P.E.R.C. NO. 77-58

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,
Respondent,

-and- Docket No. CO-77-27-32

LOCAL 246, JERSEY CITY PUBLIC EMPLOYEES, INC.,
Charging Party.

LOCAL 246, JERSEY CITY PUBLIC EMPLOYEES, INC.,
Respondent,

-and- Docket No. CE-77-2-33

CITY OF JERSEY CITY,
Charging Party.

SYNOPSIS

In a decision in an unfair practice proceeding, the Commission finds the exceptions filed by Local 246 relating to the findings of fact and conclusions of law of the Hearing Examiner to be without merit. The Commission, in agreement with the Hearing Examiner, finds that the City had not violated its duty to negotiate in good faith with Local 246 nor had the City interfered with, restrained or coerced employees in the exercise of rights guaranteed by the Act when the City attempted in September of 1976 to effectuate a five hour increase in the work week of white collar employees in the negotiating unit represented by Local 246, in the absence of an agreement with Local 246, after the Commission's impasse resolution procedure had been exhausted. The Commission specifically finds that the City conducted itself in negotiations with Local 246 in such a way as to evidence a desire to reach an agreement with Local 246 and was justified, when the parties reached a genuine, post-fact finding "impasse", in implementing its last best offer with regard to the work week of the affected white collar employees. The Commission notes that in the absence of amendatory legislation, it cannot accept what it regards as the extreme position of requiring agreement between the parties before a public employer can implement its last best offer at the expiration of an existing agreement.

Noting the absence of exceptions to the Hearing Examiner's recommended dismissal of the charge filed by the City, and based on

a review of the record, the Commission adopts the Hearing Examiner's determination that the City had not established by a preponderance of the evidence that Local 246 had engaged in surface bargaining with the City during the course of negotiations.

The Commission therefore dismisses the instant Complaints in their entirety.

P.E.R.C. NO. 77-58

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CITY OF JERSEY CITY,
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Charging Party.

LOCAL 246, JERSEY CITY PUBLIC EMPLOYEES, INC.,
Respondent,

-and- Docket No. CE-77-2-33

CITY OF JERSEY CITY,
Charging Party.

Appearances:
For the City of Jersey City, Pachman and Aron, Esqs.
(Mr. Martin R. Pachman, of Counsel)

For Local 246, Jersey City Public Employees, Inc.
(Mr. E. Perry Rabino, Esq.)

DECISION AND ORDER

An Unfair Practice Charge, Docket No. CO-77-27-32, was filed with the Public Employment Relations Commission (the "Commission") by Local 246, Jersey City Public Employees, Inc. ("Local 246") on August 9, 1976 and amended on November 3, 1976. Local 246 alleged that the City of Jersey City (the "City") had 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. (the "Act") in that the City unilaterally determined to increase the work week of white-collar employees represented by Local 246 by five hours per week and attempted to effectuate this increase

effective September 7, 1976. Local 246 alleged that this action constituted violations of N.J.S.A. 34:13A-5.4(a)(1) and (5).[1/]

Additionally, the City filed an Unfair Practice Charge, Docket No. CE-77-2-33, with the Commission on August 17, 1976 and amended on August 26 and November 3, 1976. The City alleged that Local 246 had violated the Act and specifically subsections 5.4(b)(2), (3) and (5)[2/] thereof by its conduct during the course of negotiations between the parties and after the issuance of a fact-finder's report.

On October 1, 1976, Local 246 succeeded in obtaining from Judge Frederick C. Kentz a preliminary injunction which has prevented the City from implementing the increase in hours.

It appearing to the Director of Unfair Practices that the allegations of the charges, which were consolidated, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 27, 1976.

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."

2/ These subsections prohibit employee organizations, their representatives or agents from: "(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission."

A hearing was held on November 3 and 4, 1976 in Newark, New Jersey before Hearing Examiner Stephen B. Hunter. The parties were given the opportunity to examine witnesses, to present evidence, and to argue orally. Briefs were subsequently filed by both parties by February 22, 1977 and the Hearing Examiner issued his Recommended Report and Decision on February 24, 1977.[3/] Exceptions were filed by Local 246 on March 7, 1977 and the City filed a letter response to the exceptions on March 16, 1977. A copy of the Hearing Examiner's Recommended Report is attached hereto and made a part hereof.

On the basis of his analysis of the entire record including a number of stipulated facts, the Hearing Examiner recommended that the Complaints in this consolidated proceeding be dismissed in their entirety. Noting the absence of exceptions to the Hearing Examiner's recommended dismissal of the unfair practice charge filed by the City, Docket No. CE-77-2-33,[4/] and based upon our review of the record, we hereby adopt the findings of fact, conclusions of law and recommended order of the Hearing Examiner regarding that unfair practice charge substantially for the reasons cited by the Hearing Examiner.

With respect to the unfair practice charge filed by Local 246, Docket No. CO-77-27-32, concerning the efforts by the City to obtain an increase of five hours in the work week of white-collar employees represented by Local 246, the Hearing

3/ H.E. No. 77-14, 3 NJPER ____ (1977).
4/ N.J.A.C. 19:14-7.3(b).

Examiner concluded, on the facts in this case, that the City had not violated its duty to negotiate in good faith with Local 246 nor had the City thereby interfered with, restrained or coerced employees in the exercise of rights guaranteed by the Act. Accordingly, he recommended dismissal of the complaint.

This conclusion was based, in major part, upon the following findings of fact made by the Hearing Examiner which we adopt. These facts were essentially uncontroverted and were for the most part stipulated by the parties.

The previous agreement between the parties expired on December 31, 1975. Negotiations for a successor agreement began on December 18, 1975. Additional negotiations sessions were held on the following dates: January 8, 22 and 23 and February 3 and 10, 1976. Pursuant to the filing of a Notice of Impasse by the City on February 18, 1976, a mediator was appointed by the Commission and a mediation session was conducted on March 15, 1976. Thereafter, the Commission appointed a fact-finder who held fact-finding hearings on May 20 and June 8, 1976. The fact-finder's report and recommendations was dated June 19, 1976. The fact-finder recommended a phased introduction of the increased hours: 10 minutes per day starting December 1, 1976, 20 more minutes per day starting July 1, 1977 and 30 additional minutes per day starting January 1, 1978. Local 246 rejected this report within hours after its receipt. Also, the City did not accept the fact-finder's recommendations. The parties again met on July 29, 1976 and a formal negotiating session occurred on

September 9, 1976.

Throughout the entire negotiations process, the City held to its position that the hours of the white-collar employees represented by Local 246 should be increased by five hours per week.[5/] There were negotiations between the parties regarding the issue of hours as well as other issues, both economic and non-economic. The parties reached agreement on the non-economic proposals advanced by Local 246 in the negotiations. The City proposed several different methods of and dates for the implementation of the extra hours including a phased implementation and a restructuring of the work day and work week. The City advanced several reasons to support or "justify" its position on hours and made available to Local 246 as well as to other majority representatives of employees of the City relevant information regarding the issue of hours and the economic situation of the City. The City attempted to implement its last best offer on the "hours" issue and this offer was consistent with its previous formal positions on this issue although such implementation was not attempted until over two months after receipt of the fact-finder's recommendations. Finally, the City expressed a willingness to negotiate with Local 246 regarding this issue after its last best offer had been implemented.

Based upon his analysis of the record including the above findings of fact, the Hearing Examiner concluded that the

5/ It is undisputed that working hours are a required subject for collective negotiations.

City had negotiated in good faith regarding terms and conditions of employment throughout the negotiations process including the mediation and fact-finding proceedings and that, despite the above, the parties had reached a genuine, post-fact-finding "impasse" such that, barring some change in circumstances, further negotiations between the parties would not have been productive.

In the proceeding before the Hearing Examiner, Local 246 did not contend that the City could never effectuate a change in the status quo unilaterally in the absence of an agreement between the parties. Rather, Local 246 argued that the City in this case had not negotiated in good faith and, therefore, the City was not justified in seeking a unilateral change simply because the Commission's impasse procedures had been exhausted.[6/] However, in its exceptions, Local 246 seems to retreat from this position. Although it does not state flatly that an employer can never implement a change in the status quo absent agreement, it suggests, particularly in view of the absence of the right of public employees to strike, that the Hearing Examiner's interpretations of the Act would permit a public employer to go through

6/ In In re Piscataway Township Board of Education, P.E.R.C. No. 91, 1 NJPER 49 (1975), appeal dismissed as moot (June 24, 1976), petition for rehearing denied (July 16, 1976) (App. Div. Docket No. A-8-75), petition for certification denied (September 28, 1976) (Supreme Court, Docket No. 12,919), we stated that an employer is normally precluded from altering the status quo regarding terms and conditions of employment while engaged in collective negotiations at least until the Commission's impasse procedures have been exhausted. p.6

the mechanics of negotiations and then to implement its wishes after impasse.

Our analysis of the facts of this case leads us to reject this exception. We agree with the Hearing Examiner that the City did engage in good faith negotiations regarding terms and conditions of employment throughout the negotiations process. A fundamental and inherent part of this conclusion is our finding that the City conducted itself in these negotiations in such a way as to evidence a desire to reach an agreement with Local 246.[7/] In a factual setting such as this one and even recognizing the significance of the absence of the statutory right of public employees to strike in terms of the relationship between the parties, we cannot accept what we regard as the extreme position of requiring agreement between the parties before a public employer can implement its last best offer at the expiration of an existing agreement. Although we are not completely comfortable with this situation, we believe that it is an accurate reflection of legislative intent and that any other interpretation would require amendatory legislation. We are satisfied that in this case the public employer would be justified in implementing its last best offer.[8/]

7/ See In re State of New Jersey (Council of New Jersey State College Locals), E.D. No. 79, 1 NJPER 39 (1975); affirmed P.E.R.C. No. 76-8 (1975); affirmed for reasons cited in Executive Director's decision, 141 N.J. Super 470 (App. Div., 1976).

8/ We do not necessarily mean to imply that all of the factual considerations or elements which we have identified herein must always be present before an employer can implement the last best offer. Neither are we implying that the obligation to negotiate terminates with the implementation of the last best offer as described herein.

Local 246 also excepted to the statement of the Hearing Examiner that there was "no need to commission any productivity studies..." in order to justify the City's proposed increase in hours. Without deciding whether there are circumstances when an employer must be able to support its position by referring to productivity studies, we dismiss this exception in this case. As stated by the Hearing Examiner, it is almost axiomatic that, within the limits presented herein, an increase in hours will result in increase productivity and/or an improved level of public service. Furthermore, as observed by the Hearing Examiner, the City was attempting to increase the hours of all white-collar employees in the City including those not represented by Local 246 and other City employees already worked the longer hours. The City also provided additional "justifications" for its position or hours although Local 246 apparently was not persuaded by these factors. See H.E. 77-14, p. 19.

Next, Local 246 excepts to the reference by the Hearing Examiner that other white-collar workers "accepted" the increase in hours, if such an increase were accepted by Local 246, arguing that such an "acceptance" was really compelled by the City. Local 246 offered no evidence to support this contention and, even if proved, would not change our analysis. Even if no other employee organization had accepted an increase in hours, we would reach the same conclusion. Therefore, this exception is rejected.

Finally, Local 246 excepts to the Hearing Examiner's

statement that Local 246 offered no evidence regarding the claim that the increase in hours would be violative of a city ordinance and the Civil Service Law, Title 11. This exception goes on to state that Local 246 relied simply on the ordinance itself, which was part of the record, and "...left it to the hearing examiner to determine whether the violation per se of the ordinance constituted an unfair practice since all parties had agreed that it was outside of the jurisdiction of the commission to enforce or interpret such an ordinance." Continuing, the exception asserts that the hearing examiner by-passed the issue regarding the ordinance even though he was cognizant of the fact that the Court had deferred to the Commission. However, we note that Judge Kentz stated that the interpretation of an ordinance was a question particularly suited not to administrative review but rather to judicial treatment. Our result is consistent with that of Judge Kentz.[8/] We also reject this exception. As stated by the Hearing Examiner, Local 246 "failed to establish any logical nexus between a violation of a City ordinance or a possible technical violation of Civil Service notice requirements and a violation of the New Jersey Employer-Employee Relations Act."[9/] Neither a violation of a city ordinance, nor of a Civil Service rule, assuming arguendo that such violations occurred, is a per se violation of this Act and may not even be within our jurisdiction. We also note that the parties stipulated that the

8/ See note 8, H.E. 77-14.
9/ H.E. 77-14, p. 20.

sole issue in this matter was whether the City, by unilaterally determining to increase the work week by five hours and by attempting to effectuate this increase, had violated subsections (a)(1) and (a)(5) of Section 5.4 of the Act. As stated above, based upon our review of the entire course of conduct of the City throughout these negotiations, we are satisfied that the City has met its statutory obligations.

Accordingly, based upon our review of the entire record herein and having considered and rejected each of the exceptions filed by Local 246, we find and determine that Local 246 has failed to meet its burden of proof by a preponderance of the evidence. N.J.S.A. 34:13A-5.4(c) and N.J.A.C. 19:14-6.8.

ORDER

For the reasons hereinbefore set forth, the Commission hereby adopts the Hearing Examiner's recommended order and the instant Complaints are hereby dismissed in their entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hurwitz and Parcells voted for this decision.
Commissioners Forst and Hipp voted against this decision.
Commissioner Hartnett abstained.

DATED: Trenton, New Jersey
April 19, 1977
ISSUED: April 20, 1977

H.E. No. 77-14

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

In the Matter of

CITY OF JERSEY CITY,

Respondent,

-and-

Docket No. CO-77-27-32

LOCAL 246, JERSEY CITY PUBLIC EMPLOYEES, INC.,

Charging Party.

LOCAL 246, JERSEY CITY PUBLIC EMPLOYEES, INC.,

Respondent,

-and-

Docket No. CE-77-2-33

CITY OF JERSEY CITY,

Charging Party.

SYNOPSIS

A Commission Hearing Examiner in a Recommended Report and Decision recommends the dismissal of complaints in a consolidated unfair practice proceeding. Local 246 had alleged that the City of Jersey City had unilaterally determined to increase by five hours the work week of the white collor employees in the negotiating unit represented by Local 246 and had attempted to effectuate this increase in hours, effective September 7, 1976, in violation of the New Jersey Employer-Employee Relations Act. The Hearing Examiner concludes, after a thorough review of the negotiations history between the parties, that under the circumstances in this particular matter, the City had the right to unilaterally change the working hours of the affected white collar employees when the City attempted to implement the aforementioned new hours in September of 1976. The Hearing Examiner specifically concludes that a genuine impasse existed between the parties with regard to the hours issue after the Commission's impasse resolution procedures, as set forth in N.J.S.A. 19:12-1.1 et seq., had been exhausted; that the City had negotiated in good faith throughout the entire negotiations process concerning terms and conditions of employment; that sufficient notice had been given to Local 246, after the completion of the fact-finding process, by the City's designated representatives concerning the City's contemplated change in the status quo with reference to the hours question; that the last best offer sought to be implemented by the City was consistent with the formal offers and counteroffers made by the City during the negotiations between the parties; and that the City had expressed a willingness to continue to negotiate with Local 246 with regard to the hours question after its last best offer on that issue had been implemented.

The City of Jersey City had alleged that Local 246 had violated the Act in that Local 246, by its conduct during the entire course of the negotiations with the City, and more specifically by its conduct after the issuance of the fact-finder's report in a related impasse proceeding, had refused to negotiate in good faith with the City. The Hearing Examiner, concludes after a careful review of the record, that the City had not established by a preponderance of the evidence that Local 246 had engaged in surface bargaining in violation of the Act. The Hearing Examiner further concludes that Local 246, as well as the City, had comported itself in good faith with regard to the negotiations between the parties.

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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STATE OF NEW JERSEY
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Docket No. CE-77-2-33

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Charging Party.

Appearances:

For the City of Jersey City, Pachman and Aron, Esqs.
(Mr. Martin R. Pachman, of Counsel and On the Brief)

For Local 246, Jersey City Public Employees, Inc.
(Mr. E. Perry Rabbino, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") by Local 246, Jersey City Public Employees, Inc. ("Local 246") on August 9, 1976 and said charge was amended by the filing of an Amended Charge on November 3, 1976. Local 246 alleged that the City of Jersey City (the "City") had 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.(the "Act"), in that the City had unilaterally determined to increase by five hours the work week of the white collar employees in the unit represented by Local 246 and had attempted to

effectuate this increase in hours, effective September 7, 1976. 1/

An Unfair Practice Charge was filed with the Commission by the City on August 17, 1976 and said charge was amended by the filing of Amended Charges on August 26, 1976 and on November 3, 1976. The City alleged that Local 246 had violated the Act, in that Local 246, by its conduct during the entire course of negotiations with the City and by its conduct after the issuance of a fact-finder's report in a related impasse proceeding,had refused to negotiate in good faith with the City. 2/

Local 246's Charge was accompanied by a request for interim relief with an affidavit of the President of Local 246 setting forth the facts upon which the application was based, and an application for an Order requiring the City to show cause why the requested relief should not be granted. The relief requested consisted of an interlocutory order restraining the City from implementing the increased hours on September 7, 1976, as scheduled. The Chairman of the Commission, having been delegated the authority to act upon these requests on behalf of the Commission, executed an Order to Show Cause on August 17, 1976 returnable on September 1, 1976. 3/

1/ More specifically, Local 246 asserted that the actions of the City had violated N.J.S.A. 34:13A-5.4(a)(1) and (5). These subsections prohibit 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."

2/ More specifically, the City asserted that the actions of the Local violated N.J.S.A. 34:13A-5.4(b)(2), (3) and (5). These subsections prohibit employee organizations, their representatives or agents from:

"(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances."

"(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

"(5) Violating any of the rules and regulations established by the commission."

3/ The application for interim relief was made pursuant to N.J.A.C. 19:14-9.1 et seq. See also Board of Education of the City of Englewood v. Englewood Teachers Association, 135 N.J. Super 120, 1 NJPER 34, 90 LRRM 2074 (App. Div. 1975).

Pursuant to the Order to Show Cause both parties filed briefs prior to the hearing and the City also filed an affidavit in response to the allegations made in the Charge and the affidavit of the President of Local 246. Both parties appeared at the hearing on September 1, 1976 represented by counsel.

The Order to Show Cause hearing was conducted by Sidney H. Lehmann, Special Assistant to the Chairman at that time, who had also been designated to hear applications for interim relief. At the conclusion of that hearing Lehmann entered his determination denying Local 246's request for interim relief during the pendency of the Local's unfair practice case. Lehmann later prepared an Interlocutory Decision [In re City of Jersey City, P.E.R.C. No. 77-13, 2 NJPER ____ (1976)] in order to provide the parties with a written exposition of the reasons for this determination.

In his Interlocutory Decision, Special Assistant Lehmann applied the two standards that have been developed by the Commission in evaluating the appropriateness of interim relief - the likelihood of ultimate success and the irreparable nature of the harm that will result if the interim relief is not granted 4/ - and concluded that the facts of the case did not warrant such extraordinary relief. Lehmann found that the facts developed during the interim relief proceeding did not show any significant irreparable harm that would result from the anticipated increase in the employees' hours. Additionally, Lehmann stated that the uncontested facts established that the City and Local 246 had completed mediation and fact-finding and that the issue of increased hours had been in dispute throughout the negotiations. Lehmann therefore concluded that since the Commission had not yet ruled upon the obligation to maintain the status quo with respect to terms and conditions of employment once the Commission's impasse resolution procedures had been exhausted, it would not be appropriate to predict the outcome of such a significant policy question in an interim relief proceeding when the facts did not show irreparable harm. Lehmann further found that the other arguments made by Local 246 also involved disputed factual or legal issues which should not be resolved in an interim proceeding in the absence of irreparable harm.

4/ See e.g., In re Township of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 37 (1975); In re State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); In re Township of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975).

It appearing that the allegations of the charges filed by Local 246 and by the City, if true, might constitute unfair practices within the meaning of the Act, Complaints and Notices of Hearing were issued with regard to these two charges on September 27, 1976, along with an order consolidating these two cases.

Pursuant to the Complaints and Notices of Hearing, hearings were held on November 3, 1976 and November 4, 1976 in Newark, New Jersey at which time all parties were given an opportunity to examine witnesses, to present evidence and to argue orally. Briefs and supplemental positional statements subsequently were submitted by all the parties to this instant proceeding, all of which were filed by February 22, 1977. Upon the entire record in this proceeding, the Hearing Examiner finds:

1. The City of Jersey City is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, as amended, and is subject to its provisions.

2. Local 246, Jersey City Public Employees, Inc. is an employee representative within the meaning of the New Jersey Employer-Employee Relations Act, as amended, and is subject to its provisions.

3. Unfair Practice Charges having been filed with the Commission alleging that the parties have engaged or are engaging in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, questions concerning alleged violations of the Act exist and these matters are appropriately before the Commission for determination.

BACKGROUND

At the hearing held on November 3, 1976 the City and Local 246 stipulated on the record to the following facts with regard to the instant charges before the undersigned, which facts were supplemented by testimony proffered at the formal hearings held on November 3, 1976 and on November 4, 1976:

1. Local 246, Jersey City Public Employees, Inc. is the certified exclusive majority representative for all nonsupervisory blue and white collar employees employed by the City of Jersey City, a public employer within the meaning of the Act, in the following named departments: Department of Administration, Department of Finance, Department of Personnel, Department of Law

with regard to nonprofessional employees only, Department of Public Safety with reference to nonuniformed employees only, Department of Human Resources excepting the Parks and Recreation Division, the Department of Community Development and the Office of the City Clerk.

2. Local 246 entered into a negotiated agreement with the City in December of 1974. This agreement was effective as of January 1, 1974 and expired on December 31, 1975.

3. Since the expiration of the aforementioned agreement the parties have been attempting to negotiate a successor agreement. Negotiations began on December 18, 1975 with regard to a successor agreement and continued until February 10, 1976 without reaching a settlement. Other negotiations sessions were held on January 8, 1976, January 22, 1976, January 23, 1976, February 3, 1976 and February 10, 1976. A Notice of Impasse was filed by the City and was docketed with the Commission on February 18,1976. The docket number given to that Notice of Impasse was I-76-477.

A PERC Mediator was designated to assist the parties and a mediation session was conducted on March 15, 1976. The parties were still unable to reach an agreement. On April 22, 1976 a PERC Fact-Finder, Samuel Ranhand, was appointed and Mr. Ranhand held fact-finding hearings on May 20, 1976 and June 8, 1976. His findings and recommendations were dated June 19, 1976 and the parties received said report shortly thereafter. The docket number of this fact-finding proceeding was Docket No. FF-76-426.

4. During all the steps in the negotiating process the issue of the contemplated five hour increase in the work week of white collar employees employed by the City and included within the negotiating unit represented by Local 246 from thirty-five hours a week, including a paid lunch hour each day, to forty hours a week, including a paid lunch hour each day, was in dispute and remains in dispute at the present time.

5. E. Perry Rabbino sent a letter to Martin Pachman dated June 25, 1976 relating in part to the scheduling of a post fact-finding meeting. A copy of this letter is attached to Commission Exhibit C-8. 5/

5/ This exhibit has not been appended to this recommended report and decision because of its bulk.

6. Martin Pachman sent a letter to Peter Schreiber dated July 7, 1976 that in part referred to the City's response to Local 246's rejection of the fact-finder's report. A copy of this letter is also attached to Commission Exhibit C-8.

7. A meeting was held in Wellington Davis' 6/ office on July 29, 1976. This meeting was attended by Wellington Davis and by the negotiating team of Local 246.

8. A formal negotiating session between representatives of Local 246 and the City was held on September 9, 1976.

9. Local 246 conducted a job action in protest over the City's decision to unilaterally increase, by five hours, the work week of white collar employees in Local 246's unit on the following three dates: September 14, 1976, September 15, 1976 and September 16, 1976.

10. The City obtained a temporary restraining order relating to the aforementioned job action being conducted by Local 246 on September 14, 1976. The Union, Local 246, stopped picketing on September 16, 1976 and returned to work on September 17, 1976.

MAIN ISSUES

1. The parties stipulated that the sole issue before this Hearing Examiner concerning the charge filed by Local 246 against the City was whether the City by unilaterally determining to increase by five hours the work week of the white collar employees in the negotiating unit represented by Local 246 and by attempting to effectuate said increase, effective September 7, 1976, violated subsections (a)(1) and (a) (5) of Section 5.4 of the Act?

2. The parties further stipulated that the sole issue before the Hearing Examiner concerning the Charge filed by the City against Local 246 was whether Local 246, by its conduct during the negotiations process and by its conduct after the issuance of the fact-finder's report on or about June 19, 1976 violated subsections (b)(2), (b)(3), and (b)(5) of Section 5.4 of the Act? 7/

6/ Wellington Davis is employed as the Director of the Department of Personnel by the City. Davis and Pachman comprised the City's negotiating team.

7/ The parties agreed that the numbered allegations set forth in their respective charges, as amended, should not be considered as raising additional independent issues to be analyzed by the undersigned.

THE POSITION OF LOCAL 246 REGARDING ITS CHARGE [CO-77-27-23]

Local 246 asserted that it was not contending in its charge that all public employers were proscribed from ever effecting changes in the status quo relating to terms and conditions of employment, in the absence of an agreement on the issues in dispute. Local 246 did contend, that under the circumstances in the within proceeding, the City should not have the power to unilaterally implement a five hour increase in the work week of the white collar employees represented by Local 246, even after the Commission's impasse resolution procedures were exhausted, inasmuch as the City had at all times refused to negotiate in good faith with Local 246 concerning its proposals relating to the increased work week. Local 246 primarily argued the following basic points in support of its contentions that the City's actions were violative of subsections (a)(1) and (a) (5) of Section 5.4 of the Act:

1. The City had refused to negotiate in good faith by proposing and insisting that the Local 246 accept the increased hours with no increase in pay at all, thus effectuating a decrease in the hourly rates paid the white collar employees represented by Local 246. Local 246 admitted that while this particular position of the City may not constitute a per se violation of the Act, it was indicative of the City's bad faith in this matter since the City proposed said increase, while knowing that Local 246 could never accept this, when the City intended from the beginning of negotiations to implement the increased hours in any event at the conclusion of the fact-finding process. Local 246 concluded that the City simply went through the motions of negotiating with Local 246 concerning the "hours" issue, seeking to avoid, rather than reach, a mutually acceptable agreement, since the City believed that the Commission's Piscataway doctrine would insulate the City from any liability for unilaterally changing the status quo relating to work hours once the fact-finding process was completed.

2. The City had negotiated in bad faith with Local 246 by arbitrarily demanding a five hour increase in the work week of the white collar employees within the negotiating unit, while not requiring or even requesting, that any other individuals employed by the City work additional hours. With regard to this particular point, Local 246 alleged that the record supported the inference that Local 246 white collar employees were only being offered the same salary

increase for 1977 as that proposed by the City to employees in other negotiating units, despite the fact that only Local 246's white collar workers were being compelled to work additional hours each week. Local 246 contended that the facts required that their white collar workers receive a proportionately larger salary increase for 1977 if they alone would be forced to work a significantly longer work week.

3. The City negotiated in bad faith by refusing to provide any "quid pro quo" for the additional hours to be worked by the white collar employees.

4. The City failed to negotiate in good faith by not properly elucidating the justification for its increased "productivity" proposal and by refusing to provide the information requested by Local 246 with respect to the demands of the City relating to the increased work hours issue.

5. The City's bad faith with reference to the P.E.R.C. Act was illustrated by its employment and inadequate distribution of quasi-legal notices, relating to the proposed implementation date of the new hours for the white collar employees in Local 246's unit, in contravention of the Civil Service Laws.

6. The City's refusal to negotiate in good faith with Local 246 was illustrated by the City's action in attempting to effect changes in the working hours of the white collar employees in complete contravention of extant City ordinances establishing a 9 a.m. to 4 p.m. schedule for all these employees.

THE POSITION OF THE CITY REGARDING LOCAL 246's CHARGE [CO-77-27-23]

The City submitted that in accordance with ample private and public sector precedent and consistent with principles enunciated in past Commission decisions the City had the absolute right to unilaterally impose changes in the work hours of white collar employees represented by Local 246 after having negotiated in good faith with regard to the matters at issue and utilized all statutory procedures for the resolution of contractual impasses. The City emphasized that if it was obligated to a perpetual maintenance of the status quo vis-a-vis the terms and conditions of employment of its employees, in light of its serious financial difficulties as recognized by the Commission's fact-finder and all of its municipal negotiating units, Local 246 would be locked into a quaranteed gain position, given the present circumstances, and

the City would be locked into an assured losing stance.

Given the state of the law with regard to its negotiating responsibilities, the City asserted that it, at all times, had negotiated in good faith with Local 246 with regard to all terms and conditions of employment including working hours. The City contended that it was essentially uncontroverted that it had concluded agreements on non-economic issues with Local 246 and had reached an agreement relating to salaries for the 1976 calendar year. The City also asserted that proposals and counterproposals were exchanged between the parties relating to salary increases for 1977 and contended that Local 246 conceded that the City had negotiated in good faith concerning this important economic issue. The City concluded that the essence of the dispute between the parties concerned the City's insistence on the need for Local 246's white collar employees to work a forty as opposed to a thirty-five hour week.

With reference to the "hours" issue the City made several arguments to refute specific allegations of Local 246. The City first contended that it had negotiated many aspects of its proposal relating to increased hours with Local 246. The City stated that at every stage it had indicated its willingness to modify its wage offer for 1977 in return for concessions in the work week. In addition, the City asserted that it had consistently discussed different time frames for the implementation of its proposal on hours, including different "effective dates" and phased implementation of its proposal. The City further argued that it had discussed with Local 246 the concept of varying work schedules for white collar employees, shortened lunch hours, and the possibility of weekend work in efforts to minimize the impact of increased hours on the white collar employees.

The City refuted allegations of "discrimination" by asserting that all other City negotiating units consisting in part of white collar workers, had agreed to the imposition of forty hour work weeks, in conformity with the present working hours of all blue collar and public safety employees employed by the City. The City concluded that it was difficult to conjure up a conclusion that a proposal found to be acceptable for contract agreement by three other unions amount to an unreasonable position indicative of the City's bad faith.

The City also specifically refuted Local 246's contentions that it had failed to present any justification for its demands for "extra time". The City contended that the testimony of all witnesses established that during the course of negotiations it had referred to numerous reasons in support of its position. The City submitted that Local 246 was simply dissatisfied with the rationale enunciated by the City, not that no justification existed. The City also noted that the Commission fact-finder had found the City's position concerning the need for increased productivity to be a reasonable one.

The City also set forth that the record belied the Local's assertion that the City had failed to offer any "quid pro quo" for the additional hours to be worked. The City argued that Local 246 had simply determined that the City's salary proposals for 1977, that the City contended were contingent upon the acceptance of the City's proposal on work hours, were "inadequate".

The City concluded that Local 246 had failed to prove by a preponderance of the evidence that the City had either engaged in "surface bargaining" or "subjective bad faith negotiations." The City added that the testimony of the two witnesses called by Local 246 in the presentation of its case was too evasive, self-contradictory, and self-serving to be believed.

DISCUSSION AND ANALYSIS OF LOCAL 246's CHARGE

The place to begin in analyzing whether the City's actions, in unilaterally determining to increase the work week of the white collar employees represented by Local 246 and by attempting to effectuate said increase effective September 7, 1976, [8/] violated N.J.S.A. 34:13A-5.4(a)(1) and (5) is to examine

8/ Judge Frederick C. Kentz, Jr. on October 1, 1976, in a related consolidated Order to Show Cause proceeding before him [Superior Court, Law Division, Docket No. L-780-76 and Superior Court, Chancery Division Docket No. C-261-76] granted a preliminary injunction sought by Local 246 against the City enjoining the City from implementing a forty hour work week. Judge Kentz made clear however, that he was not attempting to adjudge the right of the City under the New Jersey Employer-Employee Relations Act to compel its employees to work an additional one hour per day, after the exhaustion of the Commission's impasse resolution processes. Judge Kentz specifically stated that this particular determination should and would be ultimately decided by P.E.R.C.

Judge Kentz predicated his determination in the matters before him on his analysis of the viability and applicability of an existing municipal ordinance on employee hours [W-262]. Judge Kentz stated that the applicable case law

Continued.....

apposite Commission decisions that have dealt with allegations of employer misconduct in unilaterally altering the status quo with regard to terms and conditions of employment while engaged in collective negotiations. These decisions have in part attempted to prescribe general guidelines concerning the often debated topic, in the public and private sectors, of the "duration of the duty to negotiate."

In the matter entitled In re Piscataway Township Board of Education, P.E.R.C. No. 91, 1 NJPER 49 (1975), appeal dismissed as moot (June 24, 1976), petition for rehearing denied (July 16, 1976) [App. Div. Docket No. A-8-75], petition for certification denied (September 28, 1976) [Supreme Court, Docket No. 12,919], the Commission adopted the view, generally adopted in both the public and private sectors, that an employer is normally precluded from altering the status quo regarding terms and conditions of employment while engaged in collective negotiations and that such an alteration would constitute an unlawful refusal to negotiate. 9/ The Commission also has held that, in the context of negotiations for a collective negotiations agreement, a public employer is generally precluded from taking unilateral action with regard to a required subject for negotiations, such as employee working hours, at least until the Commission's impasse resolution procedures, set forth in N.J.A.C. 19:12-1.1 et seq., have been exhausted. 10/

8/ Continued... indicated that the interpretation of an ordinance was a question particularly suited to judicial treatment and not administrative review. Judge Kentz rejected several arguments raised by the City and found that the City would specifically violate Ordinance W-262, which he interpreted as setting in pertinent part the working hours of Local 246's white collar employees at thirty-five hours a week, if the City implemented its proposed changes in hours.

The City's subsequent Request for Leave to Appeal from Judge Kentz's decision was denied.

9/ See also In re Township of Little Egg Harbor, P.E.R.C. No. 76-15, 2 NJPER 5 (1976); In re Galloway Township Board of Education, P.E.R.C. No. 76-31, 2 NJPER 182 (1976), appeal pending [App. Div. Docket No. A-3015-75]; In re Galloway Township Board of Education, P.E.R.C. No. 76-32, 2 NJPER 186 (1976), appeal pending [App. Div. Docket No. A-3016-75]; In re Galloway Township Board of Education, P.E.R.C. No. 77-3, 2 NJPER 254 (1976), motion for reconsideration granted, P.E.R.C. No. 77-8, 2 NJPER 284 (1976), decision on reconsideration, P.E.R.C. No. 77-18, 2 NJPER 295 (1976), appeal pending [App. Div. Docket No. A-483-76]; In re Burlington City Board of Education, P.E.R.C. No. 77-4, 2 NJPER 256, appeal pending [App. Div. Docket No. A-22-76].

10/ See Piscataway, supra, 1 NJPER 50 (footnote 7) and other cases cited in footnote 9.

The Commission has thus recognized that normally the very act of unilaterally modifying a particular term and condition of employment contradicts, in and of itself, the meaning of collective negotiations; inasmuch as ordinarily one cannot unilaterally act and still collectively negotiate about the same subject. In a recent decision the Commission further elucidated its position on this topic in the following fashion:

> The Commission is attempting to maintain "those terms and conditions of employment in effect" regardless of whether those terms are derived from a contract or some other source. The status quo represents that situation which affords the least likelihood of disruption during the course of negotiations for the new contract. Because the status quo is predictable and constitutes the terms and conditions under which the parties have been operating, it presents an environment least likely to favor either Party. [In re Galloway Township Board of Education, supra, P.E.R.C. No. 76-32, 2 NJPER at 186-187]

In the instant matter it is uncontroverted that the issue of the white collar employees' working hours relates to terms and conditions of employment and thus constitutes a required subject for collective negotiations. In addition, the record clearly establishes that the City recognized that Commission mandate prescribed that the City could not take unilateral action in altering the status quo relating to the working hours of white collar employees represented by Local 246, at least until the Commission's impasse resolution procedures were exhausted. The City contends that the Commission in enunciating its Piscataway doctrine -- despite its statement that it was not faced with, nor did it wish to address the question of if or when employer unilateral action relating to terms and conditions of employment would be legally permissible -- at least implicitly adopted the general private sector view that where a genuine impasse occurs an employer does not commit an unfair labor practice by unilaterally imposing its position, so long as that which was imposed was not more favorable than which was offered to the employee organization during the course of negotiations. The City added that the basic difficulty incurred in the application of this principle in the private sector, namely whether or not a

genuine impasse exists, is obviated under our Act by the required exhaustion of impasse procedures under N.J.A.C. 19:12-1.1 et seq. The City concluded that inasmuch as it had negotiated in good faith at all times with Local 246, had utilized all available statutory or administrative procedures for the resolution of contract disputes, and had delayed the actual implementation of the forty hour week for several months after the fact-finding process had been completed, it had fulfilled the statutory requirement of negotiating in good faith on terms and conditions of employment with Local 246, as the majority representative of the affected employees.

As stated before,Local 246 did not contend that as a result of the Commission's Piscataway doctrine public employers were proscribed from ever effecting changes in the status quo relating to terms and conditions of employment, in the absence of an agreement on the issues in dispute. Local 246 however alleged that under the particular circumstances of this instant matter the City had not fulfilled its statutory negotiating responsibilities and could not therefore mechanically refer to the exhaustion of the Commission's impasse procedures as insulating it from any liability for unilaterally changing specific terms and conditions of employment in the absence of an agreement.

The undersigned concludes, on the basis of a careful review of apposite federal private sector [11/] and public sector judicial and administrative decisions that have dealt with the issue of the "duration of the duty to bargain or negotiate", that under the circumstances in this particular matter the City had the right to unilaterally change the working hours of the affected white collar employees when the City attempted to effectuate the aforementioned new hours on or about September 7, 1976.

It is essentially uncontroverted that the Commission's impasse resolution procedures as set forth in N.J.A.C. 19:12-1.1 et seq. were exhausted by the parties at the time [on or about September 7, 1976] that the City attempted to increase the working hours of its white collar employees in the unit represented

11/ The Courts of our State have specifically recognized that the New Jersey Employer-Employee Relations Act was patterned after the National Labor Relations Act, as amended, and that the latter may be utilized as a guide in resolving disputes arising under our Act [See Lullo v. Intern. Assoc. of Fire Fighters, 44 N.J. 409 (1970)].

by Local 246. Commission appointed fact-finder Samuel Ranhand had issued his Findings and Recommendations in a report dated June 19, 1976 and said report had been rejected by the membership of Local 246 on the day that this report had been served upon Local 246.

It is also evident to the undersigned that a genuine impasse, with reference to the "hours" issue and the interrelated issue of salaries for the 1977 calendar year, existed in September of 1976. Despite the parties' best efforts to achieve an agreement on this critical "hours" issue it was apparent at that time that neither the City nor Local 246 was willing to move on its own particular philosophical position, regardless of the compromises or accommodations suggested by either party. A point had been reached where continuing marathon negotiations on the "hours"issue would have been futile. There are many references in the record to the City's position that a contractual settlement had to provide that the white collar employees in the unit would all be working an additional one hour per day on or preferably before January 1, 1978 and that the City would not agree to provide, aside from a general salary increase for 1977, any additional compensation for the additional hours to be worked. The record is also replete with references to Local 246's position that its membership would not agree to work any additional time unless the City provided a proper quid pro quo, in terms of money, specifically designated to compensate the employees for the increased time worked, in addition to an acceptable general salary increase.

Although the apparent irreconciliable nature of the parties' positions on the "hours" issue after six negotiations sessions, one mediation session, two fact-finding meetings and post fact-finding conferences may create the impression that the parties may not have negotiated at all on this critical issue, the record establishes that the parties did negotiate in good faith on the "hours" issue, as well as on other non-economic and economic issues that were subjects of negotiations between the parties for a successor contract that would cover the 1976 and 1977 calendar years. The Appellate Division, in a decision that sustained an earlier Commission decision, affirmed that in the absence of a per se violation of the duty to negotiate, [12/] it is necessary to subjectively

12/ Local 246 has not contended that the City's actions relating to changes in the working hours of the white collar employees constituted any per se violation of the Act.

analyze the totality of the parties' conduct in order to determine whether an illegal refusal to negotiate may have occurred. 13/ The Appellate Division recognized that in order to be negotiating in good faith parties had to at least bring to the negotiating table "an open mind and a sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid, rather than reach, an agreement." 14/ The undersigned concludes, for the reasons to be set forth hereinafter, that the parties did negotiate in good faith with reference to the "hours" issue. 15/

It is first important to note that the parties' task in negotiating a mutually acceptable agreement on the "hours" issue was made more difficult by the fact that so few other terms and conditions of employment remained in dispute as potential "trade off" items as a result of the parties' ability to quickly conclude agreements on all other issues not directly related to the "hours" question. All non-economic proposals made by Local 246, relating to the inclusion of an agency shop clause in the contract if pertinent legislation was passed, improvements in the grievance procedure, and provisions for receiving notice of certain City ordinances, were quickly agreed to by the City. The parties agreed that no salary increases would be provided for 1976, given the fiscal problems of the City. In addition, it is uncontroverted that the parties exchanged numerous offers and proposals relating to a salary and fringe benefits package (relating to a paid dental plan) for 1977. It was the testimony of Peter Schreiber, President of Local 246, that there was "give and take" on

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13/ See In re State of New Jersey (Council of New Jersey State College Locals), E.D. No. 79, 1 NJPER 39 (1975) [affirmed P.E.R.C. No. 76-8 (1975)]; affirmed for the reasons cited in the Executive Director's decision, Appellate Division, 141 N.J. Super. 470 (1976).

14/ See In re State of New Jersey (Council of New Jersey State College Locals), supra, footnote 13, E.D. No. 70 at page 8.

15/ The undersigned concludes that a public employer is by no means insulated from a finding that it has negotiated in bad faith in violation of the Act by simply participating in the mediation and fact-finding processes. If the Charging Party establishes that the employer's bad faith or other unfair practices have caused a post fact-finding impasse that employer may be indefinitely proscribed from effectuating unilateral changes in terms and conditions of employment.

1977 economic issues and that the only issue in dispute concerned the "hours" question, not salaries.

With reference to the "hours" issue, the record reveals the following:

1. Local 246 suggested that employees in the Tax and Water Departments could work staggered, although not lengthened, hours in order to provide better service to the public. The City rejected this proposal as not being an acceptable compromise relating to the "hours" issue.

2. The City suggested different implementation dates for the increase in work hours. The City also appeared willing to explore the concept of a phased implementation of the extra hour in several stages, as recommended by the Commission fact-finder, but this concept was specifically rejected by Local 246 at the start of the second fact-finding session in the absence of receiving adequate monetary consideration to be allocated to the additional hours worked.

3. The City suggested the restructuring of the work day (e.g., earlier starting times), the shortening of lunch hours, and the possibility of weekend or holiday work as possible ways of increasing the hours of its white collar employees while minimizing the impact said increase would have on its employees. The City's proposals were rejected by the Local.

4. At a February 6, 1976 negotiations session, Local 246's negotiating team made an attempt to break the philosophical impasse over the "hours" issue, as defined hereinbefore, by tentatively proposing that the implementation of an additional hour of work per day would be satisfactory if unit members would receive a $750 salary increase effective January 1, 1977 along with a new dental plan. 16/ This proposal was subsequently rejected by the City. There is no evidence in the record that Local 246, at any time after February 6, 1976, proposed any other "settlement" package that did not require the payment of additional compensation for any increased hours worked <u>in addition to</u> an acceptable across-the-board salary increase.

5. On September 9, 1976 the City made an attempt to break the philosophical impasse on the "hours" issue by informally suggesting a forty-five

16/ The undersigned does not credit certain contrary testimony proffered by Peter Schreiber.

(45) minute increase in the work day. This "proposal" was rejected by Local 246. There is no evidence in the record that the City ever made any formal proposals that called for a less than sixty (60) minute increase in the white collar work day.

6. Local 246 never proposed nor agreed to work any additional minutes during the 1976 calendar year without receiving adequate compensation. The City never proposed nor agreed to pay Local 246 white collar employees any additional compensation [on an overtime or straight time basis] for any additional hours to be worked during calendar year 1976.

7. The City's salary and fringe benefit proposals with reference to the 1977 calendar year were tied in to Local 246's acceptance, in some fashion, of the increased work week proposed by the City.

8. Fact-finder Samuel Ranhand in his Findings and Recommendations, dated June 19, 1976, recommended the following with specific reference to the hours issue:

> 2A. Beginning with December 1, 1976 ten (10) minutes shall be added to the beginning of each work day.
>
> B. Beginning with July 1, 1977, an additional twenty (20) minutes shall be added to the beginning of each work day.
>
> C. Beginning with January 1, 1978, an additional thirty (30) minutes shall be added to the end of the work day.

Neither the City nor Local 246 accepted this recommendation of the fact-finder. As stated before Local 246's membership rejected the fact-finder's report within hours after it was disseminated to the parties.

An analysis of the above-mentioned findings of fact with regard to the "hours" question fully supports the undersigned's determinations that (1) a genuine post fact-finding impasse existed between the parties that was reflective of the polarized positions of the City and Local 246 on the critical "hours"

issue and (2) that the parties, and more specifically the City with reference to Local 246's charge, did negotiate in good faith in attempting to resolve the "hours" question. It is clear to the undersigned that the parties brought to the negotiating table an open mind and sincere desire to reach an agreement on the "hours" issue and made many efforts to suggest possible compromises on this point. Their "bottom line" positions however could not be reconciled, regardless of the restructuring of their proposals, because of their divergent attitudes relating to the productivity issue and the concept of negotiations quid pro quos. The undersigned concludes that a point had been reached in September of 1976, despite the good faith efforts of the parties, when any further negotiations between the City and Local 246, absent a dramatic change in circumstances such as a unilateral change in the status quo relating to work hours, would have been counterproductive and would have only served to further polarize the parties' respective positions.

Before summarizing, the undersigned would like to briefly comment about other factors relied upon by Local 246 as illustrating the City's "bad faith" in conducting negotiations with Local 246.

Local 246 asserted that its white collar employees were the only City workers who were required to work additional hours. Local 246 argued that if the City was indeed motivated by the desire to increase productivity it would have insisted in having all City employees work similarly lengthened hours, especially those white collar employees not represented by Local 246 who, heretofore, also worked thirty-five (35) hour weeks. Local 246 submitted that the City singled out Local 246's white collar employees so as to coerce them into settling a contract on the City's economic terms. Local 246 concluded that this evidence helped to establish that the City did not negotiate in good faith.

The record reveals, however, that with respect to all other employees in the City who worked less than a forty (40) hour week, the City maintained a consistent position in contract negotiations with reference to the need for a work week of not less than forty (40) hours for all City employees. The International Association of Firefighters representing white collar employees in the Fire Signal System Division of the Fire Department accepted an increase in hours from a thirty-two (32) hour to a forty (40)

hour week. The Jersey City Supervisors Association, representing in part white collar supervisory personnel, and Local 245, representing in part certain white collar employees assigned to the Department of Public Works, both agreed in contracts with the City to the institution of forty (40) hour work weeks for its white collar workers if and when the white collar employees represented by Local 246 started working the lengthened work week. The record further reveals that the reason why the City did not refer to other white collar employees in the units represented by Local 245 and the Jersey City Supervisors Association in its July 22, 1976 notice [17] was that the City had only completed the Commission's mediation and fact-finding processes with Local 246, not with Local 245 or the Jersey City Supervisors Association. In light of the above, the undersigned cannot conclude that the City acted in a discriminatory or arbitrary fashion, indicative of bad faith, in its negotiations with Local 246.

Local 246 further asserted that the City acted in bad faith by failing to present adequate justification for its demand for increased work hours. The undersigned, after a thorough examination of the record, concludes that Local 246 was merely dissatisfied with the reasons advanced by the City's negotiators for the increased hours. The record establishes that the following reasons, among others, were advanced by the City to justify its position on working hours: (1) productivity would be increased if clerical employees were available an extra hour a day to perform clerical functions; (2) at least certain Departments staffed by white collar employees and housed within City Hall should be open more hours to accommodate the public; (3) a loss in CETA funds had lead to the layoffs of many CETA white collar employees, thus necessitating a need to offset these losses with greater productivity from remaining employees; and (4) hourly wage rates for the City's white collar employees would still compare very favorably with the rates of other clerical and administrative workers employed in other similar sized municipalities throughout Hudson County and the State. The undersigned does not conclude that the City improperly failed to justify its demands on the "hours" issue.

17/ This July 22, 1976 notice is attached to Commission Exhibit C-3.

Local 246 additionally asserted that the City failed to provide information on attrition rates, productivity studies, and the City's fiscal situation that were requested by Local 246. Local 246 argued that the City's failure to supply this information demonstrated the City's "surface bargaining".

The undersigned, after careful consideration of the record, fails to find any evidence that the City refused to supply Local 246 with any relevant information with reference to the "hours" issue. For example, it is uncontroverted that the City at all times, even prior to the start of negotiations with Local 246, issued an invitation to all City labor leaders to review, through the use of auditors and other means, the City's books and records relating to all aspects of the budgetary process. Although the record is somewhat unclear on this point, it would appear that Local 246 did not make any attempt to take the City up on its offer until months of negotiations had taken place and then that attempt was not apparently followed up with an actual review or audit. With reference to this particular issue, it is not disputed that the City failed to give Local 246 any productivity studies on the white collar "hours" issue, only because there were no such studies in existence. The undersigned credits the City's testimony that there was simply no need to commission any productivity studies inasmuch as it was virtually axiomatic that increased productivity would be achieved if clerical employees worked an additional five hours per week.

Local 246 alleged in its Charge that the City "employed quasi-legal notices in an attempt to circumvent the statutes, rules and regulations pertaining to the Civil Service Act". Local 246 also contended in its Charge that the City violated various City ordinances [18/] for the sole purpose of coercing the members of Local 246's negotiating unit into complying with the demands of the City. Local 246 referred to these allegations in its Charge in partial support of its assertion that the City engaged in illegal "surface bargaining". An examination of the record reveals that Local 246 failed to proffer any evidence in support of the above two contentions and further failed to establish any logical nexus between a violation of a City ordinance or a possible technical violation of Civil Service notice requirements and a violation of the New Jersey Employer-Employee Relations Act.

18/ See footnote 8.

In summary, the undersigned finds that the City, under the circumstances in this instant matter, had the right to unilaterally change the working hours of the affected white collar employees when the City attempted to effectuate the aforementioned new hours on or about September 7, 1976 for the following reasons:

1. A genuine impasse, as defined in this recommended report and decision, existed between the parties with regard to the critical "hours" issue after the Commission's impasse resolution procedures, as set forth in N.J.A.C. 19:12-1.1 et seq., had been exhausted.

2. The City negotiated in good faith throughout the entire negotiations process [encompassing in part the mediation and fact-finding sessions] with Local 246 concerning terms and conditions of employment. 19/

3. Sufficient notice was given to Local 246 after the completion of the fact-finding process by the City's designated representatives concerning the contemplated change in the status quo with reference to the hours question as of September 7, 1976.20/ Despite this notice the record is devoid of any evidence that Local 246 actively sought to schedule any formal post-fact-finding negotiations sessions between the parties prior to that date. There is only a reference in the record to one apparently informal meeting between the parties on July 29, 1976 during the period between the issuance of the fact-finder's report on or about June 19, 1976 and September 9, 1976 when a formal negotiations session between the parties finally took place.

4. The last best offer sought to be implemented by the City on the "hours" question was consistent with the formal offers and counter-offers made during the negotiations between the parties.

5. The City expressed a willingness to continue to negotiate with Local 246 with regard to the "hours" question after its last best offer on that issue had been implemented.21/

19/ The undersigned concludes that the impasse between the parties was not therefore the result of the City's bad faith or its commission of other unfair practices as delineated in the Act.

20/ See Notice of July 22, 1976 appended to Exhibit C-3.

21/ See In re State of New Jersey (Local 195, I.F.P.T.E. and Local 518 S.E.I.U.), P.E.R.C. No. 77-40, 2 NJPER ____ (1977) at page 5, footnote 6.

The undersigned concludes, that given the facts in this instant matter, the unilateral imposition of changes in the working hours of Local 246's white collar employees would best effectuate the purposes of the Act by providing sufficient impetus to the settlement of the long-standing contractual dispute between the parties on a mutually accommodative basis. The dramatic action of a unilateral change in working conditions would appear to be the only way to break the contractual impasse between the parties -- a stalemate that has resulted in the failure of the parties to agree upon a successor contract to replace the agreement that expired on December 31, 1975. The existing deadlock on the issue of hours has already adversely affected the City and Local 246. The City has been unable to achieve increased productivity from any of its white collar employees during a period of financial crisis. 22/ Local 246 has not been able to finalize either an agreement with the City on the first salary increase for unit employees since 1975 or an agreement on an increased fringe benefits package as a result of the stalemate on the "hours" question -- a situation that can only further disrupt labor relations between the parties.

The undersigned concludes that as a result of the deadlock between the parties on the critical "hours" issue there is no realistic possibility that further negotiations between the parties, given the present state of affairs, will be fruitful in resolving the present impasse. Collective negotiations between the parties have ended. It is hoped that if the City does implement its proposal on increased working hours for white collar employees meaningful negotiations will again take place between the parties that may finally lead to an agreement on a contract between the City and Local 246 that will be mutually satisfactory to all.23/

22/ As set forth before no other white collar employee [included in units requested by Local 245 and the Jersey City Supervisors Associations] would work any lengthened hours as long as the "hours" dispute between the City and Local 246 remained unresolved.

23/ The undersigned notes that relevant judicial decisions relating to the public sector and decisions of other administrative agencies in the public sector recognize that when parties have reached a final impasse in negotiations, the employer may be free to unilaterally effectuate a change in terms and conditions of employment.

See, e.g. West Hartford Ed. Assn. v. DeCourcy, 80 LRRM 2422 (1972); City of Willimantic and I.A.F.F., Local 1033, Connecticut State Board of Labor

Continued.....

In summary the undersigned concludes that Local 246 has not established by a preponderance of the evidence [24] that the City has violated N.J.S.A. 34:13A-5.4(a)(1) and (5) by its actions relating to the "hours" issue.[25]

THE POSITION OF THE CITY REGARDING ITS CHARGE [CE-77-2-33]

The City contended that Local 246 had engaged in "surface bargaining" and had demonstrated that it did not have a desire to conclude an agreement with the City. The City submitted that Local 246 believed that it was in its interest to engage in dilatory, illegal tactics in an effort to avoid an agreement with the City that might necessitate the working of lengthened hours.

The City in its Amended Charge and post-hearing brief made the following allegations in support of its position:

1. Local 246 refused to review or examine proffered books and records of the City that demonstrated the City's financial plight and need for increased productivity, while at the same time Local 246 insisted that the City was able to pay requested salary increases and further insisted that the City did not require increased productivity.

2. Local 246 refused to meet with the City's negotiating committee, pursuant to N.J.A.C. 19:12-4.3(f), after the Commission's fact-finder had issued

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23/ Continued... Relations, Case No. MPP-36-2, Decision No. 1455 (decided November 23, 1976), reported in 691 Government Employee Relations Report, pages 10-12 (January 17, 1977); Police Officers Assn. v. City of Detroit, 85 LRRM 2536 (1974); Warren Consolidated Schools v. Warren Education Association, 1975 MERC Lab Op. p. 129 (1975).

See also, Assoc. of N.J. State Col. Fac. v. Bd. of Higher Education, 112 N.J. Super. 237 (1970) and Fair Lawn Education Ass'n v. Fair Lawn Board of Education (Docket No. L-30039-69 P.W. June 3, 1970).

24/ See N.J.A.C. 19:14-6.8.

25/ Local 246 has not contended that the City's actions constituted an independent violation of N.J.S.A. 34:13A-5.4(a)(1). Local 246 has asserted, that in accord with Commission and NLRB precedent, that any unfair practice committed by an employer [such as a refusal to negotiate in good faith] gives rise to a co-existent, derivative N.J.S.A. 34:13A-5.4(a)(1) violation. In light of the undersigned's conclusion that no "(a)(5)" violation has been committed by the City, I do not conclude that a derivative "(a)(1)" violation has been committed.

In any event the undersigned finds that the record does not support a finding that the City has interfered with, restrained or coerced any employees represented by Local 246 in the exercise of the rights guaranteed to them by our Act.

his report. Furthermore Local 246 made the fact-finder's recommendations public and denounced said recommendations in the "press" within hours of the release of the report, without first meeting with the City's representatives to review and discuss the import of the report.

3. Local 246 engaged in a three-day strike in September of 1976 in order to coerce the City into removing mandatory subjects of collective negotiations, i.e. changes in the work week, from the negotiations table.

4. Local 246 on many occasions seemed prepared to accept some compromise with reference to the "hours" issue, only to later shift ground and avoid agreements on that issue.

5. Local 246 simply went through the motions in engaging in the fact-finding process. The Union, for example, presented only three exhibits in support of its position before the fact-finder.

THE POSITION OF LOCAL 246 ON THE CITY'S CHARGE

Local 246 generally denied every allegation contained within the City's Amended Charge. Local 246 specifically argued that at no time did it refuse to examine the municipal budget. Local 246 further asserted that contrary to the City's allegations it had recognized and accepted the City's fiscal crisis as being legitimate and had, for all practical purposes, abandoned its claims for any increase in salary for calendar year 1976. Local 246 also challenged the City's arguments concerning Local 246's conduct relating to the fact-finding process. Local 246, for example, stated that it did not meet with the representatives of the City within five days of the fact-finder's report only because of conflicting vacation schedules.

DISCUSSION AND ANALYSIS OF THE CITY'S CHARGE

As stated before, the sole issue before the undersigned concerning the City's Charge is whether Local 246, by its conduct during the negotiations process and by its conduct after the issuance of the fact-finder's report on or about June 19, 1976 violated subsections (b)(2), (b)(3) and (b)(5) of Section 5.4 of the Act.

Absolutely no evidence of a Section 5.4(b)(2) violation was introduced by the City and their apparent allegation that Local 246 interfered with, re-

strained or coerced the City in the selection of its representative for the purposes of negotiations is dismissed. 26/

The undersigned further concludes that the City has not established by a preponderance of the evidence that Local 246 committed an unfair practice, as defined by N.J.S.A. 34:13A-5.4(b)(5), by not meeting within five days after receipt of the fact-finder's findings and recommendations with the City's representatives to discuss the fact-finder's report. 27/ The undersigned fully credits the arguments made by Local 246 that it failed to meet promptly because of problems caused by vacation schedules and not because of a desire to avoid its negotiating responsibilities. The undersigned also notes that there is no evidence in the record that establishes that the City was either able to or desirous of meeting with Local 246 within five days of receipt of the fact-finder's report. 28/

The undersigned further concludes that the City has not established by a preponderance of the evidence that Local 246 engaged in "surface bargaining" in violation of N.J.S.A. 34:13A-5.4(b)(3). As enunciated earlier the undersigned has found that Local 246 as well as the City comported itself in good faith with regard to the negotiations between the parties. 29/ There has been no evidence proffered by the City that establishes that Local 246 was seeking to avoid, rather than to conclude an agreement with the City. With reference to the specific items of "evidence" referred to in the City's Amended Charge the undersigned finds that the record clearly fails to support the City's contentions that Local 246 refused to review or examine proffered books or records of the City that demonstrated the City's financial crisis and its need for increased productivity.

26/ In its Amended Charge (Exhibit C-20) the City deleted a prior allegation in its original Charge (Exhibit C-14) that stated that Local 246 had "attempted to interfere with the chosen representatives of the public employer by threatening political repercussions for positions taken in negotiations."

27/ See N.J.S.A. 19:12-4.3(f).

28/ The undersigned questions whether the Legislature in enacting N.J.S.A. 34:13A-5.4(b)(5) and N.J.S.A. 34:13A-5.4(a)(7) intended to stigmatize parties with findings of unfair practices every time it was established that a party did not strictly comply with time limits set forth in the Commission's Rules. [See also N.J.A.C. 19:19-1.1 (Rules to be liberally construed)]

29/ See pages 14-18 of this recommended report and decision.

The record also fails to support the City's assertions that Local 246 simply went through the motions during the fact-finding process or that Local 246 constantly shifted ground with reference to its position on the "hours" issue. Although it is uncontroverted that (1) Local 246 made public its rejection of the fact-finder's report hours after its issuance without first meeting with the City and (2) that Local 246 conducted a job action for three days in protest over the City's decision to unilaterally increase the hours of work for the white collar employees represented by Local 246, the undersigned does not conclude after an examination of the totality of the parties' conduct, as referred to hereinbefore, that Local 246 engaged in illegal "surface bargaining." 30/

RECOMMENDED ORDER

Accordingly, for the reasons hereinabove set forth, IT IS HEREBY ORDERED that the Complaints in this instant consolidated matter be dismissed in their entirety.

Stephen B. Hunter
Hearing Examiner

Dated: Trenton, New Jersey
February 24, 1977

30/ Although a refusal to negotiate can, under certain circumstances, be found without a subjective analysis of "good faith," the City does not argue that such a "per se" violation is presented herein.