P.E.R.C. NO. 79-60

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MAYOR AND COUNCIL OF SAYREVILLE,

Respondent,

-and- Docket No. CO-79-7-22

PBA LOCAL 98 (SUPERIOR OFFICERS),

Charging Party.

MAYOR AND COUNCIL OF SAYREVILLE,

Respondent,

-and- Docket No. CO-79-8-23

PBA LOCAL 98 (PATROLMEN),

Charging Party.

SYNOPSIS

The Commission in an unfair practice proceeding finds that the Borough of Sayreville violated the Act when it unilaterally changed compensatory time off procedures affecting police officers in the two units represented by the charging parties on or about June 1, 1978. The Commission orders the Borough to cease and desist from interfering with restraining, or coercing police department employees in the exercise of protected rights by unilaterally changing compensatory time off procedures. The Commission further orders the Borough to cease and desist from refusing to negotiate in good faith with the charging parties regarding the issue of comp time. Furthermore, the Commission orders the Borough to restore the policy regarding the utilization of comp time as it existed prior to June 1, 1978.

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Charging Party.

Appearances:

For the Charging Party, Weinberg, Manoff & Dietz, Esqs.
(David Ericksen, on the Brief)

For the Respondent, Robert A. Blanda, Esq.

DECISION AND ORDER

On July 10, 1978 P.B.A. Local No. 98 [Patrolmen's Unit] and P.B.A. Local No. 98 [Superior Officers Unit] (the "Charging Parties") filed separate Unfair Practice Charges with the Public Employment Relations Commission (the "Commission") alleging that the Borough of Sayreville (the "Borough") 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 Charging Parties alleged that the Borough, in violation of N.J.S.A. 34:13A-5.4(a)(1), (a)(2), (a)(3) and (a)(5),[1/] unilaterally mandated on or about June 1, 1978 that compensatory time off ("comp time") due particular police officers in lieu of monetary payment for overtime worked had to be taken in increments of eight hours in derogation of the past practice between the parties whereby comp time was utilized in increments as agreed to by the affected employee and the appropriate Division Commander. Pursuant to this past practice the Charging Parties maintained that prior to June 1, 1978 the large majority of comp time utilized by police officers was taken in increments of less than eight hours.

Subsequently, in correspondence dated July 10, 1978 the Charging Parties filed proposed Orders to Show Cause and prayed for an order directing the Borough to restore its previous comp time policies during the pendency of the unfair practice charges. Stephen B. Hunter, the Special Assistant to the Chairman, who has been delegated the authority to act upon requests for interim relief, granted the Charging Parties request for an Order to Show Cause and made such orders originally returnable for

1/ These subsections prohibit employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (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."

August 15, 1978. The Show Cause hearing was later rescheduled for August 22, 1978.

At the Show Cause hearing settlement proposals were discussed and the Charging Parties' requests for interim relief were not formally pursued. In a letter dated August 24, 1978 the Special Assistant summarized settlement proposals that were discussed at the Show Cause hearing and also reaffirmed the agreement of the parties that if the instant charges could not be resolved through negotiations then he would prepare a proposed stipulation of facts, after the issuance of a complaint, with regard to both charges which would be presented to the parties for their comments. These stipulations would attempt to set forth all material factual issues concerning the comp time question. If the parties agreed to the stipulation of facts, they would waive an evidentiary hearing and further agreed to waive a Hearing Examiner's Recommended Report and Decision. This consolidated matter would then be submitted to the Commission for its decision based on the pleadings in these cases, the Stipulation of Facts, and briefs and affidavits submitted by the parties.

Subsequently, the Special Assistant was informed that the parties had failed to resolve the instant dispute through negotiations and that a formal administrative decision in this case would be necessary. The two charges were forwarded to the

Director of Unfair Practices, and it appearing to the Director that the allegations of the charges, if true, might constitute unfair practices within the meaning of the Act, Complaints were issued on October 10, 1978 along with an Order Consolidating Cases. In a cover letter the Director explained to the parties that the Complaints were issued without a notice of hearing in order to permit the parties to stipulate the facts in this matter with the assistance of the Special Assistant in accordance with the parties' expressed desire. The Director also reaffirmed the other procedural agreements of the parties referred to above if the stipulations could be achieved. The Director lastly stated that if the parties were unable to agree upon stipulations he would issue a notice of hearing and assign a hearing examiner to hear the case.

On or about December 26, 1978 the parties agreed to the following "essential facts": 2/

> 1. Charging Party, PBA Local 98 (Patrolmen's Unit) is the recognized exclusive majority representative of all patrolmen employed by the Borough of Sayreville. Charging Party PBA Local 98 (Superior Officer's Unit) is the recognized majority representative of all sergeants and lieutenants employed by the Borough of Sayreville. Respondent Borough of Sayreville is a public employer within the meaning of the New Jersey Employer-Employee Relations Act.

2/ Several modifications to the original stipulations prepared by the Special Assistant were proposed by the Borough and agreed to by the Charging Parties.

2. Both majority representatives referred to in Stipulation #1 have executed collective negotiations agreements with the Borough of Sayreville covering the period between January 1, 1977 and December 31, 1979. Copies of these agreements are to be made part of this Stipulation of Facts.

3. From on or before 1970, and for each contract period thereafter, the relevant collective negotiations agreements executed by the Charging Parties and the Borough covering patrolmen, sergeants and lieutenants within the Department have provided, in pertinent part, that employees, so opting, could take compensatory time (comp time) in lieu of cash payment for a specified number of overtime hours worked. Article VIII(J) of both agreements referred to in Stipulation #2 reads as follows:

> J. Anything herein stated to the contrary notwithstanding, with the exception of attendance at court or appearance before the Grand Jury, which must be compensated in pay, as hereinabove provided, in lieu of cash payment, an employee may opt to receive compensatory time off on a time and one-half basis. Such time may be taken only when scheduled by the Chief or his designee so as not to interfere with departmental operations and no employee may opt to receive compensatory time in excess of an annual total of sixteen (16) hours to be taken at time and one-half (1 1/2) rate.

Article VIII(C) states in part that "time and one-half shall be paid for all hours worked in excess of eight hours in any 24 hour period."

4. From on or before 1970 and up until on or about June 1, 1978 it had been the policy of the Borough and the practice between the parties to permit individual employees to take their comp time in increments of less than eight hours as agreed to by the individual police officers with the approval of the Chief of Police or the Captain in charge of the pertinent division. Comp time, pursuant to past practices and policy has been utilized for such reasons as emergencies, personal business and for college attendance. Comp time was generally taken for the purpose of taking college courses

in the evening, i.e. an employee's work time was interrupted for the purpose of attending classes and that police officer would later return to complete his designated shift. The majority of comp time so taken, pursuant to past practice and policy, was taken in increments of less than eight hours.

5. On or about June 1, 1978 the Borough through its designated representatives unilaterally and without prior negotiations mandated that comp time due affected police officers in lieu of monetary payment for overtime must be taken in increments of eight hours. The Borough has not stopped the use of compensatory time in lieu of cash payments for overtime; but has altered the method of utilizing the comp time accrued by each police officer.

6. The Borough's actions concerning the comp time issue were triggered by several incidents in which employees sought and later received from the Borough time and one-half time pay when they did not actually work in excess of eight hours in a 24 hour period, e.g., they worked four hours and then utilized four hours comp time before working additional hours on a succeeding shift during the same 24 hour period. Although these incidents rarely arose, when they did, comp time was counted as time worked for purposes of determining how much overtime would be paid if a police officer worked an additional shift during a 24 hour period.

7. The Charging Parties have chosen to file unfair practice charges (CO-79-7 and CO-79-8) relating to these instant matters and no grievances have been filed relating to alleged contract violations. The Borough has consistently asserted that this matter should have proceeded through the parties' grievance procedure, before unfair practice charges could be filed.

8. The parties further stipulate that pursuant to N.J.A.C. 19:14-6.7 of the Commission's Rules they agree to waive a Hearing Examiner's Recommended Report and Decision. This matter will be the subject of a Commission decision based upon the formal pleadings in these cases, the exhibits submitted relating to the Charging Parties' request for

> interim relief in these two matters, the Stipulation of Facts and supplemental briefs to be submitted by the parties concerning their respective legal contentions. All supplemental briefs will be due on or before December 27, 1978. 3/

Pursuant to the Act and the Commission's Rules and based upon the parties' Stipulations as aforesaid, the Commission makes the following determinations upon a review of the entire record.

The Commission is persuaded after consideration of all the submissions in this case that the Borough violated N.J.S.A. 34:13A-5.4(a)(5) and derivatively N.J.S.A. 34:13A-5.4(a)(1), but not (a)(2) and (3) when it unilaterally changed comp time procedures affecting police officers in the two units represented by the Charging Parties on or about June 1, 1978. The Borough stipulated that it effectuated the change that is the subject of the two instant charges unilaterally. The Borough's first defense is that it is a managerial prerogative, i.e. a non-mandatory subject for collective negotiations, to change policies relating to the utilization of accumulated comp time, as long as police officers can continue to select and accumulate comp time pursuant to the relevant contractual provision in effect between the parties (Article VIII(J)). As stipulated, the Borough changed comp time procedures when it became aware of occasions when employees put in for and received time and one-half

3/ Supplemental briefs were filed by the parties which were received by January 31, 1979.

overtime pay solely because comp time utilized for college attendance, for example, was considered by the P.B.A. to be "hours worked" for the purpose of overtime compensation. The Borough considered the above practice tantamount to the payment of "overtime on top of overtime" since comp time by its very definition was an "in lieu of overtime" benefit which was then utilized by police officers to obtain cash overtime benefits without actually working in excess of eight hours in a 24 hour period. The Borough's arguments in this regard, however, relate to the wisdom of agreeing to permit police officers, at the discretion of the chief of police or captain in charge, to take comp time in increments of less than eight hours, not to the non-negotiability of an issue that both concerns a form of compensation and working hours, matters that are incontrovertibly required subjects for collective negotiations.[4/] Moreover, although the Borough refers to its "managerial rights and responsibilities regarding the integrity and effectiveness of its local police force" it refers only to the economic impact of police officers taking comp time in less than eight hour increments and does not attempt to prove, for example, that manpower levels or police department operations were adversely affected because of the past practice

4/ See Galloway Tp. Bd. of Ed. v. Galloway Tp Ass'n of Educational Secretaries, 78 N.J. 1 (1978); Galloway Tp. Bd. of Ed. v. Galloway Tp Ed. Ass'n, 78 N.J. 25 (1978); Bd. of Ed. of Englewood v. Englewood Teachers Ass'n, 64 N.J. 1 (1973) and Byram Bd. of Education and Byram Tp Education Ass'n, P.E.R.C. No. 76-27, 2 NJPER 143 (1976) affmd 152 N.J. Super. 12 (App. Div. 1977).

concerning the utilization of comp time.[5/]

The Borough's second and last defense is that the unfair practice charges filed by the Charging Parties were inappropriate or at best premature since the two majority representatives had the right or more appropriately the obligation to file a class action grievance, pursuant to the contract, contesting the Borough's alleged contract violation -- which was not done in this case. The Borough appears to contend that the appropriate forum for the resolution of the instant dispute is the parties' grievance procedure and that the failure to file grievances over the alleged contract violation mandated the dismissal of the instant charges.

N.J.S.A. 34:13A-5.3, as amended, provides in relevant part:

> Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representation organization shall be utilized for any dispute covered by the terms of such agreement. (emphasis added)

The above statutory language was not originally contained in the Act, but was added as part of the amendments to the Act contained in Public Laws of 1974, Chapter 123. That same law added N.J.S.A.

5/ In a recent decision, In re North Arlington Board of Education, P.E.R.C. No. 79-12, 4 NJPER 448 (¶4023 1979), the Commission found that a board of education violated the Act when it unilaterally adopted new procedures relating to the prior approval by the superintendent of graduate courses in order for these courses to be "credited" for advancement on the salary guide. The Commission found in pertinent part that the institution of new policies relating to the obtaining or utilization of economic benefits did not relate to managerial prerogatives but to terms and conditions of employment.

34:13A-5.4(c) to the Act which gave the Commission "exclusive power" to hear and resolve unfair practices. Reading the two sections together, and recalling that both were added by the same amendment to the Act, indicates that grievance procedures take precedence over dispute solving mechanisms in "any other statute" but not over the unfair practice jurisdiction conferred on the Commission by the Act.[6/]

Although the Commission is not deprived of unfair practice jurisdiction over alleged unilateral changes in terms and conditions of employment, even when particular actions may be violative of a contract as well, the Commission itself has recognized and attempted to foster the beneficial role of grievance arbitration to settle controversies between public employers and employees. It does this by applying the doctrine of "deferral to arbitration" where it appears that the dispute underlying the unfair practice can be resolved through such means.[7/] However, because it has exclusive jurisdiction over the underlying unfair practice, the Commission's deferral is discretionary and it will not be utilized where it appears that the grievance/arbitration process will not or cannot resolve the dispute. This is consistent with the public policy of this State declared by the Legislature in N.J.S.A. 34:13A-2 in which it is stated that the purpose for the enactment

6/ See State v. Council of New Jersey State College Locals, 153 N.J. Super. 91 (App. Div. 1977).

7/ See In re East Windsor Reg. Board of Education, E.D. No. 76-6, 1 NJPER 59 (1975) and Collyer Insulated Wire, 192 NLRB 837, 76 LRRM 1931 (1971).

of this entire statute was "to promote public and private employer and employee peace."

The Commission has recognized that deferral to arbitration is appropriate where the Respondent in a particular matter is willing to submit the underlying dispute to arbitration. The Commission will not defer to the grievance arbitration process unless the underlying dispute which forms the basis of both the grievance and the unfair practice is likely to be fully heard and a decision on the merits made. In the instant matter the Borough has specifically asserted that the subject matter of the instant unfair practices and any grievances that could have been filed was a nonnegotiable managerial prerogative and was thus non-arbitrable. The Commission has only deferred to arbitration where the public employer has affirmatively agreed to proceed promptly to arbitration of the underlying issue. We have concluded that in this situation the underlying dispute may not be fully heard by an arbitrator and a decision on the merits made. We further note that the Borough, although maintaining that the Charging Parties should have filed a grievance in this case, has not suggested at any time in this proceeding that it would submit all aspects of the underlying dispute to arbitration, without asserting an obvious procedural defense such as timeliness. The Commission again has not deferred to arbitration where the Respondent may prevent the merits of a controversy from ever being resolved by asserting a procedural defense such as timeliness.

Thus we conclude, under the specific circumstances of this case, that deferral to arbitration would not be appropriate. In light of the Borough's arguments of managerial prerogative a determination by PERC is required before any arbitration could be heard. See Ridgefield Park, supra, 78 N.J. at 153-156. Given the existence of stipulated facts and the public policy of the Act to expeditiously resolve disputes, it would now seem inappropriate to send this matter back for arbitration. The subject matter has been determined to be both negotiable and arbitrable in the abstract. The stipulated facts inidicate that the Borough unilaterally changed the policy on how comp time could be taken, which constituted a unilateral change in a term and condition of employment.[8/] The Borough's arguments may indicate that a few officers have abused the policy or that the existing practice may not be the best from the Borough's point of view, but neither of these arguments excuses the unilateral change in the policy which was imposed without any prior negotiations; nor should a further delay in the resolution of this dispute be permitted.

For the above stated reasons, the Commission finds that the alteration in procedures relating to the utilization of comp

8/ N.J.S.A. 34:13A-5.3 states in relevant part:
> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

In Galloway Twp Bd of Ed v. Galloway Twp Ed Ass'n, 78 N.J. 25 at 48 to 50, the Supreme Court has specifically affirmed PERC's interpretation of this sentence as prohibiting a public employer from unilaterally changing terms and conditions of employment at any time, i.e. during the period of negotiations for a new agreement or at other times.

time constituted an unfair practice within the meaning of N.J.S.A. 34:13A-5.4(a)(5) in that this action constituted a refusal to negotiate in good faith concerning terms and conditions of employment. We further conclude that the Borough's conduct as aforesaid, although not apparently motivated by any specific anti-union animus, necessarily had a restraining influence upon the free exercise of rights guaranteed by the Act to the employees involved herein and accordingly also constituted unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1).

After careful consideration of the entire record, it is concluded that the Borough's conduct as aforesaid did not constitute unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(2) and (a)(3) and those portions of the Complaint alleging violations thereof are hereby dismissed.

ORDER

Accordingly, for the reasons set forth above, IT IS HEREBY ORDERED that the Respondent, Borough of Sayreville shall:

1. Cease and desist from:

(a) Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by unilaterally changing compensatory time off procedures.

(b) Refusing to negotiate in good faith with the Charging Parties regarding changes in terms and conditions of employment by unilaterally changing compensatory time off procedures.

2. Take the following affirmative action:

(a) Restore the policy regarding the utilization

of compensatory time off as it existed prior to June 1, 1978, i.e., individual police officers may take their comp time in increments of less than eight hours as agreed to by the individual police officers and their designated supervisor or chief of police.

(b) 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 by the Borough immediately upon receipt thereof, after being signed by the Borough's representative, and shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Borough to insure that such notices are not altered, defaced or covered by other material.

(c) Notify the Chairman, in writing, within twenty (20) days of receipt of this Order what steps the Board has taken to comply herewith.

3. That the allegations of a violation of Subsections (a)(2) and (a)(3) be dismissed in their entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Parcells, Graves, Hipp and Newbaker voted for this decision. None opposed.

DATED: Trenton, New Jersey
March 8, 1979
ISSUED: March 9, 1979

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 employees in the exercise of the rights guaranteed to them by unilaterally changing compensatory time off procedures.

WE WILL NOT refuse to negotiate in good faith with the Charging Parties by unilaterally changing compensatory time off procedures.

WE WILL restore the policy regarding the utilization of compensatory time off as it existed prior to June 1, 1978, i.e., individual police officers may take their comp time in increments of less than eight hours as agreed to by the individual police officers and their designated supervisor or chief of police.

BOROUGH OF SAYREVILLE

(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 Jeffrey B. Tener, Chairman, Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.