

P.E.R.C. NO. 85-122

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MIDDLETOWN,

Respondent,

-and-

Docket No. CO-85-94-85

MIDDLETOWN TOWNSHIP PBA LOCAL
NO. 124,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Township of Middletown violated the New Jersey Employer-Employee Relations Act when it, without negotiations with the PBA, unilaterally instituted an awards program which grants economic benefits, including compensatory time off and the use of police vehicles, to employees represented by the PBA.

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MIDDLETOWN TOWNSHIP PBA LOCAL
NO. 124,

Charging Party.

Appearances:

For the Respondent, Crummy, Del Deo, Dolan,
Griffinger & Vecchione, Esqs. (Frederick C. Kentz,
III, Esq. & Michael J. Lerner, Of Counsel)

For the Charging Party, Schneider, Cohen & Solomon,
Esqs. (David Solomon, Of Counsel)

DECISION AND ORDER

On October 12, 1984, the Middletown Township PBA, Local 124 ("PBA") filed an unfair practice charge against the Township of Middletown ("Township") with the Public Employment Relations Commission. The charge alleges that the Township violated subsection 5.4(a)(5) when it unilaterally instituted an awards program which grants economic benefits, including compensatory time off and the use of police vehicles, to employees represented by the PBA.

1/ This subsection prohibits public employers, their representatives or agents from: "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

On January 24, 1985, the Commission Designee issued a Complaint and Notice of Hearing. On February 20, 1985, the Township filed its Answer. It admitted granting compensatory time off and the use of a police vehicle to unit employees, but denied that these actions violated the Act. As separate defenses, it asserted, inter alia, that the grant of benefits was a managerial prerogative since it was based on employee evaluations and that, in any event, the case is moot since the awards program has been discontinued.

On February 27, 1985, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses, presented exhibits and argued orally. The parties filed post-hearing briefs.

On April 19, 1985, the Hearing Examiner issued his report and recommended decision. H.E. No. 85-39, 11 NJPER ____ (Para ____ 1985). He found that the unilateral grant of benefits to employees violated subsection 5.4(a)(5) of the Act. He rejected, however, the charging party's proposed remedy that all members of the negotiations unit receive compensatory time off.

The Hearing Examiner advised the parties that exceptions, if any, to his decision were to be filed by May 3, 1985. Neither party filed exceptions or requested an extension of time to do so.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-7) are accurate. We adopt and incorporate them here.

We agree with the Hearing Examiner that the Township violated subsection 5.4(a)(5) when it unilaterally granted certain

employees' economic benefits. We also hold that the subsequent rescission of the awards program did not render this dispute moot. See Galloway Twp. Bd. of Ed. v. Galloway Twp. Assoc. of Ed. Secs., 78 N.J. 1 (1978). We further hold that the Association's claim for additional compensatory time off for other members of the unit is without merit.

ORDER

The Respondent Township of Middletown is ordered to:

A. Cease and desist from:

1. Refusing to negotiate in good faith with the Middletown Township PBA Local No. 124 regarding the granting of compensatory time off and the use of a Township police vehicle as part of an awards program.

2. Resuming the compensatory time and use of police vehicle components of the awards program until such time as the Township negotiates the compensatory aspects of the plan in good faith with the PBA.

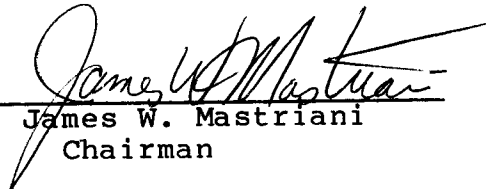
B. That the Respondent Township take the following affirmative action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and,

after being signed by the Township's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent Township has taken to comply herewith.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hipp, Suskin and Wenzler voted in favor of this decision. None opposed. However, Commissioner Graves would have ordered the remedy sought by the charging party.

DATED: Trenton, New Jersey
May 15, 1985
ISSUED: May 16, 1985

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from refusing to negotiate in good faith with the Middletown Township PBA Local No. 124 regarding the granting of compensatory time off and the use of a Township police vehicle as part of an awards program.

WE WILL cease and desist from resuming the compensatory time and use of police vehicle components of the awards program until such time as the Township negotiates the compensatory aspects of the plan in good faith with the PBA.

TOWNSHIP OF MIDDLETOWN

(Public Employer)

Dated _____

By _____ (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

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

In the Matter of

TOWNSHIP OF MIDDLETOWN,

Respondent,

-and-

Docket No. CO-85-94-85

MIDDLETOWN TOWNSHIP PBA LOCAL
NO. 124,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Township violated Subsection 5.4(a)(5) of the New Jersey Employer-Employee Relations Act when, after legally establishing an evaluation system for the personnel of its Police Department as the exercise of a managerial prerogative, it unilaterally created an economic component wherein monthly awards were given to top ranking personnel in the form of compensatory time off and/or the personal use of a Township police vehicle for 30 days. A violation was found even though the Respondent had voluntarily discontinued the compensatory time off and use of a police vehicle upon filing of the instant Unfair Practice Charge by the PBA.

However, the Hearing Examiner did not provide an economic remedy as requested by the PBA since it could not prove actual monetary losses to specific individuals as required by the decision of the Supreme Court in Galloway Twp. Bd. of Ed. v. Galloway Twp. Assn. of Educ'l Secys, 78 N.J. 1 (1978).

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.

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

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Docket No. CO-85-94-85

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NO. 124,

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Appearances:

For the Respondent

Crummy, Del Deo, Dolan, Griffinger & Vecchione, Esqs.
(Frederick C. Kentz, III, Esq. & Michael J. Lerner, Esqs.)

For the Charging Party

Schneider, Cohen & Solomon, Esqs.
(David Solomon, Esq.)

HEARING EXAMINER'
RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on October 12, 1984 by the Middletown Township PBA Local No. 124 (hereinafter the "Charging Party" or the "PBA") alleging that the Township of Middletown (hereinafter the "Respondent" or the "Township") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that in June 1984, the Township unilaterally and without negotiations with the PBA instituted an Employee Performance Evaluation System under which an awards program compensated police officers who qualified by cash awards, compensatory time off and the personal use of police

vehicles; to qualify for awards the police officers were given points for taking various police actions such as drug or drunk driving arrests, the issuance of motor vehicles summons, etc.; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(5) of the Act.^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 24, 1985. Pursuant to the Complaint and Notice of Hearing, a hearing was held on February 27, 1985 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant and argue orally. Both parties argued orally and filed post-hearing briefs by March 26, 1985.

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

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

^{1/} This Subsection prohibits public employers, their representatives or agents from:

"(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."

FINDINGS OF FACT

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

2. The Middletown Township PBA Local No. 124 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The collective negotiations unit consists of all superior officers and patrolmen, excluding only the Chief and Deputy Chief of Police. There are currently 92 employees in the unit. The PBA obtained its first written collective negotiations agreement in 1969.

4. The 1980-81 collective negotiations agreement between the parties, the most recent agreement in writing, was received in evidence as Exhibit J-1. Article X, Hours, provides in paragraph E that: "Management has the right to change shifts or the hours worked but must negotiate any impact of its changes, wages, overtime or other compensation with the Association." (J-1, p. 15)(emphasis supplied). Article XI, Overtime, provides in paragraph H "Compensatory time," in part, that an employee, in lieu of overtime, may opt to take compensatory time off at the rate of time and one-half but it may only be taken as such times as the Chief of Police in his discretion determines will not impair the good and order of the Department (J-1, pp. 17, 18).

5. Patrolman Robert Murphy, the President of the PBA since 1984, learned of the existence of the Employee Performance Evaluation System on June 4, 1984 when he received a communication

from Captain Daniel S. Murdoch, Jr., which informed Murphy that for the month of January he was being awarded four hours of compensatory time because he ranked number ten of the 41 employees in the "system" (CP-1).

6. Murphy's reaction as PBA President was to file a grievance on June 10, 1984, complaining that time off was negotiable and that all time off awarded should be on a fair and impartial basis (CP-2). On June 19, 1984 Murdoch answered the grievance, stating that he agreed with the grievance and that the practice would be rescinded (CP-2).

7. Between June 10 and June 19, 1984, Murphy met with Deputy Chief Robert Letts in an attempt to settle the matter. Letts indicated that the administration of the Police Department wanted to evaluate its employees in some manner, to which Murphy indicated his agreement but stated that this should not be a basis for "awards."

8. On June 20, 1984 Murdoch, in a daily bulletin, notified all members of the Department that the PBA had filed a grievance and that he had been forced to rescind the compensatory time for employees in the top ten of the division (CP-3).

9. On September 6, 1984, in another daily bulletin, Murdoch stated that the Township Committee had passed a resolution authorizing the Chief to award "comp time" to officers who aggressively handled their patrol work, adding that letters were out to those men who so achieved during June, July, August and September (CP-4).

10. Notwithstanding Murdoch's announcement of Township action, there was no action of the Township committee until it

adopted a resolution on September 11, 1984 establishing an awards program and creating a Public Employees Awards Committee (CP-5). This resolution, in creating an awards program and committee, did so for all employees of the Township and not just for employees of the Police Department. The resolution established criteria for the granting of awards and also provided for monetary payments between \$20 and \$1000.

11. In another daily bulletin dated September 10 and September 11, 1984, Murdoch announced that as soon as a brand new patrol car was ready the top man on the "report card system" will have use of the vehicle for 30 days on or off duty (CP-6). Murdoch added that the same procedure would be followed each month. Finally, Murdoch stated that this award issued per Chief Joseph M. McCarthy.

12. On October 13, 1984 Murphy filed a Step 1 grievance with Murdoch, reciting the history of the initial grievance and Murphy's understanding that the "rating system...would cease" (CP-7). Murphy claimed a violation of the agreement without specifying any article thereof.

13. On October 16, 1984 Murdoch denied the grievance but offered to sit down with the PBA regarding the matter (CP-8).

14. On October 20, 1984 Murphy moved the grievance to Step 2 in a letter addressed to Chief McCarthy and Herbert E. Bradshaw, the Township Business Administrator (CP-9).

15. On October 26, 1984 Bradshaw responded to Murphy, in which he took the position that since the PBA had filed the instant

Unfair Practice Charge on October 12, 1984, he saw no reason to discuss the matter unless Murphy felt it could be resolved (CP-10).

16. It was stipulated that on December 12, 1984 the Township notified all employees of the Police Department of the discontinuance of the evaluation system under which awards had been made of compensatory time off and the personal use of a police vehicle to the highest scoring police officers. This was confirmed in a letter by Chief McCarthy to all employees of the Police Department on that date, in which he recited that the PBA had filed an Unfair Practice Charge and that during a conference at PERC the possibility of taking back the compensatory time was discussed (although not resolved)(CP-11). Chief McCarthy concluded by stating that the evaluation system would remain in effect.

17. Although there is no dispute between the parties that the Township has the managerial prerogative to establish an evaluation system, Lt. William Thorne testified that the current evaluation system was based upon the fact that there are certain individuals who excel and that "...management felt that it would be to their best interests to give the overachievers something over and above..." (Tr. 45). Prior to the establishment of the current evaluation system in 1984 there had been an evaluation system in 1980-81 where points were assigned for police actions but there was no economic benefit involved.

18. It was stipulated that the awards of compensatory time off and the use of a police vehicle existed between June and November 1984 with the compensatory time component having been

retroactive to January 1984. The limit on compensatory time was four hours per month and was awarded to the top ten ranking employees in the Police Department. Between September and November 1984, a period of three months, the top ranking employee in the department was awarded the private use of a Township police vehicle for 30 days and 24 hours in each of those days. Two employees were awarded the use of the police vehicle, one employee having it for one month and the other employee having it for two months during this period. (Tr. 32-34).

DISCUSSION AND ANALYSIS

The Respondent Township Violated
Subsection (a)(5) Of the Act
When It Unilaterally Created
An Economic Component To The
Awards Provided In A Lawfully
Established Evaluation System.

The PBA concedes that the Township lawfully exercised a managerial prerogative in establishing an evaluation system in 1984. No discussion need be had regarding the Township's action in this regard. However, the Hearing Examiner does note that although the focus of the instant Unfair Practice Charge is upon employees in the Police Department, the Township resolution of September 11, 1984 provides for an awards program for all Township employees (CP-5, p. 1). It appears, however, that on December 12, 1984 only the economic component of the awards program for employees of the Police Department was discontinued.

It is clear to the Hearing Examiner that the award of compensatory time off whether it be four hours per month or some other figure has economic value to an employee even though his or

her wage per hour is not increased. The parties have clearly recognized this in Article XI of J-1 where overtime due an employee may be received in the form of compensatory time at the rate of time and one half (J-1, pp. 17-18, supra). Additionally, the parties have incorporated into their agreement in Article X, paragraph E, the provision that while the Township has the right to change shifts or hours worked it "...must negotiate any impact of its changes, wages, overtime or other compensation..." (J-1, p. 15, supra). When one considers these two articles of J-1 together it seems clear to the Hearing Examiner that there is some basis in the collective negotiations history of the parties to find herein an obligation to negotiate the compensatory time off component of the awards program established in the evaluation system.

It also seems clear to the Hearing Examiner that the use of an automobile for 30 days on a 24-hour basis is an economic benefit. Thus, for example, did the Commission hold in Morris County Park Commission, P.E.R.C. No. 83-21, 8 NJPER 561 (1982), aff'd App. Div. Docket No. A-795-82T2 (1984) that while the employer in that case had the managerial right to issue a directive limiting the use of its vehicles by department foremen for commuting to and from work the directive modified an existing rule governing a working condition because it reduced a form of compensation which, through an established past practice, had risen to the level of a negotiated benefit. Thus, the employer was permitted to implement its directive reducing the use of its vehicles but was obligated to negotiate over offsetting compensation for the employees who lost

the economic benefit of using an employer vehicle to commute to work. In so concluding, the Commission, by way of remedy, ordered only that the employer cease and desist and negotiate. There was no monetary remedy ordered.

The Hearing Examiner notes his agreement with the citation by the PBA of County of Sussex, P.E.R.C. No. 83-4, 8 NJPER 431 (1982) to the extent that a merit wage increase was recognized by implication as a term and condition of employment. However, the complaint in that case was dismissed because of a 9-year practice of unilateral grant of merit increases without protest by the charging party in that case.

The several cases cited by the Township, urging that no violation of Subsection (a)(5) of the Act has been committed are not apposite. For example, the Commission decision in Twp. of West Windsor, P.E.R.C. 79-79, 5 NJPER 193 (1979) ordered the dismissal of an unfair practice charge where the township had refused to negotiate with the PBA over the subject of additional compensation for police officers who worked during three snow emergency days while other township employees who did not work were compensated at their regular pay rate. There the essential basis for the decision was that there was no past practice or contractual provision providing for any other days off to PBA members than those enumerated in their contract. Note that in West Windsor the PBA was seeking additional compensatory days off for a snow emergency while in this case the PBA is seeking the cessation of compensatory time off under the evaluation system until such time as it is negotiated with the Township.

Also, Twp. of Bridgewater, P.E.R.C. No. 82-3, 7 NJPER 434 (1981)(appellate history omitted) does not advance the Township's position that the economic components of the awards system are not negotiable. In Bridgewater the Commission found that the employer's practice of permitting its employees to maintain and repair their personal vehicles in the township garage was a term and condition of employment; however, the Commission found no violation of the Act when the employer discontinued the practice since there was always the requirement of first gaining permission from the township to use its garage facility. Thus, the Commission held that the township had not committed an unfair practice in unilaterally withdrawing its permission for employees of its garage and equipment.

Finally, in concluding that the Township violated the Act by having unilaterally provided for the economic component to the awards given employees in the Police Department under the evaluation system, the Hearing Examiner has fully considered the applicability of the cases cited at pages 5-8 of its brief, in particular Paterson PBA v. City of Paterson, 87 N.J. 78 (1981) and IFPTE Local 195 v. State of New Jersey, 88 N.J. 393, 404-405 (1982). In particular, the Hearing Examiner is not of the view that negotiation with the PBA regarding the economics of the awards program would significantly interfere with the determination of governmental policy.

Accordingly, the Hearing Examiner finds and concludes that the Township violated Subsection (a)(5) of the Act when it unilaterally created the economic component of compensatory time off

and the use of a Township police vehicle to employees who were top-ranked under the evaluation system.

The Appropriate Remedy

As to this phase of the case the Hearing Examiner is in total agreement with the argument of the Township as set forth at pages 20-26 of its brief. There is no way that the Hearing Examiner can legally or rationally abide the request of the PBA that the Township be required to compensate all members of the unit by granting additional compensatory days off. It must be remembered that the economic component of the awards program originates with an evaluation system whereby officers are ranked for performance and then granted the benefit. It would be an intrusion on the Township's prerogative of determining which employees are to receive the awards if the Hearing Examiner were to willy-nilly order compensatory time off for everyone.

The Hearing Examiner is mindful of Galloway Twp. Bd. of Ed. v. Galloway Twp. Assn. of Educ'l Secys, 78 N.J. 1 (1978) where the Supreme Court said that the Commission had authority to "...make the affected employees whole for their actual losses sustained..." (78 N.J. at 16). It is the opinion of the Hearing Examiner that he is barred from awarding compensatory time off to all employees in the Township's Police Department under the foregoing stricture in Galloway.

Also, the Hearing Examiner notes that the Appellate Division in Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979) rejected an appeal from that portion of the Commission decision

which provided only for a restoration of the status quo ante and an order to negotiate without the provision for a monetary remedy (168 N.J Super. at 64). See also, Galloway Twp. Bd. of Ed, 157 N.J. Super. 74 (App. Div. 1978).

For all of the foregoing reasons the Hearing Examiner will recommend only a "cease and desist" order with no economic component.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent Township violated N.J.S.A. 34:13A-5.4(a)(5) when it created an economic component of compensatory time off and the use of a Township police vehicle as part of an awards program provided for in an evaluation system without having first negotiated the economic component with the Charging Party prior to implementation.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Township cease and desist from:

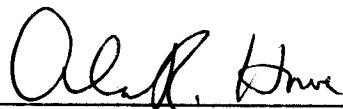
1. Refusing to negotiate in good faith with the Middletown Township PBA Local No. 124 regarding the implementation of a provision for compensatory time off and the use of a Township police vehicle as part of an awards program provided for in an evaluation system in effect in the Township's Police Department.
2. Resuming the compensatory time and use of police vehicle component of the awards program in the evaluation system in

effect in the Police Department until such time as the Township has negotiated the issue in good faith with the PBA.

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

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Township's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent Township has taken to comply herewith.



Alan R. Howe
Hearing Examiner

Dated: April 19, 1985
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT refuse to negotiate in good faith with the Middletown PBA Local No. 124 regarding the implementation of a provision for compensatory time off and the use of a Township police vehicle as part of an awards program provided for in an evaluation system in effect in the Township's Police Department.

WE WILL NOT resume the compensatory time and use of police vehicle component of the awards program in the evaluation system in effect in the Police Department until such time as the Township has negotiated the issue in good faith with the PBA.

TOWNSHIP OF MIDDLETOWN

(Public Employer)

Dated _____

By _____ (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James Mastriani, Chairman, Public Employment Relations Commission, 495 W. State Street, Trenton, N.J. 08618.