P.E.R.C. No. 90-116

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOUSING AUTHORITY OF
THE CITY OF NEWARK,

Respondent,

-and- Docket No. CO-H-89-280

PLUMBERS LOCAL UNION NO. 24,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Housing Authority of the City of Newark violated the New Jersey Employer-Employee Relations Act when it unilaterally required off-duty plumbers to carry beepers without compensation. The Commission dismisses allegations concerning a refusal to pay plumbers the steamfitters' rate of pay for certain work and a refusal to provide Local 24 with certain information.

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PLUMBERS LOCAL UNION NO. 24,

Charging Party.

Appearances:

For the Respondent, Gerald L. Dorf, attorney

For the Charging Party, Kenneth S. Hall, attorney

DECISION AND ORDER

On March 27, 1989, Plumbers Local Union No. 24 filed an unfair practice charge against the Housing Authority of the City of Newark. The charge alleges that the Authority violated the New Jersey Employer-Employee Relations Act, N.J.S.A 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),[1/] when it refused to

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

pay plumbers the steamfitters' rate of pay for certain work; unilaterally required off-duty plumbers to carry beepers; and refused to provide Local 24 with certain information.

On September 15, 1989, a Complaint and Notice of Hearing issued.

On December 20, 1989, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs by March 8, 1990.

On April 18, 1990, the Hearing Examiner issued his report. H.E. No. 90-45, 16 NJPER ___ (¶___ 1990). He found that the Authority violated subsections 5.4(a)(1) and (5) when it unilaterally required more than one off-duty plumber to carry a beeper. He recommended dismissal of the Complaint's other allegations.

The Hearing Examiner served his report on the parties and informed them that exceptions were due on or before May 1, 1990. Neither party filed exceptions or requested an extension of time.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-10) are detailed and accurate. We incorporate them. The Authority has rescinded its directive requiring plumbers to carry beepers. That aspect of the case being moot, we will simply order negotiations over retroactive compensation for plumbers ordered to carry beepers between December 1988 and June 1989.

ORDER

The Housing Authority of the City of Newark is ordered to:

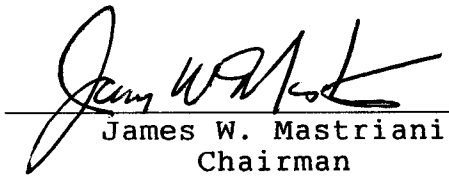
1. Negotiate over retroactive compensation for plumbers ordered to carry beepers between December 1988 and June 1989;

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

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

The remaining allegations of the Complaint are dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid and Wenzler voted in favor of this decision. None opposed. Commissioners Smith and Ruggiero were not present.

DATED: Trenton, New Jersey
June 25, 1990
ISSUED: June 26, 1990

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 negotiate over retroactive compensation for plumbers, represented by Plumbers Local Union No. 24, ordered to carry beepers between December 1988 and June 1989.

Docket No. CO-H-89-280

CITY OF NEWARK HOUSING AUTHORITY
(Public Employer)

Dated: _____

By: _____

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, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E. NO. 90-45

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

In the Matter of

HOUSING AUTHORITY OF THE CITY
OF NEWARK,

Respondent,

-and- Docket No. CO-H-89-280

PLUMBERS LOCAL UNION NO. 24,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Housing Authority of the City of Newark violated the New Jersey Employer-Employee Relations Act by unilaterally implementing an on-call schedule which required more than one plumber to carry beepers without first negotiating. Under the facts of this case, the Hearing Examiner finds that the employer had a managerial prerogative to require one plumber to be on-call in order to cover plumbing emergencies but was obligated to negotiate concerning the implementation of the on-call program for any additional plumbers.

The Hearing Examiner finds that the employer did not violate the Act by failing to pay certain plumbers at the steamfitters' pay rate because no legitimate agreement concerning the pay rate had been reached between the parties. The Hearing Examiner also finds that the employer did not violate the Act by refusing to provide an employee with information pertaining to asbestos. A request for such information was never made by the majority representative.

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. 90-45

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

In the Matter of

HOUSING AUTHORITY OF THE CITY
OF NEWARK,

Respondent,

-and- Docket No. CO-H-89-280

PLUMBERS LOCAL UNION NO. 24,

Charging Party.

Appearances:

For the Respondent, Gerald L. Dorf, Esq.

For the Charging Party, Kenneth S. Hall, Esq.

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On March 27, 1989, Plumbers Local Union 24 ("Local 24") filed an Unfair Practice Charge against the Housing Authority of the City of Newark ("Authority"). The charge alleges that the Authority violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically Section 5.4(a)(1) and (5)[1/] by refusing to implement a negotiated agreement to pay certain

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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."

plumbers the steamfitters' rate of pay when such plumbers did steamfitters work; by unilaterally implementing a requirement that plumbers carry beepers during off-duty times (in the evenings and on weekends); and by refusing to provide Local 24 with information pertaining to various work areas where asbestos is located and unit members are required to work.

On September 15, 1989, the Director of Unfair Practices issued a Complaint and Notice of Hearing. A hearing was conducted on December 20, 1989, at the Commission's offices in Newark, New Jersey. The parties were afforded an opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. The parties filed timely post-hearing briefs.

Upon the entire record, I making the following:

FINDINGS OF FACT

1. The Authority is a public employer and Local 24 is a public employee representative within the meaning of the Act (T7).[2/]

2. The Essex County Building Trades Council ("Council") is the majority representative of employees contained in the collective negotiations unit relevant in this matter. The Council is comprised of various local unions representing craft employees, including employees belonging to Local 24. The Authority and the Council entered into negotiations in order to establish the wages,

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2/ The transcript citation "T7" refers to the transcript produced on December 20, 1989, at p. 7

hours, benefits and other terms and conditions of employment for the various unit employees employed by the Authority. (T19-T20). The Business Managers for the various composite unions making up the Council have, on occasion, filed grievances related to their respective craft employees and meet with Authority management personnel in order to resolve disputed issues (T178).

The Steamfitters' Pay Rate Issue

3. Conrad A. Hoffmann has been the Business Agent for Local 24 since 1976 (T18). For some 15 to 20 years plumbers George Benko and Philip Tuosto purportedly periodically performed steamfitter's rather than plumber's work. (T26; T84-T85).[3/] During the last round of negotiations, Hoffmann tried to get the steamfitters' higher pay rate for Benko and Tuosto, arguing that they are entitled to that rate because it was impossible to determine when they were doing steamfitters' work and when they were doing plumbers' work (T23). Hoffmann raised the steamfitter pay issue previously at the negotiations table with various Housing Authority personnel and with Richard Beal, Chief of Plant Facilities. When Hoffmann raised the steamfitter pay issue with Authority personnel or at the negotiations table, he was told only that the matter would be investigated and given consideration

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3/ I make no specific finding that plumbers Benko and Tuosto actually performed steamfitter's work, however, for purposes of this decision I will assume that to be the case.

(T75-T76; T79-T80). However, Beal told Hoffmann that if the plumbers were doing steamfitter work, they should receive the higher steamfitter pay (T25).

Hoffmann considered Beal's statement to be a binding agreement with the Authority to pay the plumbers at the steamfitters' rate. Beal was a high-level supervisor and sat on the Authority's negotiations team, although he never served as spokesperson (T24-T25; T63-T64; T165). Hoffmann and Beal reached their agreement to pay the steamfitters' rate during a phone conversation, and not at the negotiations table (T80; T164). The agreement was never reduced to writing (T23-T24; T25; T66).

4. As Chief of Plant Facilities, Beal has the authority to discipline and determine whether employees are entitled to overtime pay (T177). Beal also has the authority to recommend a title reclassification to the appropriate Authority personnel (T180-T181). Beal was neither authorized by the Authority to determine whether the plumbers at issue are entitled to the steamfitters' pay rate, nor was he directed by the Authority to meet with Hoffmann regarding the matter (T177-T181).

5. Although Hoffmann assumed that Beal could speak on behalf of the Authority, he had never dealt with Beal regarding such matters previously, and Hoffmann was given nothing to indicate whether Beal was authorized to increase wage rates or otherwise enter into binding agreements with Local 24 regarding terms and conditions of employment (T65; T75-T76). Beal never told Hoffmann

that he was authorized to speak on behalf of the Authority with respect to the steamfitter pay issue (T65-T67).

6. Notwithstanding Beal's agreement to pay plumbers Benko and Tuosto the steamfitters' rate, neither plumber ever received the money. Hoffmann complained to Beal and Beal said that he would take care of the matter (T27). Nevertheless, the plumbers still never received pay at the steamfitters' rate (T27).

The Asbestos Issue

6. Most of the Authority's buildings were built during the 1940's. At that time asbestos was used as an insulator around hot water pipes and tanks (T138). On occasion plumbers are called upon to work in areas containing asbestos (T46).

7. In 1985, the Authority performed an asbestos study by testing air samples at work sites were asbestos is found. The report containing the results of the study was distributed to the various department directors (T140). In either 1987 or 1988, plumber Tuosto asked Chief of Maintenance Cicalesi for a copy of the 1985 report. Tuosto was not given a copy (T47). In mid-December 1989, after having been given a work assignment, Tuosto again asked Cicalesi for the air sample report. Cicalesi showed Tuosto the report. However, since Tuosto did not know how to read the report and did not have the background to determine whether the air sample tests were properly administered, he asked Cicalesi for a copy of the report. Cicalesi refused to give him a copy (T50-T51).

8. Local 24 Business Agent Hoffmann never asked Cicalesi or any other Authority representative to view the report (T74). Neither Hoffmann nor Tuosto ever asked the Authority to allow a union designated expert to view the report (T54; T74). Chief of Staff Benjamin Quattlebaum was only unofficially aware that requests for copies of the air sampling report had been made by Local 24 or the Council (T162).

9. Denise P. Coleman, Director of the Authority's Department of Housing Management, prepared an asbestos status report (R-1[4/]) for Dr. Daniel W. Blue, Jr., Authority Executive Director. R-1 discusses the level of the asbestos problem at the Authority and discusses the remedial action which has and should be taken. R-1 does not contain the results of air sampling tests taken in the various Authority buildings. The Authority invited the Council to meet with it in order to disseminate and discuss the information contained in R-1. The Council did not attend the meeting (T149; T190-T192).

10. The Authority has refused and continues to refuse to give copies of the air sampling report to Local 24 or the Council (T158; T163). The Authority has adopted this position upon advice of its Legal Department (T158). Additionally, the Authority is concerned that if the information contained in the air sampling

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4/ Documentary evidence submitted by the Respondent is designated "R." Documentary evidence submitted by the charging party is designated "CP."

report were to be made known generally, the Authority would be placed at a financial disadvantage in soliciting contractors' bids for asbestos abatement work (T158-T159). However, the Authority is willing to provide a copy of the report to a Local 24 designated expert, provided such expert is acceptable to the Authority (T187).

The Beeper Issue

11. In December 1988, an incident occurred at the Authority in which it was determined that the services of an employee serving in one of the craft titles was required. However, the Authority was unable to contact any of the needed craft personnel. As the result of this incident, the Authority's administration was criticized by its Board of Directors for not having an appropriate emergency response procedure in effect. Authority operational personnel decided to issue beepers to plumbers so that it would be able to recall such employees if the need arose (T170-T171). Plumbers given beepers were only contacted when it was determined that the semi-skilled employees, who were available on a 24-hour per day basis, were not qualified to remedy the problem at hand (T170-T171).

12. On December 29, 1988, George Benko was serving as Acting Plumber Foreman. Cicalesi told Benko that he wanted four plumbers to be issued beepers in order that they would be available to be contacted during the weekend in the event of an emergency (T96; T98). CP-7, a chart showing the dates on which each employee

worked, indicates that no more than three plumbers were ever assigned to be on-call on any particular day. On some days no plumbers were on call and on other days only one. About half of the time during which the Authority required plumbers to be on-call, there were two or three plumbers carrying a beeper on a particular day. Plumbers were actually called in to work on only four occasions during the period that they were required to carry beepers (CP-7; T118). Cicalesi told Benko that the plumbers were to (1) carry the beepers at all times, (2) respond promptly to the beepers, and (3) be able to report back to the job site within approximately 30 minutes, if needed (T96; T113; T117).

13. Cicalesi never discussed with Benko the issue of compensation for being on-call and carrying a beeper. Benko thought that since he would be carrying the beeper after the completion of a 40-hour work week, he would receive overtime pay (time and one-half) for all hours he was on-call (T98; T120). When Benko started working for the Authority 25 years ago, he was "scheduled to be available" after the completion of his 40-hour work week. Benko was paid at straight rate for those hours he was "scheduled to be available" (T129-T130). As described by Benko, I find no distinction between an employee being "scheduled to be available" and being on-call. Shortly after the time Benko was hired, the Authority discontinued its practice of scheduling employees to be available (T126). Benko is uncertain regarding whether Authority employees currently receive any compensation for being "immediately available" (T127).

14. Local 24 Business Agent Hoffmann was informed about plumbers being required to carry beepers and promptly called Cicalesi to complain (T29-T30). Cicalesi told Hoffmann that the plumbers would continue to be required to carry beepers (T30). Unable to resolve the issue with Cicalesi or other Authority personnel, on January 10, 1989, Hoffmann sent the Authority a letter (CP-2) grieving the Authority's order on carrying beepers (T31-T32). Having received no response to his January 10, 1989 letter from the Authority, on January 25, 1989, Hoffmann sent the Authority a follow-up letter (CP-3) demanding that the Authority rescind its order requiring plumbers to carry beepers without receiving compensation (T32-T33).

15. On February 3, 1989, the parties met for the purpose of addressing Local 24's grievance concerning beepers (T34). The meeting lasted approximately five minutes (T37). The Authority would not agree to the Local's demand that plumbers required to carry beepers receive additional compensation (T37-T38). The parties did not meet again concerning the beeper issue (T39).

16. If an employee carrying a beeper were called into work, that employee would be compensated in accordance with the collective agreement (CP-1), Article 7, Para. C. (T119; T127-T128).

17. The Authority rescinded its directive requiring plumbers to carry beepers in June, 1989 (T173). After the rescission of the Authority's directive, the Authority proposed that those plumbers who were previously required to carry beepers receive

additional compensation (T171-T172). The parties never reached an agreement on the amount of compensation.

ANALYSIS

The Steamfitter Pay Rate Issue

Local 24 contends that Richard Beal is an authorized agent of the Authority for purposes of entering into binding agreements on employee relations matters such as granting plumbers a pay rate increase when they perform steamfitter's work. The Authority asserts that Beal was never given such authority.

There are numerous cases which have held that a party is bound by an agreement reached by its agent if the agent had actual or apparent authority to conclude the agreement. Where a party's representatives are fully authorized, work within the general guidelines set forth by their principal and reach an agreement containing no conditions precedent (e.g., the need for ratification), the principal who refuses to effectuate such agreement negotiated by its agent violates the Act. See City of Orange Tp., H.E. No. 87-22, 12 NJPER 807 (¶17310 1986), adopted P.E.R.C. No. 87-78, 13 NJPER 71 (¶18031 1986). See also Camden Fire Dept., H.E. No. 82-34, 8 NJPER 181 (¶13078 1982), adopted P.E.R.C. No. 82-103, 8 NJPER 309 (¶13137 1982); South Amboy School Board, P.E.R.C. No. 82-10, 7 NJPER 448 (¶12200 1981); East Brunswick Bd. of Ed., P.E.R.C. No. 77-6, 2 NJPER 279 (1976), mot. for recon. den. P.E.R.C. No. 77-26, 3 NJPER 16 (1977); Bergenfield Bd. of Ed., P.E.R.C. No. 90, 1 NJPER 44 (1975).

I find that Richard Beal had neither the actual nor apparent authority to bind the Authority. As a high-level supervisor, Beal has the authority to discipline, determine whether an employee worked in a manner so as to entitle him/her to receive pay at the overtime rate, and recommend to appropriate Authority personnel job reclassifications. However, Beal was neither authorized by the Authority to determine whether plumbers are entitled to the steamfitter's pay rate, nor was he directed to meet with Local 24 representatives regarding that issue. Beal never told Hoffmann that he was authorized by the Authority to address and resolve the pay rate issue for the involved employees. While Hoffmann, as Local 24 Business Agent, and Beal, as Chief of Plant Facilities, may have worked together in order to resolve certain operational problems, they had never previously dealt with each other regarding an issue as significant as a modification of an employee's pay rate. Consequently, there is no historical basis which would warrant Hoffmann's reliance upon Beal as having authority to remedy the dispute. Further, it is unreasonable to conclude that Beal had been granted authority to effectuate the steamfitter's pay rate for the plumbers, since at or about the same time that Hoffmann was dealing with Beal, the Authority's negotiating team, on which Beal was a member, maintained the same position in response to this issue as it had for 15 to 20 years; specifically, that the Authority would only "consider" the matter. Consequently, I find that the Authority's refusal to pay plumbers

Benko and Tuosto at the steamfitters' rate does not violate the Act and this portion of the unfair practice charge should be dismissed.

The Asbestos Issue

N.J.S.A. 34:13A-5.4(a)(5) makes it an unfair practice for an employer to refuse to negotiate in good faith with the majority representative over the terms and conditions of employment of unit employees. Refusal to provide information relevant to contract administration is a refusal to negotiate in good faith. City of Atlantic City, P.E.R.C. No. 89-56, 15 NJPER 11 (¶20003 1988); Burlington Cty., P.E.R.C. No. 88-101, 14 NJPER 327 (¶19121 1988), aff'd App. Div. Dkt. No. A-4698-87T1 (4/28/89); Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985); Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235 (¶12105 1981). Compare NLRB v. Acme Industrial Co., 385 U.S. 432 (1967); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); Safeway Stores v. NLRB, 691 F.2d 953, 111 LRRM 2745 (10th Cir. 1982); Westinghouse Electric Corp., 239 NLRB 106, 99 LRRM 1482 (1978); enf. as mod. 648 F.2d 18, 105 LRRM 3337 (D.C. Cir. 1981). See also Gorman, Basic Text on Labor Law, at 409-418 (1976); Morris, The Developing Labor Law, at 606-621 (2d ed. 1983). The issue of providing a safe and healthful environment for employees is a mandatory subject of negotiations. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322 (1989); State of N.J., P.E.R.C. No. 86-11, 11 NJPER 457 (¶16162 1985); Byram Tp., P.E.R.C. No. 76-27, 2 NJPER 143 (1976), aff'd 152 N.J. Super. 12 (App. Div. 1977). Local 24 has the right to pursue organizational

grievances.[5/] Red Bank Reg. Ed. Assn. v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978); Fair Lawn Bd. of Ed. v. Fair Lawn Ed. Assn., 174 N.J. Super. 555 (App. Div. 1980). Requests for information pertaining to air quality as contained in the air sample tests performed by the Authority in 1985, are relevant to the employee organization to determine whether an unsafe condition exists in the work place. The Authority has a legal duty to furnish such information relevant to contract administration matters to the certified representative. NLRB v. Acme Industrial Co.; State of N.J. (Dept. of Higher Education), P.E.R.C. No. 87-149, 13 NJPER 504 (¶18187 1987). Consequently, I find that upon proper request by the certified representative or its agent to the Authority for safety information such as, but not limited to, the data contained in an air quality survey of work areas, such information is potentially relevant to the certified representative's statutory duty to administer the collective agreement and must be provided. State of N.J., Office of Employee Relations, P.E.R.C. No. 88-27 13 NJPER 752 (¶18284 1987), recon. den. P.E.R.C. No. 88-45, 13 NJPER 841 (¶18323 1987), aff'd App. Div. Dkt. No. A-2047-87T7 (12/27/88).

Although the Authority has not released the air sample test report, under the particular facts in this case, the Authority has committed no unfair practice. Neither the Council nor Hoffmann ever

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5/ While the Council is the certified representative of unit employees, the facts show and I find that the Authority has routinely recognized Hoffmann as an agent of the Council and has dealt with him on labor relations matters.

requested a copy of the report from an appropriate Authority representative.[6/] Only Tuosto requested a copy of the report from the Authority (through Chief of Maintenance Cicalesi). I find no indication in the record showing that Tuosto was acting other than on his own behalf. As stated above, an employer's refusal to provide potentially relevant information to the majority representative constitutes a refusal to negotiate in good faith in violation of Section 5.4(a)(5). However, the right to negotiate with an employer runs only to the majority representative, not individual employees. Camden Cty. Highway Dept., D.U.P. No. 84-32, 10 NJPER 399 (¶15185 1984). Consequently, I find no violation of Section 5.4(a)(5) of the Act since neither the majority representative nor an authorized agent requested a copy of the air sample report from the Authority.[7/]

The Beeper Issue

N.J.S.A. 34:13A-5.3 states, in relevant part, the following:

> A majority representative of public employees in an appropriate unit shall be

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6/ While Quattlebaum was "unofficially aware" of information requests from Local 24 or the Council, such requests were not made directly to him. Moreover, the record does not indicate the nature of such requests nor the time frame. Consequently, I find that no timely request was made upon the Authority.

7/ Since a copy of the air sample report was never provided by the Authority, I make no determination with respect to the form in which such information must be conveyed to the union subsequent to the Authority's receipt of a proper request from the majority representative. See N.J. Dept. of Higher Education, at 13 NJPER 504; Detroit Edison Co. v. NLRB, 440 U.S. 301, 100 LRRM 2728 (1979).

> entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.

On December 29, 1988, the Authority required some plumbers to begin carrying beepers on weekends or nights in order that they be available to be contacted in the event that an emergency arose at any of the Authority's buildings which required the services of a plumber. The Authority's directive to carry beepers constitutes the institution of an "on-call" program. The threshold question is whether the Authority has the inherent managerial prerogative to unilaterally implement the on-call program or whether the implementation of an on-call program constitutes a mandatorily negotiable subject.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement

> would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

The on-call program is an hours issue and, as such, intimately and directly affects the public employees' work and welfare. Employees on-call are restricted in their freedom of movement and must continue to be available to the employer during off-duty time.

The on-call issue has not been fully or partially preempted by statute or regulation.

As is frequently the case, the negotiability determination depends on the outcome of an analysis of whether a negotiated agreement would significantly interfere with the determination of governmental policy.

The Authority asserts that it has a managerial prerogative to unilaterally adopt an on-call program (Respondent's brief at p. 32), however, makes no argument regarding the nature of the governmental policy at issue. The facts establish that the Authority developed and implemented the on-call program in response to criticism from its Board of Directors for not having appropriate personnel available to adequately respond to emergency situations. The governmental policy aspect here is that the Authority is

responsible to its residents to fix plumbing problems in order to maintain a safe and healthful environment at its facilities. However, the effectuation of the policy goals must be balanced against the employees' interests.

As previously noted, a primary issue for the employees is a restriction placed on their freedom of movement during off-duty time by the implementation of the on-call program. The primary concern for the employer is its ability to respond to emergency situations. I find that the Authority's decision to implement an on-call program so that management could promptly and effectively respond to a plumbing emergency is a proper exercise of managerial prerogative. However, I limit this finding to the implementation of an on-call program for one plumber per day -- not for four. The Authority has made no showing that it needs more than one plumber per day to be on-call in order to cover plumbing emergencies. CP-7 shows that frequently only one plumber was on-call. CP-7 also shows that plumbers were very rarely called in to actually perform work. Thus, in balancing the employer's need to maintain emergency coverage with the employee's right not to be placed under restrictions during off-duty time and their right to negotiate, through their majority representative, the issue of hours, I find that the Authority violated Section 5.4(a)(5) of the Act when it required more than one plumber to be on-call without first negotiating.

The Commission has previously addressed the issue of on-call schedules. In Borough of Paramus, P.E.R.C. No. 86-17, 11

NJPER 502, 505 (¶16178 1985), the Commission stated that in the abstract the on-call working hours, schedules and compensation of unit personnel is mandatorily negotiable. However, the Commission went on to caution that on-call clauses cannot legally be read to impede an employer's ability to make emergency assignments or to make an assignment based on qualifications when it seeks a particular qualified individual to do a particular job on a particular task.

The Authority cites County of Hunterdon, H.E. No. 85-12, 10 NJPER 539 (¶15250 1984), adopted P.E.R.C. No. 85-63, 11 NJPER 29 (¶16014 1984) for the proposition that the adoption of an on-call schedule is not mandatorily negotiable. In County of Hunterdon the Commission focused on the particular circumstances existing in that case. The Commission held that "...the need to implement the on-call system in order to improve department efficiency outweighed the employees' interests in the old system's retention." County of Hunterdon, 11 NJPER at 29. Likewise, the Authority's need for a plumber to be on-call and, thereby, enhance its ability to provide important emergency services to the residents outweighs the employees' interests here too.

I have concluded that under the facts of this case the Authority has a managerial prerogative to unilaterally implement an on-call program for one plumber in order to provide emergency coverage, but must negotiate with the majority representative concerning implementation of an on-call program for more than one

plumber since it has not demonstrated a need for more than a single plumber to be on-call. Thus, the Authority violated Sections 5.4(a)(5) and, derivatively, (A)(1) of the Act by failing to negotiate with the majority representative, be that the Council or Local 24 on behalf of the Council, prior to implementing the on-call program for more than a single plumber. I reject the Authority's argument that it had met its negotiations obligation when it met on February 3, 1989, to discuss the on-call issue. The following indicia establish that negotiations did not take place: (1) the meeting was called for the purpose of addressing Local 24's grievance, not as a negotiations session; and (2) the dispute regarding the on-call program did not proceed through the Commission's impasse resolution procedures, N.J.A.C. 19:12-1.1 et seq. See State of New Jersey, H.E. No. 76-6, 2 NJPER 332 (1976) adopted P.E.R.C. No. 77-40, 3 NJPER 78 (1977). Even assuming the February 3, 1989 meeting was a negotiations session, the Authority violated the Act because it implemented the on-call program for more than one plumber on December 29, 1989, prior to the conduct of any alleged negotiating session. N.J.S.A. 34:13A-5.3; Hunterdon County, P.E.R.C. No. 87-35, 12 NJPER 768, 772, n. 4 (¶17293 1986) and P.E.R.C. No. 87-150, 13 NJPER 506 (¶18188 1987), aff'd. App. Div. Dkt. No. A-5558-86T8 (3/21/88), aff'd. 116 N.J. 322 (1989); New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84, 85 (¶4040 1978), recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd. App. Div. Dkt. No. A-2450-77 (4/2/79). Likewise, the fact

that the Authority terminated the beeper program in June, 1989, and, thereafter, made an offer to compensate[8/] the plumbers who carried beepers does not save it from having violated the Act. Hunterdon County, 12 NJPER at 768; New Brunswick.

Local 24 argues that plumbers required to be on-call should be awarded time and one-half their hourly pay for all hours that they carried beepers. Local 24 contends that there is a clearly established practice to pay the time and one-half rate to employees required to be on-call. I disagree. The facts show that 25 years ago, employees "scheduled to be available" were paid at straight rate. The Authority discontinued its practice of scheduling employees "to be available" nearly 25 years ago, thus there is no basis to claim that any particular manner of compensating employees working an on-call schedule is in effect. Consequently, I find the remedy sought by Local 24 is not clearly defined by the facts of this case and, therefore, inappropriate.

Based upon the entire record and the above analysis, I make the following:

8/ The issue of compensation for the plumbers required to be on-call and cary beepers is negotiable. County of Hunterdon, 10 NJPER at 539. The Authority has never disputed its obligation to negotiate compensation for plumbers required to work the on-call schedule and carrying beepers. The Authority has even raised as a defense in this case that in June, 1989, it offered to compensate plumbers who were affected by its action.

CONCLUSIONS OF LAW

(1) The Authority violated N.J.S.A. 34:13A-5.4(a)(5) and, derivatively, (a)(1) by unilaterally implementing an on-call program for more than one plumber and requiring that those plumbers carry beepers on weekends and nights without first negotiating with the majority representative.

(2) The Authority did not violate the Act by refusing to pay certain plumbers at the steamfitter's rate of pay.

(3) The Authority did not violate the Act by refusing to provide a copy of an air sample test to an employee.

RECOMMENDED ORDER[9/]

I recommend that the Commission ORDER the following:

A. That Respondent Housing Authority of the City of Newark cease and deist from:

1. Interfering with, restraining or coercing unit employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate concerning the institution of an on-call program for more than one plumber and the requirement that those plumbers carry beepers.[10/]

B. That the Respondent take the following affirmative action:

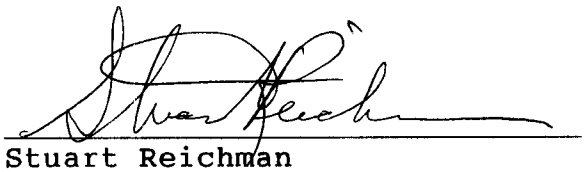
9/ My recommended order takes into account the fact that in June, 1989, the Authority rescinded the on-call program and requirement that certain plumbers carry beepers.

10/ Subsumed within my recommendation to order negotiations regarding the on-call program and requirement to carry beepers is also the issue of retroactive compensation.

1. Immediately enter into negotiations concerning the on-call program and requirement that certain plumbers carry beepers.

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

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



Stuart Reichman
Hearing Examiner

Dated: April 18, 1990
Trenton, New Jersey

Recommended Posting

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 unit employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate concerning the institution of an on-call program for more than one plumber and the requirement that those plumbers carry beepers.

WE WILL immediately enter into negotiations concerning the on-call program and requirement that certain plumbers carry beepers.

Docket No. CO-H-89-280

HOUSING AUTHORITY OF THE CITY OF NEWARK
(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, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.