

P.E.R.C. NO. 84-90

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SOMERVILLE,

Respondent,

-and-

Docket No. CO-83-137-70

SOMERVILLE BOROUGH PBA LOCAL 147,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Borough of Somerville violated the New Jersey Employer-Employee Relations Act when it refused to pay a retroactive salary increase to an employee who was on the Borough's payroll at the time the parties reached contractual agreement and who received assurances from Borough officials he would receive this increase. The Commission holds, however, the Borough was not obligated to pay employees who were not on the payroll at the time the parties reached contractual agreement and who did not receive assurances from Borough officials.

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Appearances:

For the Respondent, Whipple, Ross & Hirsh, Esqs.
(Joseph P. Donohue, of Counsel.)

For the Charging Party, Arlyne K. Liebeskind, Consultant

DECISION AND ORDER

On November 30, 1982, the Somerville Borough PBA, Local 147 ("PBA") filed an unfair practice charge against the Borough of Somerville ("Borough") with the Public Employment Relations Commission. The charge alleged that the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1) and (5), ^{1/} when, after having negotiated a collective agreement which provided for a retroactive wage increase, the Borough unilaterally adopted a resolution which denied retroactive salary payments to employees who had voluntarily resigned or who were involuntarily terminated after the date of retroactivity, but prior to the issuance of

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; 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."

the retroactive salary checks. The resolution resulted in two police officers, Kenneth Medwick and Robert Skove, who had resigned during that period being denied a retroactive wage increase. The PBA alleged that the denial of retroactive pay to these two officers violated the following contractual provision: "All officers shall be granted a salary increase of nine percent above their present base salary rate effective retroactively to March 1, 1982."

On March 3, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On March 17, 1982, the Borough filed an Answer in which it admitted that it had adopted the resolution, but denied that these two police officers were contractually entitled to retroactive wage payments.

On June 20, 1983, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses, presented evidence, and waived oral argument. They filed post-hearing briefs.

On July 18, 1983, the Hearing Examiner issued his report and recommended decision, H.E. No. 84-5, 9 NJPER 504 (¶14206 1983) (copy attached). He concluded that the Borough did not violate the Act when it adopted the resolution denying retroactive salary increases to the two police officers. He found that the contractual provision concerning retroactive wage increases was ambiguous and that the Borough's resolution denying retroactive wage increases to resigning officers merely memorialized the parties' past practice.

On August 5, 1983, the PBA filed exceptions. It maintains that the Hearing Examiner erred in: (1) finding that the retroactivity clause was ambiguous; (2) finding that the resolution merely memorialized the parties' past practice; and (3) discounting assurances of Borough officials, including the Mayor, that the resolution would not apply to officers who resigned before its adoption.

We have reviewed the record. The Hearing Examiner's findings of fact are accurate. We adopt and incorporate them here. We also agree with his conclusion that police officer Medwick, who was not on the payroll at the time the parties reached contractual agreement, was not entitled to retroactive salary payments. We disagree, however, with his conclusion that police officer Skove, who was on the payroll at the time the parties reached contractual agreement, was not entitled to retroactive salary payments.^{2/}

We believe that the contract is ambiguous with respect to which officers are entitled to receive retroactive salary payments. Given this ambiguity, we may consider the parties' past practice, negotiations history, and all other pertinent circumstances as guides in interpreting the contract.

^{2/} The Borough has asserted that the Commission lacks jurisdiction to hear this case because Medwick and Skove are no longer employees within the meaning of the Act. The PBA, however, has standing to bring this charge based on the alleged violation of its contract with the Borough. Further, Medwick and Skove were employees within the meaning of the Act from January 1, 1982 until their resignations in August and September, respectively, and the PBA has standing to seek to enforce their alleged right to payment under the collective negotiations agreement for work they did as employees.

The Hearing Examiner found evidence of past practice dispositive. We disagree: there was only one prior incident involving a unit member; this employee resigned months before the PBA negotiated its first contract with the Borough; and the PBA did not know or have reason to know this employee had not received a retroactive salary check since he never pursued the matter with either the Borough or the PBA. We do not believe this evidence rises to the level of a controlling past practice which is repeated, unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Elkouri and Elkouri, How Arbitration Works, p. 391 (BNA 1973).

We now turn to the parties' negotiations history. The testimony concerning the September 13, 1982 mediation session clears up the ambiguity concerning the phrase "present base salary rate." The major issue at this session concerned whether or not a second proposed 1.5% raise effective as of July 1, 1982 would be calculated based upon the 1981 salary structure or a 1982 salary rate revised in accordance with a first proposed 7% raise effective as of January 1, 1982. The parties resolved this issue by arranging for one raise of 9% retroactively effective March 1, 1982 and based upon the 1981 salary structure. Given this chronology, it is apparent to us that "present base salary rate" refers, as the PBA argues, to the 1981 salary rate and not, as the Borough argues, to the salary of employees still working at the time of contract ratification. The history of formal negotiations, however, yields no further clues to the meaning of the Addendum.

We next consider the significance of the September 1, 1982 discussions between Skove and the Mayor and Police Commissioner/Councilman. These discussions support a determination that the Borough should be obligated to pay retroactive salary to any officer -- in this case Skove -- on the payroll at the time the parties settled their contract by agreeing to the Addendum.

Skove was a member of the PBA negotiations team; the Mayor (who ultimately signed the contract on behalf of the Borough and who also endorsed the resolution) and the Police Commissioner/Councilman (who has primary responsibility on the Council for police employee matters) made representations which, while perhaps not absolutely binding in and of themselves, may properly be considered for contract interpretation purposes as part of the background leading to the Addendum. Given these representations, specifically the assurance that Skove would receive his retroactive pay check, we believe that the Addendum should be construed to entitle to retroactive pay "all officers" on the payroll at the time of the September 12, 1982 agreement. The Borough should not be entitled to deny Skove a retroactive salary check simply because he resigned before formal contract ratification when he specifically told the Mayor and Police Commissioner/Councilman that he would not resign before contract ratification if he would be deprived of a retroactive salary increase; these officials then assured him he could resign before contract ratification and still receive his

retroactive salary check; and Skove postponed his resignation until the day -- September 17, 1982 -- the Borough's attorney confirmed that the Borough would ratify the contract once the PBA did. Accordingly, under all the circumstances of this case, we hold that the Borough violated subsections 5.4(a)(5), and, derivatively, subsection 5.4(a)(1) when it failed to issue a retroactive salary check to Skove.^{3/}

Medwick stands in a position different from Skove. He resigned before any of Skove's discussions with Borough officials and before the mediation session and ensuing settlement. Unlike Skove, Medwick obviously did not rely upon any representations concerning retroactive pay in deciding when to resign. In the absence of any evidence of specific representations to Medwick and reliance thereon, we will not construe the Addendum to confer a contractual right to retroactive pay upon officers completely and voluntarily severing themselves from the workforce before the settlement was reached.

ORDER

The Borough of Somerville is ordered to:


1. Cease and desist from refusing to negotiate in good faith by dishonoring its contractual commitment to pay retroactive salary checks to officers, in particular Robert Skove, who resigned after the September 12, 1982 settlement agreement;

^{3/} We stress that this case is of limited precedential value because of the importance of specific fact patterns in each case of this type and the uniqueness of this particular fact pattern.

2. Pay Robert Skove \$1398.21, together with 12% interest from November 15, 1982; and

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps it has taken to comply with this order.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hipp, Newbaker and Suskin voted in favor of this decision. Commissioners Graves and Hartnett were not present.

DATED: Trenton, New Jersey
January 18, 1984
ISSUED: January 20, 1984

STATE OF NEW JERSEY
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Docket No. CO-83-137-70

SOMERVILLE BOROUGH PBA LOCAL 147,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent did not violate Subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it unilaterally adopted a resolution on October 18, 1982, which mandated that no retroactive salary payment would be made to any individual who voluntarily or involuntarily terminated employment prior to the issuance to "retro-checks." The Hearing Examiner found that the collective negotiations agreement was ambiguous and thus resorted to past practice, which indicated clearly that at least since 1977 the Respondent had not made payment of retroactive salary to any individual who voluntarily or involuntarily terminated prior to the adoption of the annual salary ordinance. There is ample Commission and court precedent that past practice and custom are relevant where the collective negotiations agreement is ambiguous or silent as to terms and conditions of employment.

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 conclusion of law.

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Whipple, Ross & Hirsh, Esqs.
(Joseph P. Donohue, Esq.)

For the Charging Party
Arlyne K. Liebeskind, Consultant

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on November 30, 1982 by the Somerville Borough PBA Local 147 (hereinafter the "Charging Party" or the "PBA") alleging that the Borough of Somerville (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 the Respondent, after reaching a collective negotiations agreement with the Charging Party, unilaterally adopted a resolution on October 18, 1982, which denied retroactive salary payments to any employee who was voluntarily or involuntarily terminated prior to the date that retroactive salary checks were approved, but the said resolution excluded employees who retire, die or resign due to a job-related disability, which resulted in the non-payment of retroactive salary to two employees in the PBA unit who voluntarily resigned in August and September 1982, all of which is alleged to be

a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 3, 1983. Pursuant to the Complaint and Notice of Hearing, a hearing was held on June 20, 1983 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by July 11, 1983.

An Unfair Practice Charge 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 Somerville is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The Somerville Borough PBA Local 147 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. The PBA's first collective negotiations agreement covered the year 1979. It was followed by a successor agreement for the years 1980 and 1981 (J-1). The 1982 agreement resulted from mediated interest arbitration and is reflected in an addendum to J-1 (J-2). Both J-1 and J-2 provide under "Salaries," that "all officers" shall receive the negotiated salary increase on a retroactive basis. (J-1, p.4, 16; J-2, para.2).

1/ These Subsections prohibit public employers, their representative or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

4. Until the implementation of the 1982 addendum in October of that year only one member of the PBA unit had ever been denied retroactive salary payment.^{2/}

5. Effective May 1, 1982 Lieutenant Allan Van Horn, a member of the PBA unit, retired and after the settlement of the 1982 agreement (J-2) he received retroactive salary payment (CP-2).

6. Kenneth Medwick voluntarily resigned on August 27, 1982 and Robert Skove voluntarily resigned on September 17, 1982. Neither received retroactive salary payment which, if it had been paid, would have amounted to \$1,323.65 for Medwick and \$1,398.21 for Skove.

7. The collective negotiations settlement, which occurred through the interest arbitration process, was consummated on September 13, 1982. Thereafter the settlement was ratified by the parties and the salary ordinance for the members of the PBA unit was adopted on November 15, 1982.

8. Prior to the adoption of the salary ordinance for the Police Department, supra, the Borough adopted a resolution on October 18, 1982, which provided that any employee who either voluntarily or involuntarily terminated prior to the time that retroactive salary checks were approved would not receive a retroactive salary check. The resolution exempted employees who retire, die or resign because of a job-related disability (J-3).

9. Robert N. Del Vecchio, the President of the PBA, testified without contradiction that in October 1982, prior to the adoption of J-3, supra, he had a conversation with James Sutphen, a Borough Councilman, wherein Sutphen stated that the pending resolution had nothing to do with the PBA or the Police Department, indicating that it was only to apply to seasonal or part-time employees such as in the Department

^{2/} Exhibits R-1 and R-2 indicate that since 1977 certain employees who voluntarily or involuntarily terminated their employment prior to the adoption of the annual salary ordinance did not receive retroactive salary payment. Until the year 1982 only one member of the PBA unit fell into this category and that was George Malast, who was terminated February 13, 1979, but who never made any effort to obtain retroactive payment from the Respondent (CP-3). In 1982 two members of the PBA unit, Kenneth Medwick and Robert Skove, voluntarily resigned prior to the adoption of the salary ordinance and they are the subject of the instant proceeding.

of Public Works.

10. Robert Skove, who was a member of the PBA negotiating committee in 1982,^{3/} testified without contradiction that on or about September 1, 1982 he went to the Borough Hall and was informed that the Borough was in the process of adopting a resolution that may or may not affect him. On the same date he spoke to the Borough Clerk-Administrator, Ralph D. Sternadori, and the Mayor, George Gurisic, both of whom explained the proposed resolution and told Skove that it was designed for part-time^{4/} seasonal employees and that he, Skove, would receive his retroactive salary check. On the same day, or the next day, Skove also spoke to Councilman Sutphen, who reassured Skove that he would receive his retroactive salary check.

11. Neither Medwick nor Skove received a retroactive salary check after the adoption of the ordinance for the Police Department on November 15, 1982, supra.

THE ISSUE

Did the Respondent violate Subsections(a)(1) and (5) of the Act when it unilaterally and without negotiations with the PBA adopted a resolution on October 18, 1982, which mandated that those individuals who have voluntarily or involuntarily terminated their employment prior to the issuance of "retro-checks" should not receive same?

DISCUSSION AND ANALYSIS

The Respondent Did Not Violate The Act By Adopting A Resolution On October 18, 1982 Regarding "Retro-Checks" Since The Resolution Merely Memorialized A Long-Standing Past Practice Of Which The PBA Had Or Should Of Had Knowledge

^{3/} Skove's decision to resign was reached by him about five months prior to the date of his resignation in September 1982 and was, thus, prior to the conclusion of the collective negotiations, which resulted in the addendum (J-2).

^{4/} Ann Laneve, the Borough's Payroll Clerk, testified without contradiction that she overheard Sternadori tell Skove that he would receive his retroactive salary check and that the resolution would not affect him.

But for the introduction in evidence of Exhibits CP-3, R-1 and R-2 the Hearing Examiner might well have concluded that when the Respondent adopted the resolution of October 18, 1982 it violated the Act by having acted unilaterally and having failed to negotiate with respect to a term and condition of employment, namely, the eligibility of recently separated employees to receive retroactive salary checks after the consummation of a successor collective negotiations agreement. However, an examination of Exhibits R-1 and R-2, together with CP-3, indicates clearly that there has been a long-standing past practice, dating back to 1977, of non-payment of retroactive salary checks to individuals who have voluntarily or involuntarily terminated their employment with the Respondent prior to the adoption of the annual salary ordinance.

Although only one PBA unit member appears among the employees listed on R-1, this employee, George Malast, who terminated on February 13, 1979, was not paid retroactive salary in the year 1979 and, by his own admission, did not pursue the matter with the PBA. The Hearing Examiner finds that the PBA either knew or should have known of the fact that Malast did not receive a retroactive salary check as a direct result of his having terminated prior to the adoption of the annual salary ordinance.

In the context of the foregoing facts, the October 18, 1982 resolution by the Borough merely memorialized a long-standing practice and, thus, did not change unilaterally a term and condition of employment. In support of this conclusion the Hearing Examiner observes that past practice and custom are revelant and controlling where the collective negotiations history indicates that an ambiguity exists as a result of the provisions of the agreements or by implication or silence: Kearny PBA Local 21 v. Town of Kearny, 81 N.J. 208, 221 (1979) and Sayreville Education Association v. Sayreville Board of Education, App. Div. Docket No. A-373-80T4 (1981). As the Court said in Sayreville:

"...the past practices and customs of the local Board of Education regarding

reimbursement for materials purchased during a professional workshop day were just as much a part of the collective bargaining agreement as if specifically expressed therein..." (Slip, p. 5).

See also, New Brunswick Board of Education, P.E.R.C. No. 78-47; 4 NJPER 84, 85 (1978), aff'd. App. Div. Docket No. A-2450-77 (1979) and Sayreville Board of Education, P.E.R.C. No. 83-105, 9 NJPER 138, 140 (1983).

The Hearing Examiner is persuaded that the phrase "all officers" in both J-1 and J-2 is ambiguous as to the question of whether or not Medwick and Skove are within the orbit of coverage. Thus, resort to past practice is both proper and relevant. As found above, CP-3, R-1 and R-2 support the conclusion that the past practice in collective negotiations between the Respondent and the PBA has been that individuals who terminate before the issuance of retroactive salary checks are not within the orbit of eligibility.

Finally, the Hearing Examiner does not find probative the uncontradicted testimony of Del Vecchio and Skove regarding conversations with Mayor Gurisic, Councilman Sutphen and Clerk-Administrator Sternadori in the fall of 1982 since the statements attributed to them were made on an informal basis and cannot be binding upon the Borough. It is the formal actions of the Mayor and Council in adopting ordinances and resolutions that constitute binding and legal actions of the Borough, as to which they are accountable. The resolution of October 18, 1982 (J-3) represents the action of the Borough with respect to the issuance of "retro-checks" and allows of no exception as to Skove.

Accordingly, the Hearing Examiner will recommend dismissal of the allegations that the Respondent violated Subsections(a)(1) and (5) of the Act by its adoption of the resolution of October 18, 1982.

* * * *

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

CONCLUSION OF LAW

The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) when it adopted a resolution on October 18, 1982, the effect of which was to deny retroactive salary payments to Kenneth Medwick and Robert Skove.

RECOMMENDED ORDER

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



Alan R. Howe
Hearing Examiner

Dated: July 18, 1983
Trenton, New Jersey