P.E.R.C. NO. 92-83

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GLOUCESTER COUNTY BOARD OF
CHOSEN FREEHOLDERS,

Respondent,

-and- Docket No. CO-H-90-197

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 1085,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Communications Workers of America, Local 1085 against the Gloucester County Board of Chosen Freeholders. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act when it unilaterally reduced the work hours of a social worker position; when it hired a social worker to work for only nineteen hours, allegedly to avoid her inclusion in CWA's negotiations unit; and when it refused to negotiate over the social worker's hours. Under all the circumstances of this case, the Commission holds that the County had no duty to negotiate before hiring the social worker to work nineteen hours a week, and has no duty to negotiate over the hours she now works.

P.E.R.C. NO. 92-83

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GLOUCESTER COUNTY BOARD OF
CHOSEN FREEHOLDERS,

Respondent,

-and- Docket No. CO-H-90-197

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 1085,

Charging Party.

Appearances:

For the Respondent, Gerald L. Dorf, Esq.

For the Charging Party, Richard A. Dann, President, CWA Local 1085

DECISION AND ORDER

On January 8, 1990, the Communications Workers of America, Local 1085 ("CWA") filed an unfair practice charge against the Gloucester County Board of Chosen Freeholders. The charge alleges that the Board violated subsections 5.4(a)(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally reduced the work hours of the social worker

---

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. (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."

position; when it hired Shirley Sorbello, a social worker, to work for only 19 hours a week, allegedly to avoid her inclusion in CWA's negotiations unit; and when it refused to negotiate with CWA over Sorbello's work hours.

On May 17, 1990, a Complaint and Notice of Hearing issued. The County filed an Answer asserting that the charge was untimely and that Sorbello was not in the negotiations unit, and denying that it had cut her hours to avoid the contract or that it had any obligation to negotiate over her work hours.

On June 8, the County moved for summary judgment. That motion was denied.

On October 10, 1990, Hearing Examiner Elizabeth J. McGoldrick conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by December 17, 1990.

On November 8, 1991, the Hearing Examiner recommended dismissing the complaint. H.E. No. 92-11, 17 NJPER 533 (¶22262 1991). While finding the charge timely, she concluded that the County had set Sorbello's hours at 19 hours per week in accordance with a State grant and that it had no obligation to negotiate over her work hours since she was not in CWA's negotiations unit.

On November 25, CWA filed exceptions. It asserts that Sorbello's position had always been in CWA's unit; the County does not have a right to hire employees into any title at any number of part-time hours it chooses; the County does not have a prerogative

to refuse to negotiate over Sorbello's hours, and the County cannot justify Sorbello's exclusion from CWA's unit by its own unilateral determination that she would work only 19 hours a week.

The County has filed a response supporting the Hearing Examiner's report. It incorporates its post-hearing brief.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-4) are accurate. We incorporate them.

We agree with the Hearing Examiner that this charge was timely filed (H.E. at 6-7). We also agree that the charge is without merit. Employees who work under 20 hours a week are excluded from CWA's unit. Sorbello is one of over 100 employees who occupy titles which are in CWA's unit, but who are excluded from that unit because they work under 20 hours per week.[2/] The employer did not set Sorbello's hours at 19 to avoid including her in the unit. Instead, that number of hours was chosen solely on the basis of the available grant funding. That number of hours was enough to meet and exceed the program goals. Before Sorbello assumed her position in the Office for the Disabled, her work had been done by an employee in the Office of Aging. That employee in

---

2/ CWA asserts that the employer has repudiated the contract provision requiring that hours of work, including meal and break times, be maintained. But we cannot find a repudiation since it is not clear, given the inclusion of part-timers in the unit, that this provision requires that full-time hours be maintained for particular positions. CWA's contract claim should be resolved through the negotiated grievance procedures. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

turn had also worked under 20 hours per week under a State grant. Sorbello did not have her hours reduced. Given all the circumstances of this case, we hold that the County had no duty to negotiate before hiring Sorbello to work 19 hours a week and has no duty to negotiate over the hours Sorbello works now.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: January 30, 1992
Trenton, New Jersey
ISSUED: January 31, 1992

H.E. NO. 92-11

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

In the Matter of

GLOUCESTER COUNTY BOARD OF
CHOSEN FREEHOLDERS,

Respondent,

-and-

Docket No. CO-H-90-197

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1085,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Gloucester County Board of Chosen Freeholders did not violate the New Jersey Employer-Employee Relations Act when it hired a Social Worker, Health at less than 20 hours per week and refused to negotiate over terms and conditions of employment with CWA, Local 1085. The Hearing Examiner found that this position was not included in CWA's unit and that CWA did not prove the County acted with any illegal motive in establishing the position. The Hearing Examiner also found that the charge was timely filed.

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. 92-11

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

In the Matter of

GLOUCESTER COUNTY BOARD OF
CHOSEN FREEHOLDERS,

Respondent,

-and- Docket No. CO-H-90-197

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1085,

Charging Party.

Appearances:

For the Respondent, Gerald L. Dorf, Esq.

For the Charging Party, Richard A. Dann, President, CWA Local 1085

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On January 8, 1990, the Communications Workers of America, Local 1085 ("Charging Party" or "CWA")) filed an Unfair Practice Charge (C-1)[1/] with the Public Employment Relations Commission ("Commission"). CWA alleges that the Gloucester County Board of Chosen Freeholders ("Respondent" or "County") violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(a)(1)

1/ Exhibits received in evidence marked "C" refer to Commission exhibits, those marked "J" refer to joint exhibits, those marked "CP" refer to Charging Party exhibits, and those marked "R" refer to respondent's exhibits. Transcript citation "T1" refers to the transcript developed on October 10, 1990, at page 1.

and (5) ("Act")[2/] when it refused to negotiate with CWA over the terms and conditions of employment of Shirley Sorbello, a part-time social worker. CWA also claims the County unilaterally changed a term and condition of employment by reducing the hours of a unit position.

A Complaint and Notice of Hearing issued on May 17, 1990. On April 5 and June 8, 1990, the County filed an answer and an amended answer (C-2) denying the charges and asserting that the charge is not timely filed. Also on June 8, the County filed a motion for Summary Judgment (C-5). The motion was denied on August 22, 1990 (C-10). On October 10, 1990, I conducted a hearing at the Commission's Trenton offices. The parties were afforded an opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. Briefs were filed by December 17, 1990.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The County and CWA are parties to a collective negotiations agreement, (J-1), effective from January 1, 1989

2/ 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."

through December 31, 1991. This agreement was executed on July 5, 1989. The unit recognition clause of J-1 states that the unit includes:

> Section 1: . . . all employees in the Blue and White Collar, Supervisory, and Row Office bargaining units, including craft employees. Part-time employees who work twenty hours or more per week shall be included. Twenty (20) hours shall mean an average of twenty (20) hours in the three (3) month period prior to January 1, April 1, July 1, and October 1 of each year (or ninety (90) days for newly hired employees). Excluded from the aforementioned units are . . . part-time employees who work less than twenty (20) hours as defined above, . . . as well as temporary and interim employees other than those specified below."
>
> Section 2: Any employee who occupies a temporary position for an aggregate of six (6) months or more in any twelve (12) month period, or which position is intended by the Employer to be occupied for an aggregate of six (6) months or more in any twelve (12) month period, shall be included in the appropriate unit. (J-1, p.1, emphasis added)

Temporary employees were excluded from CWA's unit in the prior contract (1987-1988). (J-5, p.1) The current agreement (J-1) contains a list of titles at Appendix II. The titles listed are not exclusively full-time. (T72) The County employs at least 100 employees in unit titles who work less than 20 hours per week. (T16, T27, T72) These employees are not in the unit.

Social Worker, Health is listed in Appendix II, but Senior Social Worker is not. (J-1, p.37, C-3, T52) Before July 1989 all Social Workers, Health worked full time. (C-1, C-3, p.3)

2. On January 3, 1989 Shirley Sorbello was hired as a part-time, temporary Senior Social Worker in the County's Office for the Disabled. She was assigned to a program providing services to

the blind and visually impaired. (T39, T51, C-1, C-2) The program was funded by a State grant. (T40,T47-48) Sorbello works 19 hours per week.

3. Prior to the creation of the Office for the Disabled, services to blind and visually impaired persons were offered in the County's Office on Aging. At that time, Sorbello's work was done by an employee working under 20 hours per week. The function was transferred about two years ago. (T69)

4. The County set Sorbello's work schedule at 19 hours per week solely on the basis of the available grant funding. (T40,T48,T70) Jacquelyn Love, Sorbello's supervisor, was a CWA witness. Her unrebutted testimony was that the program has exceeded its goals within this allocation; and, an increase in Sorbello's hours would create a budget problem. (T40,T41,T48)

5. In May 1989, CWA requested that the State Department of Personnel ("DOP") review and reclassify Sorbello's title.(T53,T55) CWA did not know what the proper classification of Sorbello's position should be, but it knew that her title was not listed in the state classification system. (T52-T53,T56-T57) CWA did not know whether the title would ultimately be found to be listed in Appendix II and it did not claim to represent Sorbello in May and June 1989. (T59,T62,T69) In June 1989 DOP investigated Sorbello's position (J-2, J-3). On July 31, 1989, DOP informed the County that Sorbello's position was reclassified from Senior Social Worker to Social Worker, Health, effective July 27, 1989. (J-4) On August 1, 1989 CWA was notified of the reclassification. (T54)

6. Article V, Section 1 of the agreement (J-1) states: "The current hours of work, including meal and break times, shall be maintained." The remainder of Article V describes workweek and hours schedules; it sets forth work hours for multiple shift titles, part-time hours assignments, shift changes for some titles, and converts to a biweekly payroll.

7. When the County adopts a new unit title it negotiates over work hours, except when a position will work under 20 hours per week. (T27) Social Worker, Health had not been used in a part-time capacity for at least 5 years prior to Sorbello's hire and reclassification. (T16,T27) Since some employees work less than 20 hours per week, there are many titles with positions both in and out of the unit. (T27) CWA has not claimed to represent titles which are established at under 20 hours per week. (T63, T64)

8. In August 1989 CWA objected to to the County's personnel director about Sorbello's hours of work and requested negotiations. The County refused; it believed Sorbello's position was excluded from CWA's unit. (T15-T16)

ANALYSIS

The County alleges that the charge was filed outside of the Act's six months statute of limitations and should be dismissed. CWA alleges that the County negotiated in bad faith; unilaterally changed a term or condition of employment of a represented title or position; refused to negotiate in good faith over a unit position; and interfered with rights guaranteed by the Act.

Timeliness

N.J.S.A. 34:13A-5.4(c) provides:

> ". . . no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge."

I find the charge, filed on January 8, 1990, was timely filed. The operative date from which the six months begins to run is the date on which the charging party knew (actually or constructively) of the facts giving rise to the unfair practice. Town of Kearny, P.E.R.C. No. 81-34, 6 NJPER 446 (¶11229 1980); Neptune Tp. Bd. of Ed., P.E.R.C. No. 81-101, 7 NJPER 143 (¶12062 1981) In Kearny, the Commission found that the statute of limitations began when the PBA had actual notice of the ordinance adoption and not when pre-adoption notices were published in the newspaper.

Similarly here, the statute of limitations began when CWA was notified of the actual title change and not when it believed the title was misclassified. One could argue that CWA had no proper claim to the position until the reclassification placed it in a unit title on August 1, 1989.

The County alleges that the operative date is "long before June 5, 1989" when CWA initiated a classification study, sometime in spring 1989. (C-7) However, prior to July 5, 1989 CWA did not represent temporary positions by the terms of its agreement. (J-5) Although the parties' current contract was retroactive to January 1, 1989, the date it was signed was much later on July 5, 1989. CWA did not have an even arguable claim to represent Sorbello's temporary position until after July 5, 1989.

For the reasons stated above I find that the operative date for the tolling of the statute of limitations here is August 1, 1989 and that the charge is timely.

Intent to avoid negotiations

The charging party alleges that the County hired Sorbello into a unit title at 19 hours per week to avoid its duty to negotiate with CWA over this position. Subsection 5.4(a)(5) prohibits public employers from refusing to negotiate in good faith with a majority representative. Normally motive is not an element of charges under this subsection. However, an employer might breach this duty by hiring at just below the contractual minimum number of hours in order to avoid a contract.

The inference CWA seeks is that Sorbello's hours were set low to avoid representation by CWA. However, CWA's own witness stated that the choice of 19 hours per week was required by the grant which provided for 598 total hours. Her testimony was unrebutted. And, significantly, the program goals are being exceeded at the present level of 19 hours per week. According to Sorbello's supervisor, no additional hours are warranted under this grant. For obvious cost-benefit reasons, it would not make sense to assign Sorbello additional hours per week. The supervisor testified that doing so would result in a budget problem, as it would exceed the grant funding. I consider the unrebutted testimony of this witness to be an admission against interest and conclude that there was no proof of an illegal motive but instead a rational business

purpose in the choice of 19 hours per week. Accordingly, I find as to this aspect of the charge, the County did not violate subsections 5.4(a)(5) and (1) of the Act.

Unilateral Change/Interference

CWA contends its contract prohibits the County from hiring part-time employees into unit titles which have always been filled with full-time employees. Neither the contract nor the parties' past practices so limit the County.

CWA also alleges that the County has violated the maintenance of hours clause. I disagree. The clause does not prevent the County from creating a new position in one of the titles in J-1, and hiring an employee at any number of part-time hours it chooses. CWA argues that because a title found in Appendix II has never before been filled with part-time employees, the County is prohibited from doing so unless it negotiates with CWA. However, CWA did not produce any evidence indicating that these parties had ever negotiated the addition of positions of less than 20 hours. In fact, there are 100 employees in titles listed in Appendix II of J-1 who work for less than 20 per week.

Nothing in J-1 prescribes the maintenance of hours of all titles, and nothing in the record suggests that such maintenance has been a past practice. When the County adopts a new unit title it negotiates over work hours, except where positions in the title will work under 20 hours per week. CWA has not claimed to represent titles which are established at under 20 hours per week.

The maintenance of hours clause prevents the County from unilaterally changing the hours of work of existing unit employees, or employees hired into positions falling within the recognition clause. Sorbello was never in the unit; she is in the same position as those 100 or so other County employees who work under 20 hours in "unit" titles.

An employer violates its duty to negotiate when it unilaterally alters an existing practice or rule governing a term and condition of employment, such as hours of work, even though that practice or rule is not set forth in a contract. Galloway Tp. Bd. of Ed., 78 N.J. 1, (1978) ("Galloway"). N.J.S.A. 34:13A-5.3 provides, in part:

> "Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established."

To prove a violation of this section of the Act a charging party must show that a working condition has been instituted or changed without negotiations. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322 (1989). The Commission has consistently held, with the approval of the appellate courts, that employee representatives represent positions in a unit, not merely the specific employees who hold these positions at the time of actual certification, recognition, or contract adoption. Galloway, p.17-20 (1978); Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd. App Div. Docket No. A-181-80T8 (1982)("Deptford")

CWA alleges the County unilaterally reduced a unit title's hours by employing someone at less than 20 hours per week, without negotiations. CWA argues that the County's actions amount to a reduction in hours, because until Sorbello's reclassification, the title had been exclusively full-time and therefore, within the unit. CWA relies upon Galloway, 78 N.J. 1 (1978); Deptford; and, Sayreville Bd. Of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983)("Sayreville') to support its argument.

Sorbello's hours were not reduced; there was no reduction of all positions in the title, or any reduction of hours of an existing unit position. In Sayreville, the Board changed two 12-month secretarial positions to 10 months per year. The change occurred immediately after the retirements of the incumbents. The Commission found the Board had unilaterally changed a term of employment and violated subsection 5.4. These unit positions existed immediately before the change. The position at issue here was never in CWA's unit. The bargaining representatives in Galloway, Deptford and Sayreville had represented the positions in dispute prior to the changes. Here, CWA has never represented employees who work fewer than 20 hours per week, even where their titles are otherwise listed in the parties' agreement. Services to the blind were not performed by anyone in CWA's unit in the past. In fact, the evidence shows that these services had been provided by a non-unit employee working less than 20 hours per week.

In Deptford, the Commission found a violation where the Board hired a teacher at part-time hours, without fringe benefits, to do the type of work that had previously been performed by full-time teachers with full benefits. In contrast, the County hired a Social Worker, Health at part-time hours to do the type of work that had previously been performed by a part-time employee. The Board in Deptford attempted to avoid established salary practices. Here, the employer had no such motive, but was fulfilling the requirements of a state grant.

CWA here challenges the County's right to hire an employee into a unit title, at any number of hours it requires, without negotiations. The County maintains that it was not obligated to negotiate the hours of Sorbello's position because, under the circumstances here, that subject is not mandatorily negotiable.

I agree with the County. Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 403-404]

Our Supreme Court has always held that work hours are the most fundamental terms and conditions of employment. Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1, 8-9 (1973); Burlington Cty. Coll. Faculty Ass'n v. Bd. of Trustees, 64 N.J. 9 (1973); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 67 (1978); Woodstown-Pilesgrove Reg. Sch. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 589 (1980); Local 195. In Local 195, the Court held that given the employer's right to determine such questions as what and when its services would be offered, staffing levels and employee qualifications, the subject of individual work schedules was mandatorily negotiable. However, Local 195 also mandates that we consider whether requiring negotiations over a subject in a given factual circumstance would significantly interfere with the determination of governmental policy. As stated above, when the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

Applying the above balancing test, I find the dominant concern involves the County's ability to deliver services to blind and visually impaired persons under a limited state grant. The hours of work here are so interrelated with the delivery of 598 hours under the grant that negotiating something greater than 19 hours per week would significantly interfere with the County's ability to avail itself of the grant funds. Accord, Mainland Reg'l

Teach. Ass'n v. Mainland Reg'l Bd. of Ed., 176 N.J. Super. 476 (App. Div. 1980), certif. den. 87 N.J. 312 (1981); Ramapo-Indian Hills Ed. Ass'n v. Ramapo-Indian Hills H.S. Dist. Bd. of Ed., 176 N.J. Super. 35 (App. Div. 1980)(the decision to create a new position cannot be separated from the hours required to perform the duties).

Absent an illegal motive for establishing the position at 19 hours per week, which was not proven, the County has a managerial prerogative to decide whether to take advantage of a grant and at what number of hours services under the grant should be provided.[3/]

Refusal to negotiate/interference

The Charging Party alleges that the County refused to negotiate over Sorbello's terms and conditions of employment. The County refused to negotiate after CWA requested negotiations in August 1989. I find that the County has no obligation to negotiate over the Social Worker, Health position occupied by Sorbello because her position is excluded from CWA's unit. Sorbello's assigned hours are 19 per week, and by the plain language of Article 1, CWA only represents part-time temporary employees who work a minimum average of 20 hours per week. (J-1) In effect, CWA has negotiated with the County about this subject; it negotiated out of its unit all positions whose hours are less than 20 per week.

3/ Staffing decisions are not mandatorily negotiable. See, Tp. of Readington, P.E.R.C. No. 84-7, 9 NJPER 533 (¶14218 1983); City of Camden, P.E.R.C. No. 83-116, 9 NJPER 163 (¶14077 1983); Bergen Cty., P.E.R.C. No. 83-110, 9 NJPER 150 (¶14071 1983); City of Camden, P.E.R.C. No. 82-71, 8 NJPER 110 (¶13046 1982)

For the reasons stated above, CWA has not proven either improper motive, or unilateral change. Finally, the choice of a 19 hours per week schedule was a managerial prerogative.

Accordingly, based upon the entire record and above analysis, I make the following:

CONCLUSIONS OF LAW

The charge was timely filed. The charging party did not prove by a preponderance of the evidence that the County of Gloucester unilaterally changed a term or condition of employment, refused to negotiate in good faith or interfered with rights guaranteed by the Act. Accordingly, no violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) occurred by the County's refusal to negotiate with CWA, Local 1085 when it hired Shirley Sorbello in the title Social Worker, Health at 19 hours per week, under a state grant designed to provide services to blind and visually impaired persons.

RECOMMENDATION

I recommend that the Commission **ORDER** that the Complaint be dismissed.

Elizabeth J. McGoldrick
Hearing Examiner

Dated: November 8, 1991
Trenton, New Jersey