P.E.R.C. NO. 79-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and- Docket No. CO-77-178-122

STATE SUPERVISORY EMPLOYEES ASSOCIATION,

Charging Party.


SYNOPSIS

The Commission adopts the findings of fact and conclusions of law contained in the Hearing Examiner's Recommended Report and Decision regarding a change in hours of certain employees represented by the charging party. Contrary to the contention of the charging party, the Commission finds that the increase in hours was not a unilateral change in terms and conditions of employment but rather brought the hours worked by the employees in question in line with the provisions of the collective negotiations agreement between the parties. The Commission found, in agreement with the Hearing Examiner, that the parties had in fact negotiated regarding the hours for these employees. Therefore, the Complaint was dismissed in its entirety.

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Charging Party.

Appearances:
For the Respondent, John J. Degnan, Attorney General of New Jersey (Melvin E. Mounts, Deputy Attorney General)

For the Charging Party, Fox and Fox, Esqs. (David I. Fox, of Counsel)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on December 29, 1976 by the State Supervisory Employees Association (the "Association") alleging that the State of New Jersey (the "State") 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".) Specifically, the Association alleges that the State violated N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (5) and (7) by unilaterally increasing the workweek of supervisory employees at Rahway State Prison from 40 hours to 42½ hours.

The charge was processed pursuant to the Commission's Rules, and it appearing to the Commission's Director of Unfair Practices that the allegations of the charge, if true, might constitute

an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on May 17, 1977. Hearings were held on August 18 and October 25, 1977 before Hearing Examiner Edmund G. Gerber at which both parties were represented and were afforded an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Both parties filed post-hearing briefs, and the Association filed a reply brief to the State's summation statement for brief. These documents were received by the Hearing Examiner by July 24, 1978. On October 13, 1978, the Hearing Examiner filed with the Commission and served on the parties his recommended report and decision, H.E. No. 79-21, 4 NJPER ___ (Para. ___ 1978), a copy of which is attached hereto and made a part hereof. Exceptions and a brief in support thereof were filed by the Association on October 27, 1978. On November 9, 1978, the State submitted a brief in opposition to the Association's exceptions and on November 15, 1978 the Association filed a letter response to the State's brief.

The Hearing Examiner concluded that the State did not violate N.J.S.A. 34:13A-5.4(a)(5) by increasing the workweek by 2½ hours. The Hearing Examiner found that Article VIII[1/] of the contract between the State and the Supervisory Employees Association clearly and unambiguously sets forth the working hours of all

1/ Article VIII, under "Hours of Work", states "...The number of hours in the work week for each job classification shall be consistent with its present designation in the State Compensation Plan". Under the State Compensation Plan the primary level supervisors are designated as 40-hour per week employees.

employees covered by this agreement. Based upon the Commission's decision in In re New Brunswick Board of Education, P.E.R.C. No. 78-47, 4 NJPER 84 (Para. ___ 1978), which declared that a contractual provision will be controlling if the language is sufficiently clear and unambiguous so that the mutual intent of the parties can be readily discerned, the Hearing Examiner determined that Article VIII took precedence over the established practice of paying the employees affected herein for lunch. Moreover, he ruled that the lunchtime responsibilities of these employees did not constitute "work" as that term was contemplated by the parties at the time the contract was negotiated.

After a thorough consideration of the record and exceptions, the Commission adopts the Hearing Examiner's findings of fact and conclusions of law.

The Association, in its brief in support of its exceptions, cites In re Passaic Township Board of Education, P.E.R.C. No. 78-42, 4 NJPER ___ (Para. ___ 1978) and In re New Brunswick Board of Education, supra, for the proposition that an increase in work hours must be negotiated. While it is clear that an employer must negotiate in good faith with the majority representative regarding number of hours in the workweek, the Commission finds that in this instance the State has fulfilled this obligation. In effect, the Charging Party maintains that in light of the long established practice of paying foremen at Rahway State Prison for lunch,

general negotiations over the work hours for a State-wide unit does not satisfy the requirement of good faith negotiations as it applies to the particular sub-unit of supervisory employees at Rahway Prison. In support of this assertion, the Association notes that the State specifically negotiated payment for lunch for state correction officers who, it is claimed, have lunch time responsibilities comparable to prison foremen.

However, we do not find these arguments to be persuasive. While the parties to an agreement involving a State-wide unit are free to carve out any number of exceptions to a provision which would otherwise apply across the board, not having done so, a contractual clause which is clear and unambiguous must be taken at face value. Furthermore, we find the Association's reliance upon the agreement between the State and the law enforcement unit to be misplaced. As Frank Mason, Director of Office of Employee Relations, indicated in his testimony, it was at the specific request of the Law Enforcement Association that negotiations were conducted over payment for lunch. Had the Supervisory Association similarly requested that the State negotiate this item, the State would have been obligated to do so. However, no such explicit request was made, and therefore the obligation to negotiate a paid lunch for Rahway foremen never arose.

Moreover, we find that the evidence contained in the record is not sufficient to demonstrate that supervisory personnel

at Rahway State Prison perform job related duties during their lunch period. As noted by the Hearing Examiner in the attached report, prison foremen do not supervise inmates while eating lunch nor are they required to be available for the same type of emergencies as correction officers.

Therefore, the Commission endorses the Hearing Examiner's finding that the State's obligation to negotiate work hours per week ended once an agreement containing a clear and unambiguous provision covering such an item had been executed. We wish to specifically note our agreement with the statement contained in note 5 of the Hearing Examiner's Report to the effect that changes in reporting and dismissal times are required subjects of negotiations. 2/ However, we also agree that this issue was not litigated in the proceeding.

It is hereby ORDERED that the Complaint is dismissed in its entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Parcells, Hipp and Schwartz voted for this decision. None opposed. Commissioner Graves was not present.

DATED: Trenton, New Jersey
December 14, 1978

ISSUED: December 15, 1978

2/ See Galloway Township Board of Ed. v. Galloway Township Ass'n of Educational Secys., 78 N.J. 1 (1978); In re Hillside Board of Education, 1 NJPER 5, P.E.R.C. No. 76-11 (1975).

H.E. No. 79-21

STATE OF NEW JERSEY
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RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-77-178-122

STATE SUPERVISORY EMPLOYEES
ASSOCIATION,

Charging Party.

## SYNOPSIS

On October 23, 1976, the hours of Primary Level Supervisory Employees at Rahway State Prison were changed by the State from 7:50 a.m. until 3:50 p.m. to 7:30 a.m. until 4 p.m. The State Supervisory Employees Association filed an Unfair Practice Charge with the Public Employment Relations Commission claiming that such a change was a unilateral change in the working conditions and accordingly was an unfair practice. The State maintained this was done to bring the hours worked by these employees in line with the provisions of the collective negotiations contract between the parties.

In a Hearing Examiner's Recommended Report and Decision to the Commission, a Hearing Examiner recommended this matter be dismissed in its entirety since the actions taken by the State were in accordance with the collective negotiations contract.

A Hearing Examiner's Recommended Report and Decision is not a final administrative action 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. 79-21

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Appearances:

For the Respondent
John J. Degnan, Attorney General of New Jersey
(Melvin Mounts, Deputy Attorney General)

For the Charging Party
Fox and Fox, Esqs.
(David I. Fox, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On December 29, 1976, the State Supervisory Employees Association ("Association") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the State of New Jersey ("State") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act ("Act"), as amended, N.J.S.A. 34:13A-1 et seq. Specifically, the Association claims the State violated §5.4(a)(5) 1/ by unilaterally increasing the workweek of supervisory employees at the Rahway State Prison from 40 hours to 42½ hours.

1/ Section 5.4(a)(5) makes it an unfair practice for an employer to refuse 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.

It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on May 17, 1977. Hearings were held on August 18, 1977, and October 25, 1977. 2/ It is undisputed that on October 23, 1976, the hours of Primary Level Supervisory Employees at Rahway State Prison were changed from 7:50 a.m. until 3:50 p.m. to 7:30 a.m. until 4 p.m. The State argues that this was done to bring these employees in line with the existing contract between the parties and, accordingly, it had no obligation to negotiate this change. Article VIII-A.1 of the Agreement between the parties provides that "the number of hours in the workweek for each job classification within the unit shall be consistent with its present designation in the State Compensation Plan." Under the State Compensation Plan the Primary Level Supervisors, i.e. foremen, are designated as 40-hour employees. It is undisputed that most other State employees governed by the State Compensation Plan are not paid for their lunch hours and it is the State's position that the employees in question should not be paid either. The Association maintains that these employees have worked the old schedule for many years, they had always worked during the lunch period and the State actions effectively raised their work hours from 40 to 42½ hours.

The foremen are not allowed to leave the prison during their lunch period for both security reasons and the necessity of their availability in case of an emergency. 3/ The Association points out that correction officers at the prison are paid for their lunch period and, accordingly, so should they. Frank Mason, the Director of the Office of Employee Relations for the State, testified however that correction officers are paid for their lunch period for three reasons: 1) They must eat in the institution; 2) they continuously supervise inmates during the lunch period, and 3) they eat in close proximity to the inmates and must observe all activities and be available for immediate duty. The Association claims

2/ Both parties were given an opportunity to examine witnesses, to present evidence, and to argue orally. Both parties filed post-hearing briefs, and the Association filed a reply brief to the State's summation statement for brief. These documents were received by the Commission by July 24, 1978.

An unfair practice having been filed with the Commission, questions concerning the alleged violations of the Act exist and this matter is appropriately before the Commission for determination.

3/ Vol. I, pp. 11, 49, 69, 79 and 84.

that the employees in question also meet these guidelines and should be likewise paid for their lunch periods. Unlike the correction officers, the foremen, although they eat in the institution, do not have to supervise inmates and are not required to be available for the same type of emergencies as a correction officer. More importantly, the concept of a paid lunch was specifically negotiated by the correction officers and is expressly provided for by the agreement between the State of New Jersey and the State Law Enforcement Conference of the New Jersey State Police Benevolent Association. The undersigned does not find the precedent set by the correction officers' lunch procedures to be controlling.

There was extensive testimony concerning the number of times different foremen had missed their lunch period either because they had been called out on emergencies during lunch or the nature of the work they were performing required them to remain on the job site during lunch. The estimates of the frequency with which these foremen missed lunch varied all the way from once a month to three times a week.

It is undisputed that the foremen who miss their regular lunch period can eat at a later time. Hot meals are served continuously in the officers' dining room from 9 a.m. to 5 p.m. and food is available during the entire day and can be sent to different places around the prison. On balance, it is quite clear that the employees within this unit are not required to work during the lunch periods for most days. There are times however when they had to work through the lunch either to finish a project or to handle an emergency. But it cannot be forgotten that the procedures for taking lunch were the same before the imposition of the new schedule and remained unchanged by the new hours. These employees had their lunch period interrupted before the imposition of the new work hours as well as after and, as before, they were afforded an opportunity to receive lunch on the job or take lunch later in the day. (It is noted that for security reasons employees cannot bring their own lunches into the prison. Rather, they eat meals provided by the institution.)

Significantly, the testimony does not show that even with the imposition of the new hours, these employees worked more than the 40 hours required by the contract. In, In re New Brunswick Board of Education, P.E.R.C. No. 78-47, 4 NJPER 84

(¶4040, 1978), motion for reconsideration denied P.E.R.C. No. 78-56, 4 NJPER ___, appeal pending App. Div. Docket No. A-240-50-77, the Commission stated [4] that where there is sufficiently clear and unambiguous language in the contract with respect to an issue that the mutual intent of the parties can be discerned with no other guide than a simple reading of the language, that contract language is controlling. Here the language of the contract is clear and controlling. The employer simply brought the total hours of work into line with the contract. [5]

Having failed to prove by a preponderance of the evidence that the State unilaterally increased the hours of work of the Primary Level Supervisors at the Rahway State Prison, the undersigned will recommend to the Commission that they dismiss the complaint in this matter in its entirety.

## ORDER

For the reasons set forth it is recommended that the Complaint in this matter be dismissed in its entirety.

Edmund G. Gerber
Hearing Examiner

DATED: Trenton, New Jersey
October 13, 1978

[4] In reaching an opposite conclusion under the facts of that case.

[5] It is noted that a change in the reporting and dismissal time is a change in the terms and conditions of employment. Board of Education of Township of Willingboro, P.E.R.C. No. 78-20, 3 NJPER 369 (1977), but this issue was not before the Hearing Examiner and was not considered.