P.E.R.C. NO. 85-61

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEW BRUNSWICK,

Respondent,

-and- Docket No. CO-83-315-39

NEW BRUNSWICK PBA LOCAL 23,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the City of New Brunswick did not violate the New Jersey Employer-Employee Relations Act when it did not implement a particular seniority proposal, but that it did violate the Act when it unilaterally decreased health insurance benefits. A Hearing Examiner recommended these conclusions and, in the absence of exceptions, the Commission adopts them.

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NEW BRUNSWICK PBA LOCAL 23,

Charging Party.

CITY OF NEW BRUNSWICK,

Respondent,

-and- Docket No. CO-84-91-52

NEW BRUNSWICK PBA LOCAL NO. 23,

Charging Party.

Appearances:
For the Respondent, Ralph F. Stanzione, Assistant City Attorney

For the Charging Party, Abramson & Liebeskind, Consultants (Marc D. Abramson, Consultant)

DECISION AND ORDER

On May 23, 1983, New Brunswick PBA Local No. 23 ("PBA") filed an unfair practice charge (CO-83-315-39) against the City of New Brunswick ("City") with the Public Employment Relations Commission. The PBA alleged that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (5) and (6),[1/] when it failed to reduce to writing and implement a seniority provision

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 (continued)

it had allegedly ratified.

On October 3, 1983, the PBA filed a second unfair practice charge (CO-84-91-52) against the City. This charge alleged that the City violated subsections 5.4(a)(1) and (5), when it allegedly decreased employee health insurance benefits.

On October 28, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing in CO-83-315-39.

On December 6, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing in CO-84-91-52 and an order consolidating the Complaints for hearing.

The City's Answer to the first charge denies that the parties reached agreement and asserts that, in any event, the PBA's proposal was partially non-negotiable. The City's Answer to the second charge denies that it unilaterally decreased health insurance benefits.

On January 17 and March 8, 1984, Commission Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses, introduced exhibits and waived oral argument. Both parties submitted post-hearing briefs by July 6, 1984.

On August 15, 1984, the Hearing Examiner issued his report and recommended decision, H.E. No. 85-8, 10 NJPER ___ (¶_____ 1984). With respect to CO-83-315-39, he recommended that

1/ (continued)
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; and (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

the Complaint be dismissed since the parties never reached agreement on a seniority clause. With respect to CO-84-91-52, he found that the City violated subsections 5.4(a)(5) and, derivatively, (a)(1) because it did in fact unilaterally reduce certain health insurance benefits. He recommended that the Commission order the City to negotiate with the PBA over the benefit levels of a new health insurance plan and to reimburse employees for any losses incurred due to the decrease in the level of benefits.

On August 15, 1984, the Hearing Examiner served the parties with a copy of his report and advised them that exceptions, if any, were due on or before August 28, 1984. Neither party filed exceptions or requested an extension of time.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-12) are accurate. We adopt and incorporate them here. Based on our review of the record, and in the absence of exceptions, we agree with the Hearing Examiner that the parties never reached agreement on seniority provisions and the City violated subsections 5.4(a)(1) and (5) when it unilaterally reduced certain health insurance benefits. Accordingly, we enter the following order.

ORDER

CO-83-315-39

The Complaint is dismissed.

CO-84-91-52

The City of New Brunswick is ordered to:

A. Cease and desist from:

Interfering with, restraining or coercing its employees

in the exercise of the rights guaranteed to them by the Act, and from failing to negotiate in good faith with the PBA before changing the health insurance level of benefits.

B. Take the following affirmative action:

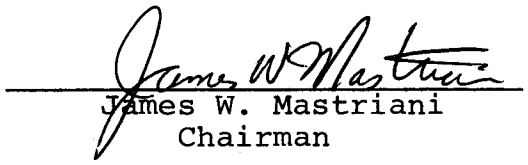
1. Immediately reimburse PBA unit members for any losses incurred from April 1, 1983 to present due to the difference in specific health insurance benefits provided under the old health insurance program with Will-Gard, Inc. and under the new health insurance program with the Rasmussen Agency.

2. Forthwith engage in good faith negotiations with the PBA over the benefit levels of a new health insurance plan.

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

4. Notify the Chairman within twenty (20) days of receipt what steps the Township has taken to comply with this order.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hipp, Newbaker and Suskin voted in favor of this decision. However, Commissioner Hipp dissented from that portion of the decision which dismissed the Complaint in Docket No. CO-83-315-39. Commissioners Graves and Wenzler were not in attendance.

DATED: Trenton, New Jersey
November 29, 1984
ISSUED: November 30, 1984

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act, and specifically will not fail to negotiate in good faith with the PBA before changing the health insurance level of benefits.

WE WILL immediately reimburse PBA unit members for any losses incurred due to the decrease in the specific level of health insurance benefits provided under the old health insurance program with Will-Gard, Inc. and under the new health insurance program with the Rasmussen Agency retroactive to April 1, 1983.

WE WILL forthwith engage in good faith negotiations with the PBA over the benefit levels of a new health insurance plan.

CITY OF NEW BRUNSWICK
(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.

H. E. No. 85-8

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

In the Matter of

CITY OF NEW BRUNSWICK,

Respondent,

-and-

Docket No. CO-83-315-39

NEW BRUNSWICK PBA LOCAL 23,

Charging Party.

CITY OF NEW BRUNSWICK,

Respondent,

-and-

Docket No. CO-84-91-52

NEW BRUNSWICK PBA LOCAL NO. 23,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the City of New Brunswick violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it unilaterally changed certain benefit levels of the employees health insurance plan. The Hearing Examiner recommended that the employees be reimbursed for any losses incurred as a result of the change and that the City negotiate in good faith with the PBA for a new health insurance plan.

The Hearing Examiner further recommended that the subsections 5.4(a)(1), (5) and (6) allegation in a companion case be dismissed. The City did not violate the Act by refusing to sign an agreement which included a seniority clause since no final agreement was reached regarding such a clause.

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. 85-8

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

In the Matter of

CITY OF NEW BRUNSWICK,

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NEW BRUNSWICK PBA LOCAL 23,

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CITY OF NEW BRUNSWICK,

Respondent,

-and- Docket No. CO-84-91-52

NEW BRUNSWICK PBA LOCAL NO. 23,

Charging Party.

Appearances:

For the Respondent
Ralph F. Stanzione, Esq., Assistant City Attorney

For the Charging Party
Abramson & Liebeskind, Consultants
(Marc D. Abramson, Consultant)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

Unfair Practice Charges were filed with the Public Employment Relations Commission ("Commission") on May 23, 1983 (CO-83-315-39), and October 3, 1983 (CO-84-91-52), by New Brunswick PBA Local No. 23 ("PBA") alleging that the City of New Brunswick ("City") had 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 PBA alleged in CO-83-315-39 that the City failed to negotiate in good faith by failing to implement a seniority provision it had allegedly previously ratified, and by failing to sign an agreement

which included that provision, all of which was alleged to be in violation of subsections 34:13A-5.4(a)(1), (5) and (6) of the Act. 1/ In CO-84-91-52 the PBA alleged that the City unilaterally changed and decreased health insurance benefits previously provided to unit members all of which was alleged to be in violation of subsections 34:13A-5.4(a)(1) and (5) of the Act.

The PBA alleged in particular in CO-83-315-39 that both parties ratified an agreement which included a seniority provision, but that the PBA then acceded to the City's request to renegotiate that provision and that they negotiated a new provision which was also allegedly ratified, and further alleged that the City subsequently refused to place that newly ratified provision in the agreement, but offered, instead, to implement that new provision as departmental policy. The PBA seeks to require the City to sign an agreement which includes that provision. The City denied committing any violation and also argued that the provision in question interfered with the assignment of personnel and was non-negotiable.

In CO-84-91-52 the PBA alleged that the City changed health insurance plans and policy administrators on or about April 1, 1983, and that the new plan represented a decrease in several benefit levels compared to the previous plan. The PBA seeks to restore the decreased levels to the pre-April 1, 1983 levels. The City denied violating the Act and asserted that an agreement had been reached.

It appearing that the allegations of the Unfair Practice Charges may constitute unfair practices within the meaning of the Act,

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; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

a Complaint and Notice of Hearing was issued on October 28, 1983 for CO-83-315-39, and on December 6, 1983 for CO-84-91-52. An Order Consolidating the Charges for hearing also issued on December 6, 1983. The Answers denying any violations were received on November 10 and December 14, 1983 respectively. Hearings were held in these matters on January 17 and March 8, 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. Both parties submitted post-hearing briefs by June 12, 1984, and the PBA submitted a reply brief by July 6, 1984.

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, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record the Hearing Examiner makes the following:

Findings of Fact

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

2. New Brunswick PBA Local 23 is an employee representative within the meaning of the Act and is subject to its provisions.

3. In CO-83-315-39 the facts show that the parties had reached a tentative agreement for a new collective agreement on or about January 26, 1983. The previous agreement, Exhibit J-1A, did not contain a seniority clause, and although the parties had agreed to a seniority clause for the new contract, no such clause was ever

actually put in writing during negotiations. (Transcript "T" 1 pp. 53-54, 126).

Thereafter by February 1, 1983 the PBA ratified the tentative agreement (Exhibit C-1C) from which it prepared the written agreement (Exhibit C-1D) which was sent to the City on February 5, 1983. The written agreement contained the following seniority clause which was drafted by the PBA.

ARTICLE XXIX

Seniority

Senior men will have the right to choose vacation and meal times first as they have in the past. In addition to the senior men working patrol type status will have the right to pick sections or posts that the City wants patrolled. This article is not to be construed as meaning to circumvent management right.

(1) Senior men will not have the choice of working together, if a dispute arises the lesser of seniority will have to pick another district or post.

(2) When details arise during patrol duty such as walking posts, school traffic, and other special tasks, will be assigned on a seniority basis. Senior men will have the option to refuse such details.

Exceptions

(1) Exceptions, will be made by the Director of Police, if and when an officer has a special or trained skill which would enable him to execute such task for the benefit of the department, safety of the mean and public.

(2) In no way will this article effect the assignment of field training officers and officers under the training program, while such program is in effect.

Definition: Senior man as pertaining to this Article. Senior men are defined as persons of the same rank with earlier employment on this department.

Having received no response from the City regarding the agreement, the PBA by letter of March 2, 1983 (Exhibit C-1E) asked the City's Business Administrator and chief negotiator, Stanley Marcinczyk, whether there was a problem with the wording of the agreement. A meeting between the parties was then held on March 8, 1983 and the City's attorney indicated that there might be a problem with the seniority clause. (T 1 p. 39). A second meeting was then held between the parties on March 15, 1983 at which time Police Director James Gassaro informed PBA President Kenneth Yanish that he did not like the wording of the seniority clause in C-1D. Gassaro testified that he thought that clause undermined his managerial rights and impeded the efficiency of the police department. (T 1 p. 161). Gassaro first expressed that view to Marcinczyk in a memorandum dated February 9, 1983 (Exhibit C-1F). In that memorandum Gassaro also proposed (to Marcinczyk) an alternative to the seniority clause set forth by the PBA in C-1D. After Gassaro had, on March 15, expressed his concerns to Yanish regarding the seniority clause in C-1D, Yanish was presented with the seniority clause in C-1F and advised to take it back to his membership. (T 1 pp. 41-42, 56). The seniority clause set forth in C-1F is as follows:

Article XXIX

Seniority

Department Definition

Established first by virtue of rank and secondly by the aggregate time served in rank. Where conflict occurs because of identical time of service or date of appointment, the member of the Department with the longest aggregate time served in the next lower rank is deemed to hold seniority.

In situations requiring decision making or the exercise of control among members of equal rank, it shall be incumbent upon the member holding seniority to take charge, unless directed otherwise by a member of higher rank.

Seniority Procedures:

1. Senior members holding the rank of police officer shall have the right to choose vacation and meal times first over junior members based on date of appointment.

2. In situations requiring decision and control where members are of equal rank, the senior officer will make the decision and exercise control, except when otherwise directed by a higher ranking command or supervisory officer.

3. Pertaining to non-routine patrol assignments, senior members shall be given preference as to being assigned to these details, however, final determination and decision will remain with the members supervisor and/or commanding officer.

   a. If grievance situations present themselves to the Police Director, the superior officer who has made the assignment decision shall be able to justify his decision to the Director of Police based on the tactical situation at the time.

4. Definition: Routine Patrol Assignments
   For the purpose of this Article, Routine Patrol Assignments shall be construed as:

   a. The basic assignments to day to day motorized patrol car plan, (i.e., North Side, South Side, etc.).

   b. Basic assignments to foot patrol districts and posts.

   c. Non-Routine Assignments shall be construed to represent police related details arising out of unusual occurrences, special events and other contingencies which are not addressed on a routine daily basis.

5. Emergency Situations:

   Due to the tactical requirements of emergency situations, seniority preference shall not apply to the deployment and/or assignments of police personnel.

On March 16, 1983 the PBA ratified the seniority clause in C-1F (T 1 p. 42), and the City Council on that same day passed a resolution, Exhibit C-1G, ratifying C-1D (T 1 p. 74), and authorizing the Mayor to sign that agreement. Councilman Rocco Catanese admitted that C-1D was approved on March 16, but he indicated that it was approved only to allow police employees to receive their raises, and he knew there were problems with the seniority clause. (T 1 pp. 74-86). In fact, he testified that he knew the problem involved the legality of the seniority clause, and that Marcinczyk told Council that said language was being worked out. (T 1 pp. 75-76). Councilman Joseph Vincze also acknowledge that they were aware of the problem with seniority, but he indicated that it was normal procedure for the City Council to approve contracts even where some issues were unsettled in order to place the economic package into effect. He indicated that Council utilized that procedure in the past. (T 1 pp. 88-90). In fact, Vincze testified that Marcinczyk advised Council that the problem language could be negotiated out once Council authorized the Mayor to sign the agreement. (T 1 p. 90). 2/

Subsequently, on approximately March 18, 1983, another meeting was held between the parties concerning the seniority clause. At that meeting Director Gassaro informed Yanish that he was withdrawing his seniority proposal (presumably C-1F). (T 1 pp. 43, 164). Gassaro testified that he withdrew that proposal because upon further review of the language contained therein he believed that the clause illegally impacted on his ability to make job assignments to the senior police officers (T 1 pp. 164, 166, 188). He further testified that he thought that the seniority clause would cause the filing of

2/ The undersigned believes that the Council intended to ratify only the economic portion of the agreement, and not necessarily all language items of the agreement.

a grievance everytime a senior officer received a detail he did not want, and that it would undermine his authority and lead to inefficiency in the department. He also admitted that he told Yanish that he was willing to put the seniority language into policy on a trial basis rather than in a contract. (T 1 pp. 177-178).

The facts further show that after March 16, 1983, all other rights and benefits for employees covered by C-1D -- other than the seniority clause as a whole -- were implemented (T 1 p. 134), but that the City had no problem with that part of the seniority clause concerning vacation and meal time. (T 1 p. 158). In addition, Marcinczyk testified that he was the City's only authorized negotiator (T 1 p. 129), but he indicated that although he had the authority to reach tentative agreements on the City's behalf, he was not authorized to sign the contracts and he indicated that contracts had to be approved by City Council. (T 1 pp. 132-133). Yanish also testified that he must submit tentative agreements to his membership for ratification, and he acknowledged that Marcinczyk had to follow a similar procedure to obtain City approval. (T 1 pp. 48-49).

Yanish, as well as police officers Kevin Moran and Francis Guyette, testified about their interpretation of the seniority clause regarding assignments for senior officers. Yanish and Moran testified that the clause meant that if all positions were otherwise covered a senior officer may choose his detail, such as, whether he wanted a walking or riding post. (T 1 pp. 58-59, 106). Yanish indicated that a sergeant could still assign any officer where he wanted. (T 1 p. 61). However, Guyette, the PBA Vice President,

indicated that the clause might prevent the City from making different assignments. (T 1 pp. 118-123).

4. In Co-84-91-52 the facts show that pursuant to Article 12 of the parties' collective agreement in J-1A (effective from January 1980-December 1981), the City contracted with Will-Gard, Inc. to administer a self-insured health plan (Exhibit CP-3) for City employees including PBA unit members. That plan was improved upon by agreement of the parties in Exhibit J-1B effective January 1982 through December 1982.

Negotiations for the successor contract to J-1A and B (Exhibit C-1D) began in the Fall of 1982, and in November 1982 the PBA made the City aware that it was interested in a health plan similar to the health plan provided by the New Brunswick Board of Education ("Board") to its employees (Exhibit R-1). Consequently, Yanish at that time placed R-1 on the table and indicated that the PBA was interested in a plan similar to R-1 which included a prescription plan, eye plan, and a dental plan. (T 2 p. 7). 3/ In fact, Yanish testified that he told Marcinczyk that what he wanted was increases similar to the Board's plan, but no decreases. (T 2 p. 40). He communicated to Marcinczyk that it was not his intent to lower any benefits contained in the Will-Gard plan. (T 2 pp. 7-9). However, Yanish admitted that the PBA did not know exactly what it was looking for in a health plan, that he personally was not aware of everything that was in the Board's plan, and other than placing R-1 on the table as an example, the PBA did not submit any specific written demands for a health plan (T 2 pp. 24, 26).

3/ The City in J-1 maintained a self-insured health plan, and intended to continue a self-insured program for the successor plan. By placing R-1 on the table as an example of a plan it wanted, the PBA was not suggesting the use of a private insurance carrier.

Yanish further testified that the parties had not agreed upon a plan at that point, and that he then expected the City to obtain bids and quotes from insurance managing companies based upon a plan similar to R-1 (T 2 pp. 25, 28).

Subsequent to November 1982, the City did obtain bids for managing a self-insured health insurance plan, but it never advised the PBA of the receipt or content of those bids. (T 2 p. 29). Then on February 16, 1983 the City, without any further contact or negotiations with the PBA, passed a resolution (Exhibit R-2) accepting the health plan proposed by the Rasmussen Agency which was implemented as the new health program (Exhibit CP-2) effective April 1, 1983. 4/

The new health plan, CP-2, did include several new or increased benefits such as a prescription drug plan and an eyeglass plan, as well as an increase in certain benefit levels. (T 2 pp. 41, 91-95). However, CP-2 also included several areas where the benefit levels were decreased as compared to what they had been in CP-3. For example, the length of coverage for hospital room and board, the major medical lifetime amount, the major medical co-insurance amount, and the amount paid for psychiatric or psychological counseling were all reduced in some fashion. (T 2 pp. 105-120). 5/ The facts also show that the plan in CP-3 is based upon and virtually the same as the plan in R-1. (T 2 p. 63).

4/ The old plan, CP-3, expired effective March 31, 1983. The new plan therefore had to be effective April 1, 1983.

5/ There was considerable testimony as to whether changes that were made really represented decreases in coverage. The City maintained that the new plan, CP-2, was, overall, a better plan and the PBA did not directly dispute that contention. However, the PBA focused in on specific areas of coverage which were changed and represented decreases. The undersigned notes that the issue herein is not whether the plan in CP-2 is a better plan than CP-3, rather, it is whether there are particular benefits in CP-2 that are lower than the benefits in CP-3.

As a result of the implementation of CP-2, the PBA by letter dated April 28, 1983 (Exhibit C-2C) requested a meeting with Marcinczyk concerning changes in the health plan. Pursuant thereto a meeting was held between the parties on May 9, 1983 at which time they discussed the decreases in the new health plan. As a result of that meeting Marcinczyk, also on May 9, sent a letter to the Rasmussen Agency (Exhibit C-2D) concerning the new coverage and level of benefits and asking for an explanation of certain changes. A pertinent portion of that letter states as follows:

> It was obviously never the intent of the City to provide decreased benefits and incidentally, I don't believe that we are, nor was it ever our intent to deviate from existing contractual agreements with any of our bargaining units.

By letter dated May 11, 1983 (Exhibit C-2E), the Rasmussen Agency responded to Marcinczyk and concluded that the new plan as a whole represented an expansion of benefits. Thereafter, Marcinczyk informed the PBA that there would be no changes in CP-2.

Marcinczyk had testified that when R-1 was given to him in November 1982 as a proposal by the PBA there was no discussion of the content of the plan, yet he asserted that it was his understanding that R-1 was the plan the PBA wanted implemented. (T 2 pp. 58-59). However, Marcinczyk then admitted under cross-examination that he told the Rasmussen Agency:

> ...that under no circumstances were we to decrease the new City plan in those areas where the Board of Education plan was lower than ours. We were not to decrease it to those levels. (T 2 p. 82).

In response to another question on cross-examination as to what he told the Rasmussen Agency Marcinczyk responded that he explained to them that:

> ...where the Board of Education plan exceeded the existing City plan, that was fine, leave it alone. That would become our plan. If the Board of Education plan had a lower benefit level, you know, speaking in general terms, then the existing plan, we would maintain a level of the existing City plan and not decrease it to the Board of Education level. (T 2 p. 83).

Consequently, based on those remarks, Marcinczyk confirmed what Yanish had said, that the PBA wanted that part of R-1 which represented increased coverage as compared to CP-3, but wanted to stay with the benefit levels in CP-3 where the corresponding benefits in R-1 were lower.

Finally, there is no evidence that the PBA ever ratified CP-2, or that the City gave the PBA the opportunity to consider CP-2 for ratification prior to that plan being implemented.

Analysis

CO-83-315-39

This Charge must be dismissed. The City never ratified the seniority clause in C-1F, and its ratification of C-1D did not include a ratification of the seniority clause therein.

The PBA's contention that the City agreed to or that it ratified a seniority clause is not supported by the evidence. The PBA first argued that Marcinczyk and Gassaro were empowered to negotiate on the City's behalf, and then it apparently argued that Marcinczyk and/or Gassaro could bind the City to an agreement. Although the evidence clearly shows that Marcinczyk and perhaps Gassaro had authority to negotiate, it also clearly showed that neither man could bind the City to an agreement. Rather, the City had to ratify any agreement before it became effective. Even Yanish admitted that Marcinczyk had to obtain City approval for any negotiated

agreement. Consequently, when Marcinczyk agreed to the seniority language in C-1D it was at that point nothing more than a recommendation made to the Council. Without the City's ratification of that entire contract including the seniority clause, it would not be binding on the City.

The facts then show that the same day the City ratified C-1D, the PBA had ratified the seniority clause in C-1F as a substitute to the seniority clause in C-1D. That alone demonstrates that no agreement was reached as to the seniority clause in C-1D, and it also supports the City's contention that although it ratified C-1D, it only ratified the economic package at that time and was not ratifying the language in the seniority clause. That contention is the most plausible explanation of the events surrounding the City's approval of C-1D because the City would not on March 16 approve the very clause in C-1D which the City, through Gassaro, had already objected to on March 15 at which time Gassaro made the counterproposal in C-1F. Rather, the councilmen knew on March 16 that the seniority language, particularly in C-1D, was unresolved, but in an effort to give the employees their new economic package it agreed to C-1D fully expecting the seniority language to be subsequently resolved. In addition, once the PBA ratified the seniority clause in C-1F as a substitute to the clause in C-1D, it was accepting the City's counterproposal to the clause in C-1D and it could not then argue that the City agreed to the clause in C-1D.

Not only did the City not ratify the seniority clause in C-1D, it did not subsequently ratify the language in C-1F. The language in C-1F apparently was not even submitted for Council con-

sideration since it was withdrawn on March 18, 1983 because Gassaro, upon reflection, considered the subject matter to be non-negotiable.

Consequently, neither the seniority clause in C-1D, nor the one in C-1F was ever actually ratified by the City and therefore no agreement was reached regarding such a clause. 6/

Having found that no agreement was reached regarding the seniority clause the Charge in CO-83-315-39 could be dismissed without further discussion. However, the City has raised a question regarding the negotiability of the clause in C-1F which should not be ignored since it affects the parties' subsequent treatment of such a clause. The undersigned believes that the job assignment portion of C-1F is at least a permissive subject for negotiations pursuant to N.J.S.A. 34:13A-16(b) and 34:13A-16(f)(4) as interpreted by the New Jersey Supreme Court in Paterson Police PBA v. City of Paterson, 87 N.J. 79, 91-93 (1981), and it may even be mandatorily negotiable. The portion of C-1F and C-1D dealing with the use of seniority for the selection of meal time and vacations is mandatorily negotiable.

The Courts and the Commission have determined that the right to make job assignments and reassignments even if only on a temporary basis is a managerial prerogative and not a mandatory subject for negotiations. See, Ridgefield Park Ed. Assn. v. Ridgefield Park Bd.Ed., 78 N.J. 144, 156 (1978); In re IFPTE Local 195 v. State of New Jersey, 88 N.J. 393, 417 (1982); Ramapo-Indian Hills Ed. Assn. v. Ramapo-Indian Hills H.S. Dist. Bd.Ed., P.E.R.C. No. 80-9, 5 NJPER 302 (¶10163 1979), aff'd 176 N.J.Super. 35 (App. Div. 1980); In re Byram Twp. Bd.Ed., P.E.R.C. No. 76-27, 2 NJPER 143

6/ Although the City did not ratify any seniority clause, it has expressed a willingness to agree to the use of seniority for the selection of meal time and vacation selection.

(1976), aff'd 152 N.J. Super. 12 (App. Div. 1977); In re Sayreville Bd.Ed., P.E.R.C. No. 84-74, 10 NJPER 37 (¶15021 1983); and In re Wanaque Borough Dist. Bd.Ed., P.E.R.C. No. 82-54, 8 NJPER 26 (¶13011 1981).

However, since the Act provides for a permissive category of negotiations for police and fire employees, criteria such as the use of seniority for the selection of police officers to fill temporary assignments has been found to be permissively negotiable, In re Town of Kearny, P.E.R.C. No. 80-81, 6 NJPER 15 (¶11009 1980), aff'd App. Div. Docket No. A-1617-79 (12/18/81); In re Cinnaminson Twp., P.E.R.C. No. 79-5, 4 NJPER 310 (¶4156 1978); but such clauses must also satisfy the test established by the Supreme Court in Paterson Police PBA, supra. That test provides as follows:

> ...First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include an inconsistent term in their agreement. State Supervisory Employees, supra, 78 N.J. at 81. If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. Woodstown-Pilesgrove, supra, 81 N.J. at 591. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policy-making powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable. 87 N.J. at 92-93.

In application of the Paterson test the Commission and Appellate Division in In re Middletown Twp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd App. Div. Docket No. A-3664-81T3 (4/28/83), found that a grievance over the use of a rotation system rather than the use of seniority as a basis for selecting officers for temporary shift assignments was at least permissively negotiable.

The job assignment language in C-1F is similarly negotiable. The language set forth therein limits the assignments to be determined by seniority to "non-routine" assignments which appear to be of a temporary nature, and the supervisor or commanding officer retains final determination regarding the assignments. Such language appears to safeguard managements policy-making authority because it vests the final decision regarding assignments with management. 7/

CO-84-91-52

It is well settled law in this State that health insurance benefits are mandatorily negotiable, In re Piscataway Twp. Bd.Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975); In re County of Middlesex, P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd in relevant part App. Div. Docket No. A-3564-78, 6 NJPER 338 (¶11169 6/19/1980). It is equally well settled that although the selection of an insurance carrier is, for police employees, only a permissive subject for negotiations, the level or type of benefit coverage is mandatorily negotiable, and any unilateral change of those benefits is a violation of the Act. In

7/ Since the PBA did not establish that the parties had ratified a seniority clause that Charge must be dismissed and therefore no remedy was ordered. However, if the PBA demands further negotiations on the job assignment portion of the seniority clause it may be necessary for the Commission to determine whether that portion of the clause is mandatorily negotiable or only permissively negotiable because the City cannot be required to negotiate over permissive subjects. It is unnecessary for the undersigned to make that determination in this proceeding.

re City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439 (¶12195 1981); In re Borough of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984). 8/

The facts in this Charge show that the parties never reached an agreement on a new health benefits plan. Marcinczyk's contention that he thought the PBA wanted the plan in R-1 is no defense to the City's responsibility to negotiate over changes in the plan. As established in CO-83-315-39, the City knew that Yanish did not have authority to bind the PBA to a proposal, that it required membership ratification, yet it never gave the PBA the opportunity to consider CP-2 for ratification.

But even more surprising is the fact that although Marcinczyk knew that the PBA was not seeking any part of R-1 which represented a decrease in existing benefits, and although Marcinczyk in his own testimony acknowledged that the City did not want to decrease existing benefits, the City still unilaterally implemented in CP-2 those portions of R-1 which represented decreases in previously existing benefit levels. Such action violated 5.4(a)(1) and (5) of the Act. For example, CP-3 contained a $2000 co-insurance clause for major medical protection, whereas CP-2, consistent with R-1 contains a $2500 co-insurance clause resulting in greater cost to the employees. The PBA never agreed to that decrease, and similar decreases in CP-2.

The Remedy

It is unnecessary for the undersigned to recommend the reimplementation of CP-3. Rather, consistent with the remedy in

8/ The selection of an insurance carrier for non-police and fire employees is non-negotiable.

Borough of Metuchen, supra, the undersigned recommends that the City be ordered to immediately negotiate with the PBA concerning the implementation of a health benefits plan, and immediately reimburse PBA members for any losses actually incurred due to the change in the health insurance plans from CP-3 to CP-2 beginning from April 1, 1983. Also consistent with Borough of Metuchen the undersigned notes that where the City is required to reimburse affected employees for losses incurred due to the change in plans, it is not entitled to set-off those reimbursement expenses based upon any increased benefits provided to the employees in CP-2. 9/

Accordingly, based upon the entire record and the above analysis, the undersigned makes the following:

Conclusions of Law

1. The City did not violate N.J.S.A. 34:13A-5.4(a)(1) (5) and (6) by refusing to sign an agreement which includes a seniority clause.

2. The City did violate N.J.S.A. 34:13A-5.4(a)(1) and (5) by unilaterally changing certain benefit levels of the employees health insurance plan.

Recommended Order

The Hearing Examiner recommends that the Commission ORDER:

A. That the Charge in CO-83-315-39 be dismissed in its entirety.

9/ The City's obligation is to at least provide the employees with the level of benefits they would have received if CP-3 had not been discontinued on April 1, 1983. The City may or may not continue to pay the increased benefits provided for in CP-2, but is at least required to retroactively reimburse the employees for that which they lost as a result of the change, and then must continue to at least provide the level of benefits in CP-3 until a new health plan has been agreed upon by both parties.

B. That the City cease and desist from:

Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, and from failing to negotiate in good faith with the PBA before changing the health insurance level of benefits.

C. That the City take the following affirmative action:

1. Immediately reimburse any PBA unit member for any losses actually incurred due to the decrease in the specific level of benefits provided in CP-2 retroactive to April 1, 1983.

2. Forthwith engage in good faith negotiations with the PBA over the benefit levels of a new health insurance plan.

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

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

Arnold H. Zudick
Hearing Examiner

Dated: August 15, 1984
Trenton, New Jersey

Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, and

WE WILL NOT refuse or fail to negotiate in good faith with the PBA concerning terms and conditions of employment of PBA unit members, particularly, by failing to negotiate in good faith with the PBA before changing the health insurance level of benefits.

WE WILL immediately reimburse any PBA unit member for any losses actually incurred due to the decrease in the specific level of benefits provided for in the new health plan, retroactive to April 1, 1983.

WE WILL forthwith engage in good faith negotiations with the PBA over the benefit levels of a new health insurance plan.

CITY OF NEW BRUNSWICK
(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, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.