P.E.R.C. NO. 86-105

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF FRANKLIN LAKES,

Respondent,

-and- Docket No. CO-86-24-79

FRANKLIN LAKES PBA, LOCAL 150,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated by the full Commission and in the absence of exceptions, agrees with the Hearing Examiner and concludes that the P.B.A. has not proven its charges by a preponderance of the evidence and therefore dismisses the Complaint.

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Appearances:
For the Respondent, Hook, Torack & Smith, Esqs. (William T. Smith, Of Counsel)

For the Chaging Party, Cucio & Cucio, Esqs. (Emil S. Cuccio, Of Counsel)

DECISION AND ORDER

On July 22, 1985, the Franklin Lakes PBA No. 150 ("PBA") filed an unfair practice against the Mayor and Council of the Borough of Franklin Lakes and Borough of Franklin Lakes ("Borough"). The charge alleges the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4[1/] when it issued an order that

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1/ The charge did not state the specific portion of the Act allegedly violated, contrary to N.J.A.C. 19:14-1.4. We do, however, believe the charge can be read to allege a violation of (a)(3) and (5) in view of the "discrimination" and "unilateral" claims. These subsections prohibit "public employers, their representatives or agents from: "(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; and (5) Refusing to negotiate in good faith with a

Footnote Continued on Next Page

dispatchers would receive preference over police officers for overtime work necessitated by the regularly scheduled dispatcher's absence. This was alleged to have " discriminated against the unit by adopting a unilateral change in working conditions contrary to the terms of the collective bargaining agreement in effect." Specifically, the PBA contends that the parties' contract gives police officers, not dispatchers, overtime preference.

On November 22, 1985, a Complaint and Notice of Hearing issued. On December 5, 1985, the Borough filed its Answer. It denied discriminating against the PBA or that it violated the parties' contract.

On January 8, 1986, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On February 6, 1986, the Hearing Examiner issued his report and recommended decision. H.E. 86-39, 12 NJPER ___ (¶_____ 1986). First, he applied the requisite In re Bridgewater, 95 N.J. 236 (1984) standards and concluded that the PBA failed to establish a prima facie case since it did not present any evidence of anti-union animus towards the PBA. Further, he concluded that the most the PBA

1/ Footnote Continued From Previous Page

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."

established was a breach of contract which was not sufficient to rise to a level of an unfair practice under Human Services, P.E.R.C. No. 84-148, 10 NNPER 419 (¶15191 1984). Therefore, he recommended dismissal of the Complaint.

The Hearing Examiner served his report on the parties and informed them that exceptions were due by February 20, 1986. No exceptions were filed.

I have reviewed the record. The Hearing Examiner's findings of fact (3-6) are accurate.[2/] I adopt and incorporate them here. In the absence of exceptions and under all the circumstances of this case, I conclude that the PBA has not proved its charges by a preponderance of the evidence.

Acting pursuant to authority delegated to me by the full Commission, I dismiss the Complaint.

ORDER

The Complaint is dismissed.

James W. Mastriani
Chairman

DATED: Trenton, New Jersey
April 8, 1986

2/ I disagree, however, that the PBA specifically alleged an (a)(3) violation. It merely alleged "discrimination."

H.E. NO. 86-39

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

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BOROUGH OF FRANKLIN LAKES,

Respondent,

-and- Docket No. CO-86-24-79

FRANKLIN LAKES PBA NO. 150

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Borough did not violate §5.4(a)(3) of the New Jersey Employer-Employee Relations Act when its Administrator unilaterally issued a memorandum on May 13, 1985, directing the police department to call off-duty Dispatchers first for overtime and police officers only when no Dispatchers available. The Charging Party failed to establish any evidence of hostility or anti-union animus by the Borough toward the PBA and, thus, it failed to satisfy the requisites of Bridgewater Twp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984). What was really involved was an alleged contract violation which would have required dismissal of the Unfair Practice Charge under N.J. Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (1984).

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. 86-39

STATE OF NEW JERSEY
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Appearances:

For the Respondent
Hook, Torack & Smith, Esqs.
(William T. Smith, Esq.)

For the Charging Party
Cuccio & Cuccio, Esqs.
(Emil S. Cuccio, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on July 22, 1985, and amended on August 5, 1985, by the Franklin Lakes PBA No. 150 (hereinafter the "Charging Party" or the "PBA"") alleging that the Borough of Franklin Lakes (hereinafter the "Respondent" or the "Borough") 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 May 8, 1985, a collective negotiations agreement was executed by the parties which provided, inter alia, that employees covered by the agreement "...shall be given preferential consideration for any overtime duty that may arise..." and that the accepted procedure prior thereto had been that in the event that no civilian dispatchers were available for overtime then a unit member was called in for overtime duty; and that on May 13, 1985, the Borough Administrator issued a directive to the Police Department that off duty dispatchers would be called in before unit police officers for overtime duty; and that on May 15, 1985, the PBA filed a grievance which was ultimately denied by the Borough on June 25, 1985; all which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(3) 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 on November 22, 1985. Pursuant to the Complaint and Notice of Hearing, a hearing was held on January 8, 1986, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral

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1/ This subsection prohibits public employers, their representatives or agents from: "(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."

Significantly, the PBA did not allege a violation of §5.4(a)(5) of the Act.

argument was waived and the parties filed post-hearing briefs by January 29, 1986.

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 post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Borough of Franklin Lakes is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Franklin Lakes PBA No. 150 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. At the time of the hearing there were 18 employees of the Borough within the collective negotiations unit represented by the PBA, namely, two Patrol Sergeants, one Detective Sergeant and 15 Patrolmen. There were also five Civilian Dispatchers who work at the desk and who are not in any collective negotiations unit.

4. The PBA has been the collective negotiations representative for Sergeants and Patrolmen in the above unit since at least 1974. At least since 1974 and up to 1982 unit members were

given first preference for overtime for desk duty when a civilian Dispatcher was unavailable. This was the case notwithstanding that the Borough employed two to four Dispatchers between 1974 and 1982.

5. At sometime in 1982 the Borough's Council directed Captain Robert Scanlan of the Police Department to call in available Dispatchers for overtime duty rather members of the PBA's unit. This lasted for about eight to ten months during which Scanlan stated to the PBA that any change in Council policy regarding overtime would have to be taken up in negotiations.

6. Two members of the PBA's negotiating team, Irving Conklin and Joseph R. Seltenrich, testified credibly that at one negotiations meeting in 1983 for the 1983 collective negotiations agreement objection was made by them to the use of civilian Dispatchers for overtime duty. Present for the Borough were two Councilmen, Joseph Lillo, Chairman of the Police Committee, and Geoffrey Rosamond. As a result of this meeting, Article XI, §E was inserted into the collective negotiations agreement, which provides as follows: "Employees covered under this Agreement shall be given preferential consideration for <u>any</u> overtime duty that may arise..." (J-1, p. 12)(emphasis supplied). Notwithstanding that Lillo testified that the foregoing contract language was never intended to cover the use of Dispatchers for overtime duty, on and after the effective date of the 1983 agreement PBA unit members received

preferential treatment for overtime duty on the desk.[2/] This continued during 1984, the contract language remaining the same, and also continued into 1985. The 1985 agreement was executed by the parties on May 8, 1985.

7. On May 13, 1985, five days after the execution of J-1, the Borough's Administrator, Frank DeRosa, sent a memorandum to Scanlan, in which Scanlan was directed to call off-duty Dispatchers first for overtime and police officers only when no Dispatchers are available (J-2). DeRosa had been hired as Borough Administrator in March, 1985, and, in reviewing Borough records determined there was a significant amount of Police Department overtime. He reviewed the matter with the Mayor and Council on May 12, 1985. The issuance of J-2 occurred the next day.[3/]

8. Lillo testified that he did not disbelieve the testimony of Conklin and Seltenrich that from 1983 until May 13, 1985 PBA unit members received preference for overtime duty. Thus, the Hearing Examiner does not credit Lillo's later testimony that the Chief of the Police and Scanlan told him that Dispatchers had always received preference for overtime.

2/ The testimony of Conklin is credited that Article XI, §E was aimed solely at the dispute over overtime for Dispatchers, and the testimony of Lillo is not credited that the issue arose in 1983 because of the use of Marshalls by the Borough against which the PBA wanted protection.

3/ It is not disputed that Dispatchers are paid approximately $6.00 per hour and that a typical patrolman is paid approximately $15 per hour.

9. There was no evidence adduced at the hearing that the Borough was in any way hostile in its relationship with the PBA nor was there any evidence of anti-union animus on the part of the Borough toward the PBA.

DISCUSSION AND ANALYSIS

The Borough Did Not Violate §5.4(a)(3) Of The Act When Frank DeRosa Sent A Memorandum To Captain Robert Scanlan On May 13, 1985, Directing That Scanlan Call Off-Duty Dispatchers First For Overtime, i.e., Unilaterally Eliminating The Preference For Police Officers.

Although the above Findings of Fact would appear at first blush to indicate that the Borough has violated the Act by DeRosa's memorandum of May 13, 1985, it must be recalled that the PBA has alleged a violation by the Borough of §5.4(a)(3) of the Act. This subsection prohibits the Borough from 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 rights guaranteed to them by the Act.

In order to prove a violation by the Borough of §5.4(a)(3) of the Act, the PBA must satisfy the Bridgewater[4/] test, which sets forth the following requisites in assessing employer motivation: (1) the charging party must make a prima facie showing sufficient to support an inference that protected activity was a

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4/ See Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984).

"substantial" or a "motivating" factor in the employer's decision to discipline (here the unilateral withdrawal of preferential consideration for any overtime duty); and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (95 N.J. at 242). The Supreme Court in Bridgewater further refined the test by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile towards the exercise of protected activity (95 N.J. at 246).

As will be discussed hereinafter, the conduct of the Borough, if objectionable, arose to nothing more than a breach of contract. When DeRosa unilaterally directed Scanlan to call off-duty Dispatchers first for overtime, and police officers only when no Dispatchers were available, this action arguably violated Art. XI, §E of Exhibit J-1. However, there was no evidence that DeRosa, on behalf of the Borough, acted in any way which was hostile to the PBA in its relationship with the Borough nor was there any evidence of anti-union animus on the part of the Borough towards the PBA (see Finding of Fact No. 9, supra).

Under Bridgewater, supra, it was absolutely necessary for the PBA to make a prima facie showing that the Borough was hostile to or manifested anti-union animus toward the PBA in its ongoing relationship with the PBA prior to the May 13, 1985 memorandum from DeRosa to Scanlan. Absent this prima facie showing, the PBA has

failed to meet one of the essential requisites of the first part of the first part of the Bridgewater test, supra.

Moreover, even if the Hearing Examiner assumes that the PBA was engaged in protected activity in connection with the negotiation of J-1 and by seeking to continue the provision of Art. XI, §E, and that this engaging in protected activity was known to the Borough, as indeed it was, the PBA has failed to prove in any respect that the Borough was hostile to the PBA in its relationship or manifested any anti-union animus toward the PBA. Thus, the Hearing Examiner need not reach the second part of the Bridgewater test, namely, that the Borough demonstrate by a preponderance of the evidence that its action in issuing the May 13, 1985 memorandum would have taken place even in the absence of the PBA's exercise of protected activity.

The PBA having failed to satisfy the Bridgewater test, the Hearing Examiner must dismiss the allegation that the Borough violated §5.4(a)(3) of the Act.

The Hearing Examiner, having previously noted that the PBA did not allege a violation of §5.4(a)(5) of the Act, nevertheless notes that even if an allegation of this subsection had been made, dismissal would have to be recommended on the basis of the decision of the Commission in N.J. Dept. of Human Services, P.E.R.C No. 84-148, 10 NJPER 419 (1984). In this decision, the Commission held that the policies of the Act militate against permitting litigation of mere breach of contract claims under the guise of unfair practice charges. The Commission concluded that the parties should be

encouraged to use their own negotiated grievance procedures for the resolution of contract disputes and not substitute the Commission for a grievance procedure (10 NJPER at 422).

The instant case clearly falls within the foregoing holding of N.J. Dept. of Human Services, supra. Although the Hearing Examiner does not and is not sitting as an arbitrator in the dispute before him, it is at least arguable that the Borough violated Art. XI, §E of J-1 when DeRosa issued his unilateral memorandum of May 13, 1985 (J-2). Thus, the dispute involved clearly implicates the parties' grievance procedure for resolution. Therefore, even if the Hearing Examiner were to apply §5.4(a)(5) of the Act, he would still be required to recommend dismissal of the instant Unfair Practice Charge on the basis of N.J. Dept. of Human Services, supra.

Based on all of the foregoing, the Hearing Examiner will recommend that the alleged violation by the Borough of §5.4(a)(3) of the Act be dismissed.

* * * *

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

CONCLUSION OF LAW

The Respondent Borough did not violate N.J.S.A. 34:13A-5.4(a)(3) when its Administrator, Frank DeRosa, sent a memorandum on May 13, 1985 to the police department, which directed it to call off-duty Dispatchers first for overtime and police officers only when no Dispatchers were available.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: February 6, 1986
Trenton, New Jersey