P.E.R.C. NO. 88-92

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF TENAFLY,

Respondent,

-and- Docket No. CO-H-88-37

LOCAL 29, RWDSU, AFL-CIO,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, dismisses a Complaint based on an unfair practice charge filed by Local 29, RWDSU against the Borough of Tenafly. The charge alleged the Borough violated the New Jersey Employer-Employee Relations Act when it assigned only one employee to a snow plow. The Chairman, in agreement with the Hearing Examiner and in the absence of exceptions, finds that the charge was untimely under N.J.S.A. 34:13A-5.4(c); that the charge pertains to a good faith contract interpretation dispute and therefore is not an unfair practice and that the Borough complied with the contract, under the circumstances, in assigning one person to a snow plow.

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Appearances:

For the Respondent, Logan & Logan, Esqs.
(James P. Logan, of counsel)

For the Charging Party, Reitman, Parsonnet, Maisel & Duggan, Esqs. (Jesse H. Strauss, of counsel)

DECISION AND ORDER

On July 27, 1987, Local 29, RWDSU, AFL-CIO filed an unfair practice charge against the Borough of Tenafly ("Borough"). The charge alleges the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4(a)(5),[1/] when, on January 22, 1987, it assigned only one employee to a snow plow. The charge alleges this assignment

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

repudiated the parties' alleged agreement to assign two employees to a snow plow.

On October 30, 1987, a Complaint and Notice of Hearing issued. On November 30, the Borough filed an Answer. It admits assigning one employee to a snow plow, but contends the contract authorizes it to do so. As an affirmative defense, it contends the Complaint is untimely.

On December 14, 1987, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They also filed post-hearing briefs.

On February 26, 1988, the Hearing Examiner recommended that the Complaint be dismissed. H.E. No. 88-39, 14 NJPER ___ (¶_____ 1988). He found that the charge was untimely under N.J.S.A. 34:13A-5.4(c); that the charge pertains to a good faith contract interpretation dispute and therefore is not an unfair practice under State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), and that the Borough complied with the contract, under the circumstances, in assigning one person to a snow plow.

The Hearing Examiner informed the parties that exceptions were due on or before March 10, 1988. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-7) are accurate. I adopt and incorporate them here. Under all the circumstances of this case and acting

pursuant to authority delegated to me by the full Commission, I agree the Complaint should be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: Trenton, New Jersey
March 23, 1988

H.E. NO. 88-39

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

In the Matter of

BOROUGH OF TENAFLY,

Respondent,

-and- Docket No. CO-H-88-37

LOCAL 29, RWDSU, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the Borough of Tenafly did not violate the New Jersey Employer-Employee Relations Act when it asked men to work one man per plow in tandem throughout one section of town. The Hearing Examiner found that the Borough complied with the parties' collective agreement.

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. 88-39

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

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Appearances:

For the Respondent
Logan and Logan, Esqs.
(James P. Logan, of counsel)

For the Charging Party
Reitman, Parsonnet, Maisel & Duggan, Esqs.
(Jesse H. Strauss, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (Commission) on July 27, 1987 by Local 29, RWDSU, AFL-CIO (Local 29) alleging that the Borough of Tenafly (Borough) violated subsection 5.4(a)(5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[1/] Local 29 alleged that the Borough failed to comply with

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1/ This subsection prohibits public employers, their representatives or agents from: "(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 parties' collective agreement and unilaterally altered a term and condition of employment by requiring only one-man crews in certain snow plowing work just prior to January 22, 1987. Local 29 explained that it filed a grievance on January 22 and that the Mayor and Council rejected the grievance on March 5, 1987. Local 29 argued that the Mayor and Council ignored another provision of the contract.

A Complaint and Notice of Hearing (C-1) was issued on October 30, 1987. The Borough filed an Answer (C-2) on November 30, 1987. In denying that it committed a violation the Borough argued, in part, that the Complaint should be dismissed because the Charge was not filed within the time provided in the statute of limitations, and that the snow plowing was performed with the cooperation of the affected employees and was therefore in compliance with the parties' collective agreement.

A hearing was held on December 14, 1987.[2/] Both parties filed post-hearing briefs by February 11, 1988.

Based upon the entire record, I make the following:

Findings of Fact

1. Local 29 became the majority representative of department of public works (D.P.W.) employees employed by the Borough when a local organization representing those employees, the Department of Public Works Organization (DPWO), affiliated with

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2/ The transcript from the hearing will be referred to as "T."

Local 29 in the spring of 1987. Local 29 was subsequently recognized by the Borough as the majority representative (T85-T87).

2. The DPWO represented the D.P.W. employees as early as 1977. When snow plowing had to be performed by D.P.W. employees, prior to 1978, there were always two men in each truck primarily for safety reasons (T25-T26). During the negotiations between the Borough and DPWO in December 1977, the Borough wanted flexibility in its snow plowing operation and sought to use one man in a snow plow at least in certain situations (T27, T38-T39). The DPWO negotiations team included employees Tomasi, Cataraso, Pfieffer, Besold and Yusis (T37, J-4). The parties reached an agreement on the snowplowing issue during those negotiations which resulted in the Borough using one man per snowplow when plowing in tandem on main roads and cul-de-sacs (J-4, T38). From the time those negotiations were completed through November 1986, the Borough only used one man per snowplow when plowing in tandem on main roads and cul-de-sacs. In all other situations there were two men in a truck (T28).[3/]

4. In December 1986, Brooks Bodecker, the Borough's D.P.W. Superintendent, assigned one man per truck to perform all the

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3/ In addition to using its own employees to clear snow, the Borough also had an arrangement with a private contractor to clear snow on the east side of the Borough. The private contractor always used one man in a snowplow (T77). This case, however, is limited to the D.P.W. employees, and the private contractor's method of operations are not relevant here.

snowplowing, not just the main streets and cul-de-sacs. The DPWO, however, filed no grievance or charge over that incident.

On January 18 and 19, 1987 a snow storm forced Bodecker to call out the D.P.W. employees on a Sunday (January 18) and a Monday (Monday, January 19 was a holiday, the observation of Martin Luther King Day) to salt the roads. Employees Yusis, Hutloff, Besold, Kittan and Reilly worked on January 18 from approximately 9:30 p.m. to 1:30 a.m. (January 19)(R-1). Employees Yusis, Hutloff, Besold, Kittan and Ricciardi were called out from approximately 1:00 p.m. to 6:00 p.m. on January 19 (J-1).

Since the roads continued to be slushy, Bodecker believed it was necessary to plow the roads before Tuesday morning, January 20th (T70-71). He attempted to contact more employees for that plowing function but could only get four employees, Yusis, Hutloff, Besold and Ricciardi, to do the work (R-1, T70-T71). When the employees arrived for work Bodecker explained the situation to them and asked them if they would plow all usual locations (not just main roads and cul-de-sacs) one man in a truck in tandem (T71-T73). The employees agreed to work one man in a truck in tandem in their entire work area (T72).[4/] Hutloff and Besold worked from approximately 8:00

4/ I credit Bodecker's testimony that the four drivers agreed to work one man in a truck, and agreed to work one man in a truck in tandem on all streets, not just main roads and cul-de-sacs. The four drivers did not testify and were not present at the hearing and there was no evidence contradicting

Footnote Continued on Next Page

p.m. (January 19) to 7:30 a.m. (January 20), and Yusis and Ricciardi worked from approximately 10:30 p.m. (January 19) to 7:30 a.m. (January 20)(R-1). In Bodecker's notes of who worked during those days (R-1), he indicated that the D.P.W. plowed tandem on both sides of town. None of the four employees who worked Monday evening complained about working one man in a truck (T73).

5. The Borough and DPWO were parties to a collective agreement (J-1) effective from January 1, 1984--December 31, 1986. The DPWO negotiating team for J-1 did not include the same people as were included on the DPWO team in 1977 (J-1). Exhibit J-1 contained the following relevant clauses:

Section 1(c) permitted the Borough:

> To introduce new, different or improved methods and procedures in operations.

Section 2 permitted the Borough:

> to establish policy, the Borough shall have the right to maintain the efficiency of the Borough operations entrusted to it and to determine methods, means and personnel by which the Borough operations are to be controlled.

4/ Footnote Continued From Previous Page

Bodecker's testimony. Tomasi testified that on January 20 some of the four men who had worked one man in a plow on the evening of January 19 approached him and said that they had not been approached by Bodecker and were not asked to work one man in a snowplow that evening (T54-T56). I do not credit Tomasi's testimony to show that Bodecker did not ask them to work one man in a plow that evening. Bodecker testified that he did ask them, those drivers were not produced at hearing to contradict that testimony, and Tomasi was not there that evening and had no first-hand knowledge of the events.

Section 24:

> During the contract period, the parties understand the following:
>
> (a) One man per snow plow may be used only when plowing in tandem on main roads or on cul-de-sacs-or otherwise upon the cooperation between the parties.

Section 23 of J-1 was the grievance procedure. The first step was an oral presentation of the grievance to the D.P.W. Superintendent. The second step was before the Borough Administrator. The third step was before the D.P.W. Council Committee, and the fourth and final step was before the Mayor and Council. There was no advisory or binding arbitration provided for in the agreement.

6. On January 22, 1987 the DPWO filed a grievance over the events of January 19, 1987 when the four drivers worked one man per snow plow in tandem. The grievance alleged that the Borough violated J-1, Section 24(a). Both the D.P.W. Superintendent and the Borough Administrator waived a hearing at their respective levels and the grievance proceeded to the D.P.W. Council Committee at step three (T76).

The Council Committee held a hearing on January 29, 1987 and denied the grievance (J-2). It concluded that pursuant to Section 1(c) and Section 2 of J-1, and pursuant to Section 2 of the

Borough's Personnel Policy,[5/] that the Superintendent had the authority to alter the work method in question.

The grievance proceeded to the Mayor and Council, and on March 5, 1987 the Mayor and Council denied the grievance (J-3). The Mayor and Council considered the language in Section 24(a) of J-1 and found that language did not "specifically provide for the number of personnel required in a snowplow on streets other than main and cul-de-sacs." The Mayor and Council further found pursuant to Section 1(c) and Section 2 of J-1, that the D.P.W. Superintendent had the right to implement new procedures, and they found he did introduce improved methods for snow plowing which made plowing safer. The Mayor and Council concluded that since Section 24(a) was silent as to the number of employees required in plows other than on main streets and cul-de-sacs, and in view of the Borough's rights in Section 1(c) and Section 2, that the grievance was denied. Unlike the D.P.W. Council Committee, the Mayor and Council did not cite or rely upon any provision in its personnel policy in denying the grievance.

Analysis

This Charge was not timely filed pursuant to N.J.S.A. 34:13A-5.4(c), the six-month statute of limitations, but had it

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5/ Section 2 of the Borough's Personnel Policy provides:

> The Borough Council reserves the right to amend, change, interpret or eliminate any personnel policies concerning terms and conditions of employment, practices and rules whenever it appears to be in the best interest of the Borough to do so according to law.

been, this matter does not constitute an unfair practice. It is no more than a breach of contract claim which was appropriate for resolution only through the parties' grievance procedure. State of N.J. (Dept of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984)(Human Services). Notwithstanding that finding, in considering the case on its merits I find that the employees agreed to perform the work in question pursuant to Section 24(a) of J-1, and that the Borough complied with and did not repudiate the contract and took no action in violation of the Act.

The Statute of Limitations

N.J.S.A. 34:13A-5.4(c) provides that no complaint shall issue based upon an unfair practice occurring more than six months prior to the filing of the charge.[6/] Since January 22, 1987 was the date the grievance was filed, the six months is calculated to be July 22, 1987, and the Charge had to be filed, that is received by the Commission, by that date. Mailing the Charge on an earlier date is not sufficient to comply with the statute. State of N.J. (Office of Administrative Law), D.U.P. No. 88-4, 13 NJPER 767(¶18292 1987). This Charge was not filed until July 27, 1987; thus, it was not timely filed.

6/ That statute also provides, however, that if an aggrieved party was "prevented" from filing the charge the six months' period would not begin until the day the party was no longer so prevented. Local 29 did not argue that the aggrieved party(s) was ever prevented from filing nor do the facts suggest that the Charging Party was so prevented.

To avoid a procedural problem, Local 29 in its opening remarks at hearing, and in its post-hearing brief, argued that March 5 and not January 19 (or January 22) was the operative date for statute of limitation purposes. Local 29 argued that the unfair practice complained of here was not the alleged violation of Section 24(a), which occurred on January 19; rather, it was the alleged repudiation of Section 24(a) on March 5 by the issuance of J-3 that gave rise to the Charge (T7-T8). That argument lacks merit. A plain reading of the Charge shows that the incidents that gave rise to the filing of the grievance--which were the events of January 19, 1987--also gave rise to the filing of the Charge. The Charge refers to the snowfalls prior to January 22, 1987, argues that Section 24(a) limits one-man crews "only when plowing in tandem on main roads or on cul-de-sacs" and concludes:

> Hence, by limiting all assignments to a one-man crew, the employer was unilaterally altering a term and condition of employment in violation of the contract.

Local 29 then explained what the Mayor and Council did on March 5 in J-3, and alleged that "the decision [J-3] totally ignores that the contract restricts such 'discretionary' authority where otherwise specifically set forth in the contract..." Local 29 concluded the statement in the Charge as follow:

> The employer herein has unilaterally and illegally altered a term and condition of employment without negotiations with an appropriate employee organization.

There is no allegation or conclusion in the Charge that the Borough violated the Act by repudiating the agreement. I find that

the above concluding statements (including the one made after describing J-3) refer back to the January 19 incidents which were the only incident(s) where the Borough could have "unilaterally and illegally altered a term and condition of employment." The Mayor and Council did not alter any term and condition of employment on March 5; they only issued a decision. The only alteration occurred on January 19.

The apparent allegation that the Borough's decision in J-3 "ignored" certain contract restrictions on the Borough's discretionary authority, is not, standing alone, an allegation that the Borough repudiated the contract. If Local 29 intended to allege contract repudiation, it should have clearly made that allegation after its discussion of what occurred on March 5. Local 29 did not do that. Instead, it referred to the alleged unilateral change which could only have referred to the events of January 19, 1987. Local 29 never alleged repudiation in the Charge.

Thus, I find that January 22, the date the grievance was filed, not March 5, was the operative date for computing the statute of limitations and this Charge was not filed within the time provided. Therefore, the Complaint should be dismissed.[7/]

7/ The filing and processing of the grievance here did not toll the statute of limitations. State of N.J.(N.J. State College Locals), P.E.R.C. No. 77-14, 2 NJPER 308 (1976), aff'd 153 N.J. Super. 91 (1977); State of N.J. (Sachau), D.U.P. No. 84-28, 10 NJPER 216 (¶15110 1984). Thus, to the extent that

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The Grievance Procedure--(Human Services)

Since I found that Local 29 did not file this Charge raising a repudiation allegation, the real issue, I believe, is whether the Borough breached the contract by having men work one man in a plow on January 19. When a breach of contract issue is the only issue raised, it should be resolved through the parties' grievance procedure, not the Commission's unfair practice procedure. In Human Services the Commission held:

> A mere breach of contract claim does not state a cause of action under Subsection 5.4(a)(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures. 10 NJPER at 420.

The DPWO did file a grievance over the January 19 incident and that grievance was processed through the parties' entire grievance machinery. Although Local 29 did not like the results of the final grievance decision, it was not entitled to disregard the results of the grievance procedure in favor of proceeding in the unfair practice forum.

In the Charge, Local 29 commented that the grievance procedure had no binding arbitration or other vehicle for the neutral review of disputes. That comment suggests that Local 29

7/ Footnote Continued From Previous Page

Local 29 was waiting until the final results of the grievance processing was available, it was taking a chance that it could rely on that final grievance processing date (March 5, 1987) as the first date of the six-month period. Any such assumption was inaccurate.

believes that because arbitration was not provided for in J-1, that it was entitled to some further review of a contract dispute. That is not the case. Human Services holds that where parties have a grievance procedure to resolve contract disputes, the parties will use that procedure, whether it culminates in arbitration or not, to resolve matters of contract interpretation. The DPWO processed the grievance through the final step of the grievance procedure. A decision based upon a reasonable interpretation of the contract was issued, and that should have resolved the dispute.8/

The Merits

Even if the statute of limitations and Human Services issues were resolved in favor of Local 29, the Complaint should be dismissed on its merits. The record does not support a finding that the Borough repudiated J-1.

The uncontroverted facts show that on the evening of January 19, Bodecker attempted to call in nine men for snowplowing

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8/ In reaching my decision on the Human Services issue, I had the benefit of having heard all the facts, and my decision thereon is only intended to show that if those facts were known, a complaint would not have issued. I am not suggesting that the Director of Unfair Practices was wrong in issuing a complaint here. Human Services provides that in certain circumstances a breach of contract claim is appropriate for complaint. One such circumstance is where the employer has allegedly repudiated or abrogated a contractual provision. Since Local 29 made some remarks in the Charge related to the March 5 grievance decision by the Mayor and Council, the Director, I assume, correctly issued a complaint to allow the Charging Party to develop the facts. With the benefit of hindsight, I conclude that the Borough did not abrogate the contract and that this matter was nothing more than a breach of contract allegation which should have been resolved by J-3.

but could only get four me to appear for work. He concluded that the condition of the roads were bad enough to require plowing before morning, and he had to use the available men. He explained the situation to them when they arrived for work, asked them if they would work one man in each truck plowing all streets in tandem, and the men agreed. I find that the men "cooperated" with Bodecker in performing the work.

Section 24(a) of J-1 provides that one man plowing should only be done when plowing in tandem on main roads or cul-de-sacs" or otherwise upon the cooperation between the parties." Here the parties cooperated in having the four men perform the work in question. There was no showing that the DPWO had a president or other slate of officers who could be contacted, or that one particular person was expected to act on behalf of the organization in deciding whether to "cooperate" with the Borough. Thus, it was not reasonable to expect Bodecker to obtain cooperation from someone other than the affected employees. In addition, Bodecker's need for the employees was immediate.

Yusis and Besold, two of the DPWO negotiators who agreed to the original language resulting in Section 24(a) in 1977, agreed to do the work on January 19. On January 19, Bodecker had also attempted to contact Tomasi and Cataraso, two other DPWO negotiators from 1977 who agreed to the relevant language, but they were unavailable. With no particular DPWO official required to be contacted, Bodecker acted reasonably in asking the employees if they

would perform the relevant work, and they agreed. Bodecker thereby acted in accordance with Section 24(a) in obtaining the employees' cooperation before the work began.9/ A public employer meets it negotiations obligation when it acts pursuant to the language in its collective agreement. Pascak Valley Bd.Ed., P.E.R.C. No.81-61, 6 NJPER 554, 555 (¶11280 1980); Randolph Tp. Bd.Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982).

In issuing J-3 the Mayor and Council apparently did not consider whether Bodecker complied with the "cooperation" language in Section 24(a). But there was no showing that the meaning of the "cooperation" language was ever presented during the grievance processing, and I do not draw any negative inference from J-3 because it lacked a discussion regarding the "cooperation" language. The Borough's decision in J-3 was based upon a reasonable interpretation of its contract, and I do not infer therefrom that the Borough was repudiating the collective agreement.

Accordingly, based upon the above analysis, I make the following:

9/ If the Borough considered the road conditions existing on January 19, 1987 to constitute an emergency, Bodecker may have had a managerial right to require the men to perform the work as they did and to negotiate with the DPWO upon demand after the fact over compensation or some other negotiable item. See Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981). In this decision, however, it is not necessary for me to decide whether Borough of Pitman applies because Bodecker complied with the parties' collective agreement.

Recommended Order

I recommend that the Complaint be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: February 26, 1988
Trenton, New Jersey