P.E.R.C. NO. 87-150

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HUNTERDON COUNTY BOARD OF CHOSEN FREEHOLDERS,

Respondent,

-and-

Docket No. CO-85-335-94

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Hunterdon County Board of Chosen Freeholders violated the New Jersey Employer-Employee Relations Act when it unilaterally terminated its Safety Incentive Demonstration Program. The Commission finds that the program was mandatorily negotiable and that the County terminated it in retaliation against the CWA's filing an earlier unfair practice charge contesting the program's enactment.

P.E.R.C. NO. 87-150

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HUNTERDON COUNTY BOARD OF CHOSEN FREEHOLDERS,

Respondent,

-and- Docket No. CO-85-335-94

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Gaetano M. DeSapio, Esq.

For the Charging Party, Steven P. Weissman, Esq.

DECISION AND ORDER

On September 26, 1986, we decided Hunterdon Cty. Freeholders Bd., P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986). We held that the County 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) when it unilaterally instituted its safety incentive demonstration program. That program provided for cash payments as an award for employees who avoid or reduce on-the-job injuries for a one-year period. We found that the County was obligated to negotiate with CWA before implementing this program since CWA was the majority representative of the affected employees and the program was mandatorily negotiable.

We also found that the Hearing Examiner erred in dismissing the charge's remaining allegation that the County violated the Act when it unilaterally terminated the program to retaliate against CWA for filing the charge. We found that CWA established a prima facie case that the County's unilateral cessation of the program violated subsections 5.4(a)(3),(4) and (5). We, therefore, remanded that portion of the case concerning the program's cessation to allow the County to present evidence showing that the action occurred for legitimate reasons, thus rebutting the prima facie violation of subsections 5.4(a)(3) and (4), or that CWA indicated that it did not want the program to continue, thus rebutting the prima facie violations of subsection 5.4(a)(5).[1/] Because the case was remanded, we declined to consider the appropriate remedy for the County's unilateral institution of the program.

On December 19, 1986, Hearing Examiner Alan R. Howe conducted the remand hearing. The parties examined witnesses and argued orally. They waived post-hearing briefs.

On February 11, 1987, the Hearing Examiner issued his report and recommended decision. H.E. No. 87-47, 13 NJPER ___ (¶ 1987). He found that the program's unilateral termination violated subsections 5.4(a)(1) and (5) because CWA did not consent

---

1/ The County would not have violated 5.4(a)(5) if CWA had agreed that the program be terminated.

to its termination and also violated subsections 5.4(a)(1), (3) and (4) because the County failed to establish that it terminated the program for legitimate business reasons. As a remedy, he recommended pro rata cash payments for employees who qualified for payments between from January 1, 1985 and November 12, 1985, the date the County discontinued the program. He also recommended a cease and desist order and a notice of the violation.

On March 5, 1987, the County filed exceptions. It repeats the exceptions it previously filed and adds one more: The County should not be found guilty of an unfair practice for eliminating a program that offended the union.2/

On March 13, 1987, CWA responded to the exceptions and filed cross-exceptions. It contends that the exceptions are irrelevant because they pertain to the original decision. CWA excepts to the remedy, contending that eligible employees should receive the full amount of the bonuses to which they would have been entitled had the program not been unilaterally discontinued.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 8-13) are accurate. We adopt and incorporate them here.

Except for the exceptions concerning the proposed remedy, we have already rejected the County's previously filed exceptions so we need not discuss them here. The issues we now face arise out of

---

2/ It also requested oral argument. We deny that request.

the program's termination and turn on the legal principles set out in Hunterdon Cty.

The first issue is whether the unilateral termination violated subsections 5.4(a)(1) and (5). We hold that it did. We remanded so that the County would have the opportunity to support its defense that CWA consented to the termination. The facts, based upon the entire record, establish that CWA made clear to the County that it wanted the program to continue through 1985 and did not consent to its termination.

We next consider whether the termination violated subsections 5.4(a)(3) and (4). We hold that it did. We remanded to give the County the opportunity to show it acted for a legitimate business reason. Its reason for terminating the program was as follows:

> Well, we were -- seemed to have quite a lot of problems with the union in litigation. It was time consuming on both of our parts, County Counsel's time, our union representatives leaving work coming down here testifying, all this stuff. So, if they don't want the program, we'll just terminate it. That'll solve the litigation, and everybody can go back to work, that's what we are all there for.

This reason does not constitute a legitimate business justification under Bridgewater. First, the County did not have the right to terminate the program unilaterally. That, as we have seen, would not solve the litigation. See also Hunterdon Cty. Second, the evidence establishes that the County was pleased with the program, and terminated it only when the union complained. Third, that

testimony supports finding a violation: the County terminated the program because the union filed the unfair practice charge.We therefore find that the County violated subsection 5.4(a)(3) and (4) by discriminating against the employees because CWA filed the unfair practice charge.

We now consider the appropriate remedy. We agree with the Hearing Examiner that a cease and desist order and notice are appropriate. We believe, however, that his affirmative relief recommendation should be modified to include a monetary remedy for the entire year since that is what the eligible employees would have received if the program had not been illegally terminated.3/ We also believe that interest should not run from July 1, 1985 as recommended by the Hearing Examiner. Rather, it should run from January 15, 1986 since eligible employees would not have received payments until the conclusion of the program if the program had not been terminated. Interest should be calculated at the rate authorized by R. 4:42-11. Collingswood Bd. of Ed., P.E.R.C. No. 86-50, 11 NJPER 694, 700 (¶16240 1985). The record establishes that CWA consented to the program's termination as of January 1, 1986.

ORDER

The County of Hunterdon is ordered to:

A. Cease and desist from:

---

3/ The program was based on the 1985 calendar year.

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act by unilaterally implementing a safety incentive demonstration program and by terminating that program.

2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by this Act, particularly by terminating the safety program because CWA filed an unfair practice charge.

3. Discriminating against employees because they have signed or filed an affidavit, petition or complaint, particularly by terminating the safety program because CWA filed an unfair practice charge.

4. 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, particularly by unilaterally implementing and terminating the safety program.

B. Take the following affirmative action:

1. Pay to those employees who would have qualified under the 1985 safety program the cash awards they would have received if the program was not terminated plus interest from January 15, 1986 at the rate authorized by R. 4:42-11.

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 on forms to be provided by the

Commission shall be posted immediately upon receipt thereof 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 herewith.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
May 20, 1987
ISSUED: May 21, 1987

P.E.R.C. NO. 87-150 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 cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act by unilaterally implementing a safety incentive demonstration program and by terminating that program.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by this Act, particularly by terminating the program because CWA filed an unfair practice charge.

WE WILL cease and desist from discriminating against employees because they have signed or filed an affidavit, petition or complaint, particularly by terminating the safety program because CWA filed an unfair practice charge.

WE WILL cease and desist from 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, particularly by unilaterally implementing and terminating the safety program.

WE WILL pay to those employees who would have qualified under the 1985 safety program the cash awards they would have received if the program was not terminated plus interest from January 15, 1986 at the rate authorized by R. 4:42-11.

Docket No. CO-85-335-94 HUNTERDON COUNTY BOARD OF CHOSEN FREEHOLDERS

(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.

H.E. NO. 87-47

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

In the Matter of

HUNTERDON COUNTY BOARD OF
CHOSEN FREEHOLDERS,

Respondent,

-and- Docket No. CO-85-335-94

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.


SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent County violated §§5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when, effective January 1, 1985, it unilaterally and without negotiations with CWA established a Safety Incentive Demonstration Program for employees in the Road and Bridge Department, which Program provided for cash awards of between $50 and $100 for employees with exemplary safety records during the calendar year 1985. The Hearing Examiner found that the statute authorizing the creation of such a program was not preempted from negotiations. The Hearing Examiner likewise found a violation of the Act when the County unilaterally terminated the Program on November 12, 1985, without notice to or negotiations with CWA.

The Hearing Examiner also recommends that the Commission find that the County violated §§5.4(a)(3) and (4) of the Act by its conduct on November 12, 1985, in terminating the Program since the County's action was in retaliation for views expressed by CWA at an exploratory conference and by having filed the Unfair Practice Charge in June 1985.

By way of remedy, the Hearing Examiner ordered payment with interest of the pro rata amount of the cash awards which would have been due to eligible employees had the Program not been unilaterally discontinued on November 12, 1985.

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. 87-47

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

In the Matter of

HUNTERDON COUNTY BOARD OF
CHOSEN FREEHOLDERS,

Respondent,

-and- Docket No. CO-85-335-94

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

Appearances:

For the Respondent
Gaetano M. DeSapio, Esq.

For the Charging Party
Steven P. Weissman, Esq.

HEARING EXAMINER'S RECOMMENDED REPORT
AND DECISION ON REMAND BY THE COMMISSION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on June 21, 1985, and amended on December 13, 1985, by the Communications Workers of America, AFL-CIO (hereinafter the "Charging Party" or the "CWA") alleging that the Hunterdon County Board of Chosen Freeholders (hereinafter the "Respondent" or the "County") has 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. (hereinafter the "Act"), in that on December 28, 1984, the County Engineer established a Safety Incentive Program for all employees of the County's Road and Bridge Department, which provided for cash awards to employees represented by the CWA; further the said Program was not negotiated with the CWA; following a Commission-conducted exploratory conference on October 28, 1985, where the CWA proposed that the existing Program be maintained in effect until December 31, 1985, and that a new Program be negotiated with the CWA, effective January 1, 1986, the County unilaterally terminated the program on November 12, 1985, in retaliation for CWA having filed the initial Unfair Practice Charge, all of which is alleged to be violation of N.J.S.A. 34:13A-5.4(a)(1), (3), (4) and (5) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued

---

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; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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."

on January 10, 1986. Pursuant to the Complaint and Notice of Hearing, a hearing was held on May 5, 1986, in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. At the conclusion of the Charging Party's case, the Respondent moved to dismiss the allegations in the Unfair Practice Charge, as amended, which allege a violation by the County of N.J.S.A. 34:13A-5.4(a)(4) only. The Hearing Examiner at that time reserved decision on the Respondent's motion to dismiss, stating that the Respondent need not adduce any evidence by way of defense, the parties having previously stipulated the necessary facts for adjudication by the Hearing Examiner of CWA's charge of a violation by the Respondent of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5). The parties filed post-hearing briefs by June 2, 1986.

The Hearing Examiner filed his Recommended Report and Decision (H.E. No. 86-62, 12 NJPER 500 (¶17188 1986)) on June 10, 1986, in which he concluded that the County violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it unilaterally and without negotiations with the CWA established and implemented a Safety Incentive Demonstration Program ("Program") for employees in its Road and Bridge Department, effective January 1, 1985. However, the Hearing Examiner concluded that the Respondent County did not violate N.J.S.A. 34:13A-5.4(a)(3) or (4) by its conduct as will be set forth again hereinafter.

The Hearing Examiner recommended that the Respondent County be ordered to cease and desist from refusing to negotiate in good faith with CWA regarding the implementation of the Program, or any like program recognizing employee performance, which contains an economic component. The Hearing Examiner further recommended that the Respondent County be ordered to cease and desist from resuming the Program, or any like program recognizing employee performance, which contains an economic component until such time as the County has negotiated the issue in good faith with CWA. Finally, the Hearing Examiner recommended that the Respondent County be ordered to make payment forthwith, with interest at the rate of 9.5% per annum from July 1, 1985, the prorated share of the cash awards due to eligible employees in the Road and Bridge Department and he set forth a formula for the making of such payments with interest. The Hearing Examiner also recommended that the allegations that the Respondent County violated N.J.S.A. 34:13A-5.4(a)(3) and (4) be dismissed in their entirety.

On September 26, 1986, the Commission issued its decision in this matter (P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986), in which it remanded the case to the Hearing Examiner for further proceedings in order that the Respondent County be given the opportunity to present evidence, which "...under Bridgewater[2/]

---

2/ See Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235, 242, 246 (1984).

would rebut a prima facie case and/or establish that the action occurred for legitimate reasons...." The background to this remand by the Commission is as follows:

1. The Commission agreed with the Hearing Examiner that the County's unilateral institution of the Program on December 28, 1984, violated §§5.4(a)(1) and (5) of the Act (12 NJPER at 771).

2. The Commission next considered the §5.4(a)(3) allegation in the Unfair Practice Charge, as amended, vis-a-vis the November 12, 1985 decision of the County to discontinue unilaterally the Program. In this instance, the Hearing Examiner had in his Recommended Report and Decision, supra, concluded that the Respondent County had not violated §5.4(a)(3) of the Act.[3/] The Commission concluded that the CWA had established a prima facie case that this subsection of the Act had been violated, utilizing the scintilla analysis in New Jersey Tpk. Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979) and Bridgewater, supra. Here, the Commission in its remand concluded that the filing of the initial Unfair Practice Charge was protected, that the employer knew of the filing and that there was at least indirect evidence of hostility toward CWA by the Respondent County (12 NJPER at 771).

3. The Commission next considered the §5.4(a)(4) allegation in the Unfair Practice Charge, as amended, and concluded that CWA had established a prima facie violation of this subsection

---

3/ See 12 NJPER at 502.

of the Act, having decided that it could infer that the Program was unilaterally discontinued on November 12, 1985, because of CWA having filed its initial Unfair Practice Charge and having stated its position that it wished to negotiate further with the County at the exploratory conference on October 28, 1985. The Commission noted that the County had not previously indicated any dissatisfaction with the Program before its unilateral discontinuance (12 NJPER at 771).

4. The Commission further concluded that CWA had presented sufficient evidence to establish a prima facie case that the unilateral discontinuance of the Program on November 12, 1985, violated §5.4(a)(5) of the Act. The Commission proceeded to conclude that just as the County's initial institution of the Program violated §5.4(a)(5) of the Act, CWA had presented sufficient evidence to establish a prima facie case that its unilateral termination violated the Act. The Commission rejected the County's defense that it simply returned to the status quo, emphasizing that the County's action, both in instituting and in terminating the Program, was unilateral. The Commission then stated that it was holding that an employer, which unilaterally grants favorable benefits contrary to its statutory duty to negotiate, may not unilaterally terminate such benefits absent a request to do so by the union, adding that the employer "...is obligated to negotiate with the union before again unilaterally changing such benefits..." (citing cases from the private sector)(12 NJPER at 772).

5. In sum, the Commission, in its remand to the Hearing Examiner, concluded that the CWA had established a prima facie case that the employer had violated the Act. The Commission stated, as noted previously, that it had held only that a "...prima facie case was established. The County must be given the opportunity to present evidence which, under Bridgewater, would rebut a prima facie case and/or establish that the action occurred for legitimate business reasons..." (12 NJPER at 772).[4/] Pursuant to the remand, supra, a further and final hearing was held in Trenton, New Jersey, on December 19, 1986. Both parties presented relevant evidence through additional examination of witnesses. Both parties argued orally (2 Tr. 59-75) and off the record waived the filing of further briefs in this matter.

An Unfair practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the initial post-hearing briefs of the parties, and the oral argument of counsel at the remand hearing, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record in this case, the Hearing Examiner makes the following:

---

4/ The Hearing Examiner assumes for purposes of his decision on remand that the Commission intended that the Bridgewater analysis be applied only to the alleged §§5.4(a)(3) and (4) violations of the Act and not to the §5.4(a)(5) since discriminatory motivation is not relevant to an (a)(5).

## FINDINGS OF FACT[5/]

1. The Hunterdon County Board of Chosen Freeholders is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Communications Workers of America, AFL-CIO, is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. CWA is the collective negotiations representative for a unit of blue and white collar employees employed by the County, including employees in the Road and Bridge Department. A copy of Article 1, the recognition clause in the 1984-85 collective negotiations agreement, was received in evidence as Exhibit J-1.

4. Pursuant to N.J.S.A. 40A:5-31 and 9-18 the County established on December 28, 1984, a Safety Incentive Demonstration Program ("Program") for employees of the County's Road and Bridge Department, effective January 1, 1985. The objective and terms of the Program were set forth in a memo to all employees of the Road and Bridge Department by the County Engineer, David W. Stem, on December 28, 1984 (J-2). CWA received notice of the establishment

---

5/ This decision on remand incorporates all previous Findings of Fact together with those made on the basis of the evidence adduced at the remand hearing on December 19, 1986, supra.

of the Program in the same manner as all other employees of the Road and Bridge Department.[6/]

5. The Program was established and implemented by the County without negotiations with CWA and CWA at no time demanded negotiations after implementation of the Program.

6. Clarence H. Bodine, Jr., the Personnel Director of the County, testified that after the issuance of J-2 on December 28, 1984, he first heard of a complaint by CWA when the County received notice of the filing of the Unfair Practice Charge on June 21, 1985.

6. On October 28, 1985, a Commission designee conducted an exploratory conference with respect to the Unfair Practice Charge of June 21, 1985, supra. Present for CWA was Alan B. Kaufman, a representative, and Andrew Weiman, the President of CWA Local 1035 (1 Tr 17). Present for the County was its counsel, Gaetano M. DeSapio, and Bodine (1 Tr 17).[7/] As to what transpired at the exploratory conference on October 28, 1985, supra, the testimony was as follows:

---

6/ The CWA regularly receives minutes of the meetings of the Board of Chosen Freeholders and, some time during January 1985, CWA received the minutes of the meeting of December 28, 1984, when the Program was established, supra.

7/ Any confusion as to who attended this conference on behalf of the parties was eliminated at the second hearing on December 19, 1986 (2 Tr 9, 15, 17, 25).

a. Bodine testified that CWA stated that it wanted to discuss various aspects of the Program and that the union had numerous problems and complaints with it, to which the County's representatives responded that they would have to get back and discuss the matter with the Freeholders (2 Tr 15, 16). Bodine testified without contradiction that the response of the CWA's representatives was "No," there would have to be another meeting for that (2 Tr 16). Finally, Bodine testified that the County needed to know the various objections to the Program by CWA so that it could be discussed before the Freeholders "...and maybe...change the Program to their (CWA's) satisfaction..." (2 Tr 17).

b. Kaufman testified in much more detail as to what transpired at the exploratory conference, supra, namely, CWA's statement of position: (1) that it wanted the Program to continue until the end of the year since there were employees who would have been eligible for a bonus and CWA did not want them to lose it and; (2) that CWA desired to commence negotiations for a new Program, which would begin with the new year in 1986,and which would meet some of the objections raised by CWA to the present Program (1 Tr 17, 24-28; CP-1; 2 Tr 24).

c. During a caucus between Kaufman and Weiman they developed a written statement of their position (CP-1, supra), which provided for (1) the negotiation of a new program; (2) the keeping of the existing Program in effect

until December 31, 1985, with payment to be made to whichever employees were entitled; (3) the current Program to expire December 31, 1985; and (4) no new program as of January 1, 1986, unless negotiated (1 Tr 25-28; 2 Tr 47, 48). The unequivocal testimony of Kaufman that CWA related the contents of CP-1, supra, to the representatives of the County on October 28th is credited (1 Tr 36-38, 41, 42). Also, the Hearing Examiner credits the testimony of Kaufman that the County's response to the contents of CP-1, as related by CWA, was that the subject matter was non-negotiable (1 Tr 28, 40, 41, 43, 44; 2 Tr 25).

d. Kaufman acknowledged freely that at the October 28, 1985, exploratory conference he did, on behalf of the CWA, raise a number of unfair aspects of the Program aside from the monetary aspects of it, i.e., (1) the size of crews vis-a-vis the failure to report accidents and (2) that it was not fair to penalize individuals on vacation (2 Tr 27, 31-33, 43). Kaufman acknowledged that the County asked him whether the problems he raised could be rectified (2 Tr 44). However, Kaufman testified credibly that CWA's position was that the Program should continue until the end of 1985 and that CWA was not going to involve itself in giving recommendations, adding that "...If you want to sit down, then we would do that..." (2 Tr 44, 45; 1 Tr 44, 45). However, Kaufman testified further without contradiction that prior to the Freeholders' meeting of

November 12, 1985, infra, no representative of the County ever contacted CWA or expressed a willingness to negotiate the Program (1 Tr 29).

e. Kaufman testified candidly that it was the fear of CWA that if it raised objections to the Program the County would terminate it (2 Tr 47). At no time during the exploratory conference of October 28th did the County ever indicate that it was going to terminate the Program prior to the action of the Freeholders on November 12, 1985, infra (2 Tr 45, 46). Further, the County never gave notice of discontinuance of the Program prior to November 12, infra (2 Tr 25).

f. Maintaining its position that it wanted to negotiate a new Program, effective January 1, 1986, CWA through Kaufman acknowledged that there might be a hiatus between the existing Program (J-2) and a new program, and he further acknowledged that the County was under no obligation to establish a new program but, that if it did so, then it was to be the subject of collective negotiations (2 Tr 26, 54).

7. At a meeting of the Board of Chosen Freeholders of the County on November 12, 1985, it was voted, after discussion, to "scrap the Safety Incentive Program effective immediately" (J-3). The minutes of this meeting reflect that counsel for the County explained that after the Program was in effect for six months, CWA contended that the County should have negotiated it and that after the County went through a pre-hearing meeting and asked CWA to

provide it with a list of its objections these were not provided by CWA. Counsel added that there is a statute that says that the County can put in an awards program for anything it wanted and that CWA cannot frustrate that effort. Counsel concluded by stating that CWA can have an opportunity to comment but cannot be given a "veto power." (J-3, supra).

8. The County offered as its witness on the issue of the County's motivation in unilaterally discontinuing the Program, George Melick, a member of the Board of Chosen Freeholders for nine years. It was Mr. Melick who moved that the Program be scrapped "effective immediately" at the November 12th meeting. While Melick testified that he voted to terminate the Program and was not motivated to retaliate against the union, he then gave as his reason for termination the following explanation:

> Well, we were--seemed to have quite a lot of problems with the union and litigation. It was time consuming on both of our parts, County Counsel's time, our union representative leaving work, coming down here testifying, all this stuff. So, if they don't want the Program, we'll just terminate it. That'll solve the litigation, and everybody can go back to work, that's what we are all there for...(2 Tr 22, 23).

9. No eligible employees in the Program received any compensation before the Program was discontinued, supra.

## DISCUSSION AND ANALYSIS

### The Respondent County Violated §§5.4(a)(1) And (5) Of The Act When It Unilaterally Established And Then Discontinued a Safety Incentive Demonstration Program For Its Employees In the Road and Bridge Department Without Having Negotiated With CWA.

As stated in his original decision (H.E. No. 86-62, supra) there is no doubt that the County may unilaterally establish a

program such as was done here on December 28, 1984, for the purpose of encouraging safety or, as provided in N.J.S.A. 40A:5-31, a program recognizing employees on the basis of suggestions made, heroism, professional accomplishments or service. However, when there is a collective negotiations representative in place, here CWA, and the County decides to add an economic component to the program then a problem arises. The problem is, of course, whether or not the County is obligated to negotiate with the majority representative before establishing a program, such as the instant Safety Incentive Demonstration Program, before implementation.

The County has taken the position that it had the right first to establish unilaterally the Program, providing cash awards, without notice to or negotiations with CWA and, further, that it could unilaterally discontinue the Program without notice to or negotiations with CWA. It claims a managerial prerogative to do so.

In connection with the County's position that it had the right to establish the Program unilaterally with provision for cash awards without notice to or negotiations with CWA, it cites in support thereof N.J.S.A. 40A:5-31, supra, which provides, in part, that: "Any local unit may establish and maintain plans for award programs for employees, designed to promote efficiency and economy in government functions, to reward individual employees for meritorious performances and suggestions..." Neither this provision of Title 40A nor N.J.S.A. 40A:9-18 mandates the creation of an awards program. Further, there is no requirement that an award

contain an economic or monetary component. For example, as provided in N.J.S.A. 40A:9-18, supra, the awards may be in the form of "...cash, medals, certificates, insignia or other appropriate devices or tokens of appreciation..." (emphasis supplied).

CWA, in its initial post-hearing brief, argued that neither N.J.S.A. 40A:5-31 or 9-18 preempts negotiations within the meaning of the decision of our Supreme Court in State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978). CWA correctly pointed out that a term and condition of employment which is "set" by a statute may not be contravened by a negotiated agreement, the Supreme Court having stated that:

> ...specific statutes or regulations which expressly set particular terms and conditions of employment...for public employees may not be contravened by negotiated agreement. For that reason, negotiation over matters so set by statutes or regulations is not permissible. We use the word "set" to refer to statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer...(78 N.J. at 80) (emphasis supplied).8/

---

8/ The Commission in its analysis of this phase of the case did not substantially differ from the Hearing Examiner in that it first cited and quoted from Local 195, IFPTE v. State, 88 N.J. 393 (1982), followed by Bethlehem Tp. Bd. of Education v. Bethlehem Tp. Education Ass'n, 91 N.J. 38 (1982), quoting from essentially the same language as State Supervisory, supra, on preemption.

The Commission, in agreement with the Hearing Examiner, concluded that Title 40A, supra, did not preempt negotiations vis-a-vis the County's unilateral establishment of the Program (see 12 NJPER at 770, 771). In so concluding, the Commission cited County of Essex, P.E.R.C. No. 86-149, 12 NJPER 536 (¶17201 1986), which involved the negotiability of merit increments. In Essex the Commission, in finding merit increments a negotiable subject, stated at one point that:

> ...The employees' interest in negotiating compensation as part of a viable negotiations process outweighs the employer's interest in deciding unilaterally who should receive merit/increments under the circumstances of this case...(12 NJPER at 540).

Based on the foregoing, the Hearing Examiner concludes again, in agreement with the Commission, that the Title 40A provisions cited by the County do not preempt negotiations and, therefore, the County was obligated to negotiate with CWA over the establishment of the economic terms of the Program before it was implemented since the proposed economic component clearly implicated a term and condition of employment for those employees in the Road and Bridge Department, who were to be covered by the Program.[9/] Accordingly, the Hearing Examiner will recommend that the unilateral

---

9/ The Commission also noted that the County was not relieved from its negotiations obligation because the Program involved only token awards, stating that such payments intimately and directly affect the work and welfare of public employees and do not significantly interfere with the determination of governmental policy (12 NJPER at 771).

institution of the Program violated §§5.4(a)(1) and (5) of the Act.[10/]

The Commission, in its remand decision, concluded that just as the County's unilateral institution of the Program violated the Act, so did its unilateral termination of the Program violate the Act since both the institution and termination of the Program were done unilaterally. The Commission stated that the latter was the antithesis of the County's statutory duty to negotiate (12 NJPER at 772).

The Commission then referred to its decision in Borough of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984), a case involving the substitution by the employer of insurance carriers. In Metuchen the employer sought to substitute one insurance carrier for another and the evidence showed that some benefits were better and some were worse as provided by the new carrier. In the course of concluding that the employer violated the Act without having negotiated the substitution of carriers before implementation, the Commission cited a decision in the private sector, namely, NLRB v. Keystone Consolidated Industries, 653 F.2d. 304, 107 LRRM 3143 (7th Cir. 1981) where the Court affirmed the NLRB's remedial order, stating "...we would not, and do not, consider the merits of the

---

10/ The County's contention that it did not violate the Act because CWA never made a demand to negotiate is rejected since the Program as ultimately presented to CWA was a "fait accompli." See New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84, 85 (¶4040 1978).

Company's action. That the Metropolitan plan offers some additional benefits to employees is irrelevant. The relevant fact is that the union never consented to the change..." (107 LRRM at 3146, fn. 2).

Also, the Seventh Circuit stated in Keystone, supra, that:

> When the (employer) unilaterally changed insurance plans, its action resulted in some favorable and some unfavorable changes to the employees. The Board's policy in cases of combined favorable and unfavorable unilateral changes is to order a return to the status quo ante with regard to the unfavorable changes, but to not penalize employees by ordering revocation of the favorable changes...An employer can change this condition only as it can change any condition--by giving notice of the proposed change and by successfully bargaining with the union to secure the union's approval.
>
> The Board's policy is entirely consistent with the purposes of the Act. The refusal to revoke favorable changes simply ensures that, under whatever formula the Company implements to restore the employees' health benefits, the Company cannot use the Board's order as a license to abolish or alter any of the favorable changes resulting from its unlawful conduct without fulfilling its statutory duty to bargain...Thus, the Board is not impermissibly dictating terms of the parties' contract. It is merely ordering its traditional remedy of a return to the status quo ante, combined with its traditional refusal to penalize employees by revoking benefits conferred as a result of an unfair labor practice. (107 LRRM at 3146, 3147).

Thus, as the Commission stated in its remand decision, an employer which unilaterally grants favorable benefits contrary to its statutory duty to negotiate may not unilaterally terminate such benefits absent a request to do so by the CWA herein, it being obligated to negotiate before again unilaterally changing such

benefits.[11/] The Commission then stated as reasons for such a holding that (1) one unilateral action does not justify a second unilateral action, both actions violating the Act, and (2) it is evident that the Union, CWA in this case, would otherwise be blamed for the rescission of the favorable benefit. In other words, the employer was the wrongdoer and the union should not suffer for the employer's wrongful action.

With the foregoing legal principles in mind, the Hearing Examiner finds that the County has failed to adduce any evidence constituting a defense to the apparent illegality of its actions in first establishing unilaterally the Program and then terminating the Program unilaterally on November 12, 1985. Plainly, CWA did not consent to such conduct on the part of the County and its termination decision. The Hearing Examiner finds irrelevant the fact that CWA, following the exploratory conference on October 28, 1985, did not provide the County with any suggestions or clarifications as to what Program should contain or provide. Further, the fact that Andrew Weiman, the Local Union President of CWA, was present at the November 12th meeting of the Board of Chosen Freeholders where the termination action was taken is not probative as to any contention that CWA consented to the Freeholders' action on that date. It is noted, in this regard, that CWA received no

---

11/ See like NLRB decisions: Steel-Fab, Inc., 212 NLRB 363, 86 LRRM 1474 (1974); and Great Western Broadcasting Corp., etc., 139 NLRB 93, 96, 51 LRRM 1266 (1962).

formal notice of the Freeholders' meeting on November 12th that termination action would be taken by the Freeholders on that date.

The County having made a unilateral change in terms and conditions of employment, both by unilaterally establishing the Program on December 28, 1984, and by unilaterally terminating the Program on November 12, 1985, violated §§5.4(a)(1) and (5) of the Act.

When The County Unilaterally Terminated The Program On November 12, 1985, It Violated §§5.4(a)(3) And (4) Of The Act Because Its Action Was Illegally Motivated.

The Hearing Examiner, on remand, is persuaded that the County was illegally motivated in its action to terminate the Program on November 12, 1985.12/

The Commission, in its remand decision, concluded that CWA had established a prima facie case that both §§5.4(a)(3) and (4) had been violated. In other words, under Bridgewater, supra, the Commission concluded that CWA had established: (1) that it was engaged in protected activity by having filed the initial Unfair Practice Charge; (2) that the County knew of this activity; and (3) that the County's hostility towards CWA's filing of the initial Unfair Practice Charge was manifested by the County's having

---

12/ It is true that the Hearing Examiner in his initial decision, supra, concluded that the County had not violated §§5.4(a)(3) and (4) of the Act. However, given the Commission's guidance in this regard on remand, and the evidence adduced in the entire record, the Hearing Examiner has reversed his position as to these alleged violations of the Act.

unilaterally terminated the Program on November 12, 1985. Admittedly, the Commission noted that direct evidence of hostility rarely exists but that inferences can be drawn by "certain employer conduct" (12 NJPER at 771). Of course, under Bridgewater a Charging Party's prima facie case may be rebutted by establishing that a legitimate business justification existed for the employer's action and that the same action would have taken place even in the absence of protected activity. This was the purpose of the remand hearing on December 19th. The Hearing Examiner now turns to an analysis of the evidence adduced at the remand hearing.

Recalling first the fact that the Commission in its remand decision noted that there was nothing in the initial record that would show that the County was not pleased with the Program, it nevertheless terminated the Program just before it was to be concluded and shortly after the filing of CWA's initial Unfair Practice Charge. This fact is coupled with the statement of Kaufman at the exploratory conference on October 28, 1985, that CWA wanted the Program to be continued. The Hearing Examiner concludes from the evidence adduced at the remand hearing that the County established no legitimate business justification for its termination action. As set forth in Findings of Fact Nos. 8c & 8d, supra, there were no true negotiations between the parties at the exploratory conference on October 28, 1985. Rather, there were "discussions" between the parties as to the adequacy of the Program and Kaufman's insistence that the County continue the Program until the end of

1985 and pay the eligible employees involved and discontinue the Program. If the County wanted to resume the Program, and Kaufman did not so insist, then Kaufman wanted to negotiate any new program for the succeeding year. Kaufman allowed for the fact that there might be a hiatus between the initial Program (J-2) and any new program.

Also, as found in Finding of Fact No. 8e, supra, the County at no time prior to its unilateral decision to terminate the Program advised CWA of this fact. Of course, as previously noted, CWA did desire that the Program be discontinued as of December 31, 1985, with all eligible employees paid their bonuses under the Program.

The Hearing Examiner has found as a fact (see Finding of Fact No. 8, supra) that evidence of retaliatory motivation on the part of the County in terminating the Program appeared in the testimony of Freeholder Melick. While he testified that the County had no motive to retaliate against CWA, he went on to state that the County "...seemed to have quite a lot of problems with the union in litigation..." which was time consuming with "...our union representatives leaving work, coming down here testifying, all this stuff..." He concluded by stating that if "...they don't want the Program, we'll just terminate it. That'll solve litigation, and everybody can go back to work..." (2 Tr 22, 23).

In the opinion of the Hearing Examiner, this testimony by Melick establishes a basis for drawing an inference that the County was hostile to CWA for the position taken by it at the exploratory conference on October 28, 1985, and that the County was illegally

motivated towards CWA when it unilaterally terminated the Program on November 12th.

Following the same line of reasoning with respect to the alleged §5.4(a)(4) alleged violation, the Hearing Examiner concludes that the County was illegally motivated by CWA's having filed the initial Unfair Practice Charge as to the Program, with the County's decision to terminate having come shortly after the exploratory conference, the County not having previously indicated any dissatisfaction with the Program.

Thus, the Hearing Examiner find and concludes that, under the Bridgewater analysis, the County violated §§5.4(a)(3) and (4) of the Act when it unilaterally terminated the Program on November 12, 1985, the County having failed to establish any legitimate business justification for its action, i.e., that the same action would have taken place even in the absence of CWA's protected activity of having filed an unfair practice charge in June 1985 and having vehemently expressed its views regarding the Program at the exploratory conference on October 28, 1985.

Accordingly, an appropriate remedy will be recommended for the violations by the County of §§5.4(a)(1), (3), (4) and (5) of the Act.

* * * *

REMEDY

There is no disagreement as to the fact that no eligible employees in the Road and Bridge Department received any

compensation under the Program before it was discontinued. Although counsel for the County argues that no payment under the Program was due until the end of the 1985 calendar year, an examination of J-2 does not disclose that this is a necessary condition precedent. Paragraphs 1, 2 and 3 of the Program provide for cash awards of $50 to $100 for eligible employees, who satisfy the requirements set forth in those three paragraphs.

Unlike Tp. of Middletown, H.E. No. 85-39, 11 NJPER 328 (¶16117 1985) where a monetary was deemed by the Hearing Examiner to be speculative, the Hearing Examiner in this case is persuaded that proration of the $50 to $100 cash awards can be made and, thus, the Galloway[13/] requirement of "actual losses" is met. In deciding that proration is appropriate by way of remedy, the Hearing Examiner notes that in the Program itself (J-2) the County recognized that where an employee was assigned from one crew to another "...his time or incidents will be prorated..." This suggests that the County itself has considered the elemental fairness of proration when the Program was established on December 28, 1984.

Thus, the Hearing Examiner will recommend hereinafter an affirmative monetary remedy, using an appropriate formula.

* * * *

---

13/ Galloway Tp. Bd. of Ed. v. Galloway Tp. Assn. of Educ'l Secys, 78 N.J. 1, 16 (1978).

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent County violated N.J.S.A. 34:13A-5.4 (a)(1) and (5) when it unilaterally and without negotiations with CWA established and implemented the Safety Incentive Demonstration Program for employees in its Road and Bridge Department, effective January 1, 1985 and on November 12, 1985 unilaterally terminated the said Program.

2. The Respondent County violated N.J.S.A. 34:13A-5.4(a)(3) and (4) by its conduct herein.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent County cease and desist from:

1. Refusing to negotiate in good faith with CWA regarding the implementation or termination of a Safety Incentive Demonstration Program, or any like program recognizing employee performance, which contains an economic component.

2. Resuming the Safety Incentive Demonstration Program, or reestablishing it or any like program recognizing employee performance, which contains an economic component until such time as the County has negotiated the issue in good faith with CWA.

3. Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or

discourage employees in the exercise of the rights guaranteed to them by this Act, particularly, by unilaterally terminating the Safety Incentive Demonstration Program in retaliation for CWA's having filed the initial Unfair Practice Charge and stating its position at an exploratory conference on October 28, 1985.

4. Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act, particularly, by unilaterally terminating the Safety Incentive Demonstration Program in retaliation for CWA's having filed the initial Unfair Practice Charge and stating its position at an exploratory conference on October 28, 1985.

B. That the Respondent County take the following affirmative action:

1. Forthwith make payment with interest at the rate of 9.5% per annum from July 1, 1985, the prorated share of the cash awards due to eligible employees in the Road and Bridge Department, i.e., those employees who qualified under ¶¶1, 2 and 3 of the Program between January 1, 1985 and the date of discontinuance on November 12, 1985, the said proration to be based upon the number of days between January 1, 1985 and November 12, 1985 divided by 365 days and multiplied by the amount of the cash award which would have been due as of December 31, 1985.

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 on forms to be provided by the Commission shall be posted immediately upon receipt thereof 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 herewith.

Alan R. Howe
Hearing Examiner

Dated: February 11, 1987
Trenton, New Jersey

Appendix "A"

# NOTICE TO ALL EMPLOYEES

## PURSUANT TO

AN ORDER OF THE

## PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

## NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT refuse to negotiate in good faith with CWA regarding the implementation or termination of a Safety Incentive Demonstration Program, or any like program recognizing employee performance, which contains an economic component.

WE WILL NOT resume the Safety Incentive Demonstration Program, or reestablishing it or any like program recognizing employee performance, which contains an economic component until such time as the County has negotiated the issue in good faith with CWA.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act, particularly, by unilaterally terminating the Safety Incentive Demonstration Program in retaliation for CWA's having filed the initial Unfair Practice Charge and stating its position at an exploratory conference on October 28, 1985.

WE WILL NOT Discharge or otherwise discriminate against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act, particularly, by unilaterally terminating the Safety Incentive Demonstration Program in retaliation for CWA's having filed the initial Unfair Practice Charge and stating its position at an exploratory conference on October 28, 1985.

WE WILL forthwith make payment with interest at the rate of 9.5% per annum from July 1, 1985, the prorated share of the cash awards due to eligible employees in the Road and Bridge Department, i.e., those employees who qualified under ¶¶1, 2 and 3 of the Program between January 1, 1985 and the date of discontinuance on November 12, 1985, the said proration to be based upon the number of days between January 1, 1985 and November 12, 1985 divided by 365 days and multiplied by the amount of the cash award which would have been due as of December 31, 1985.

Docket No. CO-85-335-94

HUNTERDON COUNTY BOARD OF CHOSEN FREEHOLDERS
(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.