtime] shall be paid at the rate of one and one-half (1-1/2) times an employee's straight time rate of pay for all work performed in excess of the employee's regularly scheduled quitting time, or performed prior to the employee's regularly scheduled starting time, or performed on an employee's scheduled day off.

In the Interlocutory decision, it was held that when the above contract provisions are read together, "there are 'specific

3/ At the interim relief hearing the Town argued that they had a managerial right to change the shift hours pursuant to Irvington PBA v. Town of Irvington, 170 N.J. Super. 539 (1979). This argument was effectively considered and rejected in Howe's Interlocutory Decision and Order and the undersigned will rely on Howe's analysis therein.

provisions' of the agreement which contravene the right of management to establish and change work schedules and assignments." I respectfully cannot reach this same conclusion. Neither the recognition of a regularly scheduled quitting and starting time in the overtime provision nor an acknowledgment of department practices in the hours of work provision are clear enough to satisfy the Association's burden here.

Although it is well settled and undisputed here that a Hearing Examiner has the ability to interpret agreements of contracting parties to the extent necessary to resolve unfair practices, [4/] the Charging Party must prove its case by a preponderance of the evidence [5/] and its entire case rests on contract interpretation coupled with past practice.

I find the Town's analysis of the contract, that Article VI gives to it "the right to establish and change work schedules," is equally compelling. The plain meaning of a work schedule is the regular recurring hours which an employee works. The overtime provision in XV refers to "regularly scheduled quitting or starting time." Article VI gives the town the right to change that regularly scheduled time. The reference to present departmental practice in

4/ NLRB v. C&C Plywood, Corp., 385 U.S. 421, 87 S. Ct. 559, 17 L. Ed. 2d 136 (1967) and NLRB v. Hutting Sash and Door, 377 F. 2d. 964 8th Cir. (1967). These cases decided under the National Labor Relations Act, are appropriate for use as precedents for cases arising under our Act. Galloway Twp. Bd/Ed v. Galloway Twp. Ed/Assn, 78 N.J. 25 (1978).

5/ The requirements of proof in an unfair practice hearing are significantly different then those present in an arbitration proceeding. In re Twp. of Jackson, P.E.R.C. No. 81-76, 7 NJPER 30 (¶12010, 1980).

Article XVIII does not refer to scheduling but to number of hours worked and the length of meal period. The other provisions of Article XVIII refer to a 7-1/2 hour day for white collar employees, a 7-hour day for municipal court employees and sanitation employees and not to specific starting and/or quitting time.

As stated in New Brunswick Bd/Ed v. New Brunswick Ed/Assn, P.E.R.C. No. 78-47, 4 NJPER 84 (1978), aff'd Docket No. A-2450-77 (1979), "where there is clear and unambiguous contract language granting a benefit to employees, but through past practice the employer has granted a more generous benefit, the contract provision takes precedence over the past practice."

I do not believe the provisions of the contract discussed above create ambiguities here. Accordingly I recommend that the Complaint in this matter be dismissed in its entirety.

Edmund G. Gerber
Hearing Examiner

DATED: September 25, 1981
Trenton, New Jersey