

P.E.R.C. NO. 82-59

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SOUTH RIVER,

Respondent,

-and-

Docket No. CO-81-186-93

SOUTH RIVER P.B.A. LOCAL 62,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission, in the absence of any exceptions, accepts the recommendations of its Hearing Examiner and determines that the Borough of South River violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4(a)(1) and (5) when it unilaterally adopted a resolution restricting the use of personal days of employees represented by South River P.B.A. Local 62. The Commission orders that the Borough rescind the resolution, cease and desist from refusing to negotiate proposed contractual alterations, and post an appropriate notice.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SOUTH RIVER,

Respondent,

-and-

Docket No. CO-81-186-93

SOUTH RIVER P.B.A. LOCAL 62,

Charging Party.

Appearances:

For the Respondent, Schwartz & Schiappa, Esqs.
(Gary M. Schwartz, of Counsel)

For the Charging Party, Bosco-McDonnell Associates
(Simon M. Bosco)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on December 19, 1980, by the South River PBA Local 62 ("PBA") alleging that the Borough of South River ("Borough") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, when it unilaterally and without prior negotiations with the PBA altered the terms of the existing collectively negotiated agreement between the parties. It was specifically alleged that the Borough's action violated N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.^{1/}

^{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."

It appearing that the allegations of the Charge, if true, might constitute unfair practices, a Complaint and Notice of Hearing was issued on January 23, 1981. On April 24, 1981, the parties appeared before Commission Hearing Examiner Edmund G. Gerber for the purpose of presenting evidence, examining and cross-examining witnesses, oral argument and the presentation of legal briefs. On September 22, 1981, the Hearing Examiner issued his Recommended Report and Decision, H.E. No. 82-10, 7 NJPER ____ (¶ _____ 1981), a copy of which is attached hereto and made a part hereof.

The dispute in the instant case concerns a resolution adopted by the Borough Council on November 6, 1980 which provided that the Borough's Chief of Police "is not to permit under any circumstances more than 10% of the total sum of personal days allocated to the uniformed members of his department to be used in any one calendar month." At the time this resolution was adopted the Borough and the PBA were engaged in interest arbitration in order to resolve a dispute concerning the terms of a successor collective negotiations agreement to replace the one which expired in 1979. The Hearing Examiner found that the Borough's action violated its obligation to negotiate terms and conditions of employment with the Association, especially in view of N.J.S.A. 34:13A-21, part of the Interest Arbitration Law, which provides:

During the pendency of proceedings before the arbitrator, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other,...

The Hearing Examiner rejected the Borough's contention that the Association had agreed to allow the Borough to adopt such a resolution, and also rejected the Borough's reading of 34:13A-21, as not being operative during the time an interest arbitrator is acting in the capacity of a mediator. The Hearing Examiner recommended that the Borough be ordered to cease and desist from such action and rescind the resolution of November 6, 1980.

Neither party has filed exceptions to the Hearing Examiner's report. Upon review of the entire record in this matter, we are satisfied that the Hearing Examiner's findings of fact and conclusions of law are based upon substantial evidence on the record and they are hereby adopted. We further find that the recommended order of the Hearing Examiner is an appropriate remedy to effectuate the policies of the Act and is hereby adopted as well. In this regard, we note that the Respondent has advised the Commission, in writing, that on October 15, 1981, in accordance with the recommended order of the Hearing Examiner, the Borough has rescinded its resolution of November 6, 1980, and has posted the Notice to Employees attached to the Hearing Examiner's Report.

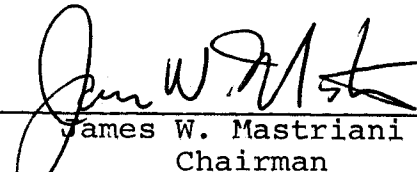
Since a Hearing Examiner's Report is a recommendation and does not have final and binding effect, the Commission must issue the final order. However, in this case since the instant order adopts the Hearing Examiner's recommendations, compliance with the recommended order of the Hearing Examiner will be deemed to constitute compliance with the order issued on behalf of the Commission.

ORDER

IT IS HEREBY ORDERED that the Respondent Borough of South River:

1. Cease and desist from unilaterally imposing alterations to the collective negotiations contract without prior negotiations.
2. Rescind their resolution of November 6, 1980, which unilaterally altered a contractual provision for the taking of personal days by patrolmen.
3. Post at all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon the receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for a period of sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials.
4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Parcels, Graves, Suskin, Newbaker and Hipp voted for this decision. None opposed.

DATED: December 15, 1981
Trenton, New Jersey
ISSUED: December 17, 1981

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from unilaterally imposing alterations to the collective negotiations contract without prior negotiations.

WE WILL rescind the resolution of November 6, 1980, which unilaterally altered a contractual provision for the taking of personal days by patrolmen.

BOROUGH OF SOUTH RIVER

(Public Employer)

Dated _____

By _____

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission,
429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H. E. No. 82-10

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

In the Matter of

BOROUGH OF SOUTH RIVER,

Respondent,

-and-

Docket No. CO-81-186-93

SOUTH RIVER PBA, LOCAL 62,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Borough of South River committed an unfair practice when it unilaterally changed the manner in which police officers were allowed to take personal days. The contract between the Borough and the South River PBA, Local 62 provided that leave days could be taken at any time with the permission of the chief of police. The Borough unilaterally altered the terms of the contract when it imposed a mathematical formula limiting the total number of leave days taken by the entire police force in any one calendar month.

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.

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

In the Matter of

BOROUGH OF SOUTH RIVER,

Respondent,

-and-

Docket No. CO-81-186-93

SOUTH RIVER PBA, LOCAL 62,

Charging Party.

Appearances:

For the Respondent, Schwartz & Schiappa, Esqs.
(Gary M. Schwartz, Esq.)

For the Charging Party, Bosco-McDonnell Associates
(Simon M. Bosco)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On December 19, 1980, the South River PBA filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that while the parties were in interest arbitration the Borough of South River (Borough) committed an unfair practice when it unilaterally and without prior negotiations altered the terms of the existing labor relations contract. It was specifically alleged that the Borough violated N.J.S.A. 34:13A-5.4 (a) (1) and (5) of the Act. ^{1/}

It appearing that the allegations of the charge, if true,

^{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."

may constitute an unfair practice, a Complaint and Notice of Hearing was issued on January 23, 1981.

A hearing in this matter was conducted on April 24, 1981, at which time the parties were given an opportunity to present evidence, examine and cross-examine witnesses, argue orally and present briefs.

The PBA and the Borough were parties to a collective negotiations agreement for 1978 and 1979. Negotiations for a successor agreement were unsuccessful and at the time in question the parties had submitted their contract dispute to interest arbitration pursuant to N.J.S.A. 34:13A-16 et seq. The 1979 contract provided that each police officer "is to receive five personal days off per year with pay, nonaccumulative with the approval of the Chief of Police and shift commander."

On November 6, 1980, the Borough council adopted a resolution which provided that the Chief of Police "is not to permit under any circumstances more than ten percent of the total sum of personal days allocated to the uniform members of his department to be used in any one calendar month."^{2/}

The Borough maintains that they had a right to take such action on the basis of 1) the contract, 2) an agreement between the PBA's attorney and the Borough and 3) their inherent managerial authority to ensure sufficient manning. The Borough argues that the resolution directly concerns minimum manning and is not subject

^{2/} This directive also included the use of vacation time. This portion of the directive was withdrawn and is not part of the instant charge.

to negotiations. In City of Orange v. Orange PBA Inc. Local 89, P.E.R.C. No. 79-10, 4 NJPER 420 (¶4188, 1978), the Commission held that a governmental agency had the right to establish minimum manning levels. Once those levels are established however the manner in which vacation time is scheduled is mandatorily negotiable. Here, the existing contract provision expressly reserves to the Borough, through the Chief of Police and shift commander, the right of prior approval to the granting of personal leave and the Borough is free on a case-by-case basis to grant or deny personal leave. The contract language safeguarded the Borough's right to ensure minimum manning. Accordingly any change in that procedure must be negotiated.

The Borough argues the contract gave it the right to issue the resolution. The contract provides that "Vacation days may be taken any time during the year with the approval of the Chief of Police who shall consider the availability of manpower." This vacation provision grants the right to take vacation time anytime during the year and no such language appears in the personal leave provision. Accordingly the Chief of Police may very well exercise greater discretion in granting personal days than vacation days in denying the use of personal days during certain times of the year. However, the adopted resolution goes beyond the existing contract provisions. The resolution does not take into consideration the presence or absence of other employees taking vacation or sick days. It is a rigid, mechanical test that severely limits the taking of personal days beyond what has occurred heretofore under the contract and effectively alters the terms and conditions of employment. See,

The Mayor and Council of Sayreville, P.E.R.C. No. 79-60, 5 NJPER 117 (¶10069, 1979) where a change in the past practice of granting compensatory time was determined to be a violation of the Act.

Significantly §34:13A-21 provides, "During the pendency of proceedings before the arbitrator existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other..." CWA, AFL-CIO and State of New Jersey, I.R. No. 82-2, 7 NJPER ____ (¶____, 1981); City of Vineland and Vineland PBA Local #266, I.R. No. 81-1, 7 NJPER ____ (¶____, 1981). The Borough argued that they were not in interest arbitration since the arbitrator at the time was mediating the dispute. Section 34:13A-16 (f)(3) provides that throughout the formal arbitration proceedings, the arbitrator may mediate or assist the parties in reaching a mutually agreeable settlement. Accordingly, the arbitrator's attempt at mediation is part of the arbitration process within the meaning of the Act.

The Borough argued that there was an oral agreement between themselves and the PBA. The Mayor of South River, James Schenicki, testified that during a negotiations session the Borough raised the issue of its need to control the taking of personal days. The Borough felt that during the Christmas season the police force was undermanned. It specifically wanted to create a floor and ceiling on the use of personal days. The Mayor testified that the negotiator for the PBA, Nancy Oxfeld, stated that she did not understand why this matter was being discussed. Limiting the use of personal days was the Borough's prerogative. The mayor testified that Oxfeld acknowledged the right of the Borough to create a floor

and ceiling on the taking of personal days.

Oxfeld testified that there were conversations concerning manning, vacation time and personal days and she did state that, under the contract, the Borough had the right to limit the number of personal days a patrolman may use at any one time, since the Chief of Police and shift commander could refuse approval of personal days. However, she denied that she told the Borough they had the right to unilaterally impose a specific floor or ceiling to the taking of personal days.

Oxfeld testified that the confusion arose because the Borough believed it had no discretion to refuse the taking of personal days. In the Borough's view the Chief of Police was not part of management. Oxfeld told the Borough's negotiators that the chief was not in the unit and was a part of management.

It is apparent that both Oxfeld and Schenicki testified in good faith. It is further apparent that there was no meeting of the minds and, hence, no agreement.

Moreover, and perhaps more importantly, §34:13A-5.3 expressly provides that "when agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and majority representative. And 5.4(a)(6) and (b)(4) make it a specific unfair practice to reach an agreement and then refuse to reduce a negotiated agreement to writing, i.e. sign such an agreement. Therefore, even though this was not a final negotiated agreement concerning all terms and conditions of employment, it did relate to a specific term and condition of employment and under such circum-

stances in construing 13A-21 (which prohibits the alteration of terms and conditions during the pendency of proceeding without consent) verbal agreements should be discouraged. Accordingly, there was no agreement during negotiations which permitted the Borough to implement its resolution on personal days.

It is therefore recommended that the Commission find the Borough of South River violated §5.4(a)(1) and (5) of the Act when it unilaterally altered the contract provision as to the taking of personal days without prior negotiations.

Upon the entire record before me, I recommend the Commission issue the following


ORDER

The Respondent Borough of South River shall

- 1) Cease and desist from unilaterally imposing alterations to the collective negotiations contract without prior negotiations.
- 2) Rescind their resolution of November 6, 1980, which unilaterally altered a contractual provision for the taking of personal days by patrolmen.
- 3) Post at all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon the receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for a period of sixty (60) consec-

utive days. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials.

4) Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.



Edmund G. Gerber
Hearing Examiner

DATED: September 22, 1981
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from unilaterally imposing alterations to the collective negotiations contract without prior negotiations.

WE WILL rescind the resolution of November 6, 1980, which unilaterally altered a contractual provision for the taking of personal days by patrolmen.

BOROUGH OF SOUTH RIVER

(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 James Mastriani, Chairman, Public Employment Relations Commission, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.