P.E.R.C. NO. 2012-24

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and- Docket No. CO-2009-160

FRATERNAL ORDER OF POLICE
LODGE 174, NEW JERSEY
INVESTIGATORS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission considers exceptions to a Hearing Examiner's recommended decision and dismisses the Complaint in an unfair practice proceeding filed by FOP Lodge 174 New Jersey Investigators Association against the State of New Jersey. The charge alleges that the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1) and (5) when it did not negotiate the impact of the decision to cease permitting employees to commute in their State vehicles. The parties filed cross-motions for summary judgment. The Commission affirms the Hearing Examiner's grant of summary judgment to the State finding that the evidence that is properly in the record does not establish a violation of the Act. The Commission grants the FOP's second exceptions and excludes evidence of settlement discussions relied upon in the initial decision from its consideration of the relevant facts.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent Paula T. Dow, Attorney General
(Sally Ann Fields, Senior Deputy Attorney General)

For the Charging Party Loccke, Correia, Limsky, Bukosky, attorneys (Marcia Tapia, of counsel)

DECISION

Fraternal Order of Police Lodge 174, New Jersey Investigators Association, has filed exceptions to a Hearing Examiner's report (H.E. No. 2011-7, 37 NJPER 70 (¶26 2011) issued in an unfair practice case, denying the FOP's motion for summary judgment and granting a cross-motion for summary judgment filed by the State of New Jersey. The Hearing Examiner found that material facts were not in dispute and that the State was entitled to dismissal as a matter of law. We hold that the undisputed facts, that are properly in the record, warrant dismissal of the case.

A complaint was issued on an unfair practice charge filed by the FOP against the State claiming violations of N.J.S.A. 34:13A-5.4a(1), and (5).[1/] The charge alleged that the State violated the Act when it failed to negotiate over the impact of the loss of use of State vehicles for commuting on unit members.[2/]

The FOP's motion for summary judgment was referred to the Hearing Examiner. N.J.A.C. 19:14-4.8(a). Thereafter, the State filed its cross-motion.

The Hearing Examiner found, that for many years, JJC investigators were permitted to use the State's vehicles to commute to and from work because they would frequently report directly to an assignment or be called to report to a scene on short notice. When they applied for jobs, the investigators were told that a vehicle would be provided for their commute.

On September 8, 2008, the JJC issued a directive that stated, in pertinent part, that, effective October 1, State

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1/ These provisions 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/ The FOP represents approximately 111 employees in the titles of investigator, senior investigator and principal investigator assigned to the Department of Corrections, the Juvenile Justice Commission and the State Parole Board.

vehicles would no longer be provided to JJC investigators to use for their commute.[3/]

On September 19, 2008, counsel for the FOP wrote to the Director of the State's Office of Employee Relations (OER) asserting that the pending loss of the use of the vehicles by unit employees, if implemented, would constitute a unilateral alteration of a term and condition of employment without negotiations and a violation of the Act.[4/] The letter, which does not refer to the JJC, requests:

- Impact negotiations on terms and conditions of employment affected by the proposed change;
- That prior to such negotiations, the State cease and desist from any unilateral change;
- If any changes had been made, that the State restore the status quo by "continuing the previous practice regarding the use of vehicles by unit members."

The letter concludes by stating that, in the absence of a response to the request for negotiations and demand that the State preserve the status quo, the FOP would file unfair practice charges and/or claims in other State or Federal forums.

On November 5, 2008, after OER determined that the JJC had altered its vehicle policy, the FOP filed its charge.

3/ The State's Office of Employee Relations was apparently unaware of this directive at the time it was issued.

4/ The letter cites Court and Commission case law and asks that it be sent to the appropriate State officials and/or outside counsel.

The Hearing Examiner found that, in February and April 2009, representatives of the State and the FOP met to try to settle their dispute.[5/] One meeting was held in person and the other by telephone conference call. These efforts proved unsuccessful. During meetings conducted at the Commission, both before and after a Complaint issued, efforts to settle the case continued.

The Hearing Examiner observed, citing Morris Cty. and Morris Cty. Park Comm., P.E.R.C. No. 83-31, 8 NJPER 561 (¶13259 1982), aff'd 10 NJPER 103 (¶15052 App. Div. 1984), certif. den. 97 N.J. 672 (1984), that the State had a managerial prerogative to limit the use of its vehicles, but also had the duty to negotiate on request over offsetting compensation for employees who lost the use of State-owned vehicles for commuting.[6/] Using that standard, she found that there were no material facts in dispute and held that the State was entitled to a judgment dismissing the case as a matter of law. The Hearing Examiner cited these factors:

- The FOP did not set forth any facts that showed bad faith on behalf of the State.
- The State did not refuse to meet, discuss, or respond to the FOP as evidenced by both face-to-face settlement discussions and further efforts conducted at the Commission.

5/ Exploratory conferences that had been scheduled as part of the processing of the FOP's charge, were postponed so that the parties could meet on their own to try and resolve the dispute.

6/ The use of an employer vehicle for commuting can be a reportable form of compensation. See N.J. Turnpike Auth., P.E.R.C. No. 2010-68, 36 NJPER 68 (¶32 2010)

- The FOP did not wish to continue to meet, and declined to have the issue included as part of the parties pending interest arbitration.

- The FOP rejected the State's offer of monetary compensation at the parties' last meeting.

- The FOP did not make a counter-proposal and instead pursued its unfair practice charge.

She concluded:

> The only possible favorable outcome for the Association in this litigation would be an order to negotiate. The State has demonstrated through its actions its willingness to and, indeed, has negotiated. To continue this litigation, therefore, is contrary to the policies of our Act that encourage prompt settlement of labor disputes. Based upon the totality of the parties' conduct, I do not find that the State refused to negotiate or negotiated in bad faith without a desire to reach an agreement. Under these circumstances, there are no material facts in dispute and the State is entitled to relief as a matter of law.
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> [37 NJPER at 72].

The FOP has filed two exceptions.[7/] First, it asserts that the State had to negotiate prior to taking away vehicles unit members had used for commuting. Second, that the Hearing Examiner improperly relied upon settlement talks conducted during the processing of the unfair practice charge as evidence of the State's satisfaction of its statutory duty to negotiate.

7/ We reject the State's argument that the FOP's exceptions do not conform to N.J.A.C. 19:14-7.3.

We reject the exception that the State was obligated to negotiate prior to implementing its reduction of the number of employees who could use State-owned vehicles for commuting. That decision was a managerial prerogative. While the JJC policy allegedly changed mandatorily negotiable terms and conditions of employment, and was severable from the policy decision, the FOP's insistence that a negotiated settlement on those severable topics had to be reached before the directive was implemented would, as a practical matter, delay implementation of the change in policy and, as a matter of law, is not supported by the rulings in other unfair practice cases involving similar facts.

In Morris Cty. Park Comm., the employer denied that it had an obligation to negotiate over its decision concerning the use of its vehicles and the majority representative asserted that the directive altered existing working conditions. The Commission held:

> Section 5.3 of our Act provides in part: "Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." We believe that the directive modified an existing rule governing a working condition because it reduced a form of compensation which, through an established past practice, had risen to the level of a negotiated benefit. To that extent, the directive violates our Act just as would a directive reducing an employee's salary where record evidence demonstrates that part of the salary reflected a compensation offset for transportation expenses. However, we also

> believe that the County has a right to deploy its vehicles as it sees fit, a right the directive implements. To that extent, the directive does not violate our Act. The appropriate solution, which we adopt, is to uphold the directive's restrictions on using County vehicles, but to require the County to negotiate over offsetting compensation for those employees who have lost the economic benefit of using a County vehicle to commute, a mutually recognized and longstanding benefit.[8/]
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> [8 NJPER at 562]

And, in N.J. Tpk. Auth. and N.J. Tpk. Supervisors Ass'n, H.E. No. 93-1, 18 NJPER 381 (¶23171) 1992 NJ PERC LEXIS 283, adopted P.E.R.C. No. 93-72, 19 NJPER 154 (¶24077 1993), 1993 NJ PERC LEXIS 189, the Hearing Examiner found that, although the employer acknowledged that a negotiations obligation existed concerning the severable consequences of changing its policy on the use of Authority vehicles for commuting, the employer violated the Act by insisting that such negotiations be part of contract talks for a successor agreement. She reasoned:

> Although it may have been convenient for the Authority to postpone negotiations until the parties began their overall negotiations in December 1990, the Authority's obligation to negotiate the separate, severable issue arose when the Association made its demands in the spring of 1990. Unit members were suffering an immediate economic loss which the Authority could not delay addressing.

8/ The Appellate Division of the Superior Court specifically agreed with the Commission's method of accommodating the competing interests of the employer and the affected employees. 10 NJPER at 103-104.

> The Association requests as a remedy that the Authority restore affected unit members to the status quo ante and return the recalled cars. This remedy is inappropriate. The appropriate remedy must balance the employer's non-negotiable right to restrict the use of its vehicles with the union's right to negotiate compensation for a lost benefit. Morris Cty. Therefore, I recommend that the parties negotiate immediately over offsetting compensation for those unit members whose cars have been recalled.
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> [18 NJPER at 382]

Both of these cases confirm that the difference between the emergence of a public employer's obligation to negotiate in cases solely involving unilateral changes in negotiable working conditions and when that obligation ripens in cases like Morris Cty., N.J. Tpk. Auth., and this case, where the exercise of a managerial prerogative also changes working conditions. Those issues must be addressed without impeding managerial decisions.

In unilateral change cases involving mandatorily negotiable topics, N.J.S.A. 34:13A-5.3's "proposed new rules" language imposes an affirmative duty to negotiate prior to making the change. See Hunterdon Cty. and CWA, 116 N.J. 322, 327, 331-332 (1989) (Act bars unilateral employer action changing compensation).[9/] In the mixed cases involving managerial policy

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9/ Cf. University of Medicine and Dentistry, P.E.R.C. No. 2010-98, 36 NJPER 245 (¶90 2010) (Employer's negotiations obligation over non-contractual terms and conditions of employment is to negotiate in good faith to impasse. Exhaustion of formal impasse procedures is not required

(continued...)

changes that result in severable alterations in working conditions, the duty to negotiate arises only where the majority representative makes a demand. An employer need not delay its managerial changes until negotiations on the severable issues are complete. Thus, the State was not required to begin and/or complete negotiations before the JJC changed its vehicle policy.

We grant, in part, the second exception because the Hearing Examiner should not, in deciding the merits of the FOP's charge, have relied on accounts of settlement discussions, conducted as part of the unfair practice case processing, or on the positions taken by the FOP with respect to settlement offers.[10/] In particular, we do not consider these factors, in making our determination: that the FOP declined to have the issue resolved in the parties' pending interest arbitration; that the FOP rejected the State's offer of monetary compensation; and that the FOP did not make a counter-proposal and pursued its charge.[11/]

9/ (...continued)
prior to implementation.)

10/ N.J.A.C. 19:14-1.6(d) provides that certain information given to Commission staff is confidential and shall not be divulged in any proceeding. And, both the courts and the Commission follow the evidentiary rule that offers to compromise are not admissible to prove that a disputed claim has, or lacks, merit. See Kas Oriental Rugs, Inc. v. Ellman, 394 N.J. Super. 278, 283 (App. Div. 2007); Township of Mantua, P.E.R.C. No. 82-99, 8 NJPER 302, 303 (¶13133 1982).

11/ Unlike N.J. Tpk. Auth. and N.J. Tpk. Supervisors Ass'n, the record does not show that the State insisted that the impact
(continued...)

However, we concur with her conclusion that the State did not breach its negotiations obligations given its right to curtail the use of State vehicles for commuting and the voluntary face to face meetings between the State and the FOP in February and April 2009, held to seek a resolution of the dispute over the severable effects of that decision on terms and conditions of employment.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Krengel, Voos and Wall voted in favor of this decision. None opposed. Commissioner Jones recused himself.

ISSUED: November 22, 2011

Trenton, New Jersey

11/ (...continued)
of the loss of vehicles be part of interest arbitration.