

H.E. No. 2007-11

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

In the Matter of

BOROUGH OF RIDGEFIELD,

Respondent,

-and-

Docket No. CO-2005-275

RIDGEFIELD PBA LOCAL NO. 330,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Borough of Ridgefield did not violate the New Jersey Employer-Employee Relations Act by denying a bonus terminal leave benefit to a retiring police officer or by refusing to negotiate over such benefits with the Ridgefield PBA Local No. 330. The Hearing Examiner found that the Borough did not change the method of determining whether an employee would receive such a benefit and if so, how much.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
Basile Birchwale & Pellino, attorneys
(Stephen Pellino, of counsel)

For the Charging Party,
Loccke, Correia, Schlager, Limsky & Bukosky, attorneys
(Michael A. Bukosky, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On April 26, 2005, Ridgefield PBA Local No. 330 (PBA) filed a charge against the Borough of Ridgefield (Borough) alleging that the Borough violated 5.4a(1), (2), (3), (4), (5), (6) and (7)^{1/} of the New Jersey Employer-Employee Relations Act (Act),

^{1/} These provisions 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4)
(continued...)

N.J.S.A. 34:13A-1, et seq. The charge alleged that the Borough "altered, repudiated and/or modified" the method and manner in which certain terminal leave benefits were given to unit members upon retirement. The charge also alleges that the PBA demanded that the Borough negotiate any changes to the terminal leave benefit and any impact to its members which flowed from the changes, but that the Borough refused to negotiate.

The issue in this case is whether the Borough failed to provide an additional, supplemental or bonus terminal leave benefit of a promotion and/or one to three months additional salary to Lt. William Candeletti just prior to his retirement. The PBA alleged the Borough violated the Act by denying a bonus terminal leave benefit to Lt. Candeletti. This case is not about traditional terminal leave benefits received at retirement such as accumulated sick, vacation and compensatory time. There are articles in the parties' collective agreement providing for such benefits and there is no dispute here regarding those benefits.

1/ (...continued)

Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

On August 23, 2005, a Complaint and Notice of Hearing was issued on only the 5.4a(1) and (5) allegations of the charge. The Borough filed its Answer to the Complaint admitting some allegations, denying others and asserting defenses. The Borough denies altering, repudiating or modifying how or whether it provides the bonus terminal leave benefit to unit members. It asserts that the PBA is aware of its longstanding method of handling each police officer's request for bonus terminal leave benefits on a case-by-case basis directly with the employee. The Borough further contends that the PBA waived its right to challenge how it provided the bonus terminal leave benefit.

On August 24, 2006, I conducted a hearing during which the parties examined witnesses and presented documents. Briefs were filed by the parties on January 4, 2007 and reply briefs were filed by March 8, 2007. Based on the record, I make the following:

FINDINGS OF FACT

1. The Borough is a public employer within the meaning of the Act (T5, T6; C-1A, C-2)^{2/}.
2. The PBA is an employee representative within the meaning of the Act and represents permanent full-time police officers employed by the Borough including captains, lieutenants,

^{2/} The transcripts will be referred to as T, Commission exhibits as C, PBA exhibits as CP, and Borough exhibits as R.

sergeants, detectives and patrolmen (T5, T6; J-1 Article I; "Recognition", C-1A, C-2).

3. The Borough and PBA signed a Memorandum of Agreement on January 12, 2005, the terms of which have been incorporated in a successor agreement covering the period of January 1, 2004 through December 31, 2008. The successor agreement was signed by the parties on February 24, 2006 (J-1).

Article VI, Section E provides a terminal leave benefit for sick leave. Article X, Section E explains the terminal leave benefit regarding compensatory time and "return" time. When an officer retires, he/she is compensated for any accumulated unused vacation and sick time, and return days in accordance with the parties' labor agreement (T46, T47, T126).

4. In addition to being compensated for the above described accumulated unused days, since 1992 some officers have been given promotions and/or bonus payments upon retirement (T47, T48). Each bonus retirement package was agreed upon directly by the individual officer and representatives of the Borough on a case-by-case basis with the knowledge but not direct participation of, the PBA (T48, T63, T65, T66, T83).

The record shows that Officer Harry Dammer was promoted to sergeant as a bonus terminal leave benefit before his 1992 retirement (T78, T127). PBA President Robert Williams who has been employed by the Borough since 1996 (T45) testified he

believed Dammer (Dana in the transcript) received a promotion to sergeant as a bonus terminal leave benefit (T78-T79). Councilman John Quaregna, who was Deputy Police Commissioner in 1992 and has been Police Commissioner since 2001 (T124-T125), testified that Dammer did not receive a bonus terminal leave benefit (T127-T128). The PBA considered late term promotions a bonus terminal leave benefit (T97, T98, T100, T101). Since Councilman Quaregna may not have considered late term promotions as a bonus terminal leave benefit (T129-T130), but did not dispute a late term promotion for Dammer, I consider Dammer's late term promotion a bonus terminal leave benefit.

Officers William Hamilton and Nick Greco, who both retired in 1996, did not receive anything over and above cashing out their contractual unused time (T79, T127, T128, T129). Lt. William Kelly was promoted to lieutenant as a bonus terminal leave benefit in 1997 (T51, T79, T129; CP-5, p. 3). Officer Robert Carozza, who retired in 1998, did not receive any bonus terminal leave. Officer Claus Botjer, who retired in 1998, was promoted to lieutenant as bonus terminal leave (T52, T129; CP-5, p. 3). Officer Rudy Eger received a promotion to lieutenant as a bonus terminal leave benefit in or around 1999 (T77, T78, T129, T130).

Captain Vincent Zaco, who retired in 2000, was paid as a bonus terminal leave benefit an arbitrary sum ostensibly for

vacation, sick and return time when no such time was due (T53, T130; CP-5, p. 3). Lt. David Cassirer, who retired in 2004, was given three months additional salary as bonus terminal leave (T53, T54, T149; CP-5, p. 3). Officer Warren Cassirer, who retired in 2005, received two months additional pay as his bonus terminal leave benefit (T55, T149; CP-5, p. 3). Officer John Freightag, who retired in 2005, was promoted to lieutenant and received six weeks additional salary as bonus terminal leave (T55, T56, T150; CP-5, p. 3). Officer George Fritztensky, who retired in 2005, was also promoted to lieutenant and was given one month additional pay as a bonus terminal leave benefit (T56, T140, T151; CP-5, p. 3), and Lt. Vincent Berta, who retired in 2006, was promoted to captain and received an additional one month's salary as a bonus terminal leave benefit (T56, T151; CP-5, p. 3).

5. The Borough determined whether to offer, and how to structure the elements of any bonus terminal leave benefit on a case-by-case basis directly with employees who requested such a benefit (T143, T176, T177; CP-3, p. 2). The Borough never negotiated bonus terminal leave benefits with the PBA (T82-T83). The PBA was aware of and acquiesced to employees seeking their own bonus terminal leave directly with representatives of the Borough (T63, T66, T97-T98).

In deciding whether to extend bonus terminal leave to unit employees, the Borough considered whether the particular employee retirement would generate an overall savings to the Borough (T132, T137, T143, T159, T161). The factors that went into that determination were an officer's accrued unused time, the salary of the officer, the duties of the officer, the past performance of the officer, the staffing needs of the Borough and if and when the Borough could replace the officer (T137, T161, T177, T178, T179; CP-5, p. 2). The Borough performed a cost/benefit analysis, including anticipated overtime costs and whether the officer would be replaced and, if so, when, and make a determination based on savings to the Borough (T137). For example, with respect to Lt. David Cassirer, after considering his amount of accumulated sick and vacation time, the Borough achieved immediate savings by giving him three months payment to leave earlier than he would have and then not replacing his position (T131, T137, T161).

Other considerations over the years have been whether the Borough could replace the retiring officer with an officer at a lower salary and how much overtime would be generated by the officer retiring either because he could not be replaced or during the time that the retiring officer was no longer working and the new officer was able to perform police duties (T133-T137, T154). Not all retiring officers received bonus terminal leave.

6. In 2003, Lt. David Cassirer personally notified the Borough that he wanted to retire quickly. He asked for three months salary above and beyond his accumulated unused time and did not want a late term promotion (T57, T131). Considering Cassirer's proposal, the Borough calculated that by his early departure and his agreement to take accumulated sick, vacation and compensatory time as time off, rather than as a cash payment, and determining that it would not need to replace him, it would save money. Accordingly, the Borough was willing to accept Cassirer's offer (T131; CP-1). As a courtesy, the Borough's attorney, by letter of October 24, 2003 (CP-1), notified the PBA's attorney of the agreement between the Borough and Lt. Cassirer (T61). The letter provided in pertinent part:

It is the Borough's position that this agreement with Lt. Cassirer is not subject to the Collective Bargaining Agreement, and is not an [sic] negotiable matter. Nonetheless, in an effort to maintain a good relationship with the local PBA, we are providing you with this notice of the Borough's intention.

The letter then explained that further details of the agreement would be worked out between Lt. Cassirer and the Borough Administrator and then presented to the Mayor and Council for approval. The letter concluded with the statement: "Please call if you or your client have any comments" (T95, T96; CP-1).

The PBA never responded to the letter (T95-T96).

The PBA did not respond to CP-1 at least in part because it believed that what Lt. Cassirer sought was consistent with prior practice (T62, T96). Lt. Cassirer had discussed his proposal with the PBA before making his offer to the Borough (T57).

7. The PBA did not regularly discuss bonus terminal leave benefits with officers prior to 2003, but it was aware the benefit was given. Beginning with Lt. Cassirer in 2003, and continuing with his brother Warren, and officers Freightag, Fritzensky, Berta and Candeletti, they each discussed with the PBA the bonus terminal leave benefit they were seeking from the Borough before making their individual proposals (T57, T66, T82-T83, T93).

The PBA never participated in negotiations with the Borough on behalf of those specified employees. It abided the circumstance that the individual officers presented their proposals directly to the Borough (T82-T83, T92-T94). Officer Fritzensky asked for a late term promotion and two and one half or three months of time, and the Borough counter-offered with the promotion and one month of time. Fritzensky accepted the Borough's proposal, despite PBA President Williams' admonition to him that he was being "short-changed" (T92).

8. By letter dated November 15, 2004 (R-2), Lt. William Candeletti informed Police Chief John Bogovich of his (Candeletti's) intention to retire on December 31, 2005.

Candeletti noted in R-2 that based upon his accumulated leave time, his last day of work would be around August 15, 2005. Candeletti requested that his retirement package include as a bonus a promotion to captain effective January 1, 2005, and an additional month's pay which would change his actual last day worked to about July 15, 2005. Nothing in R-2 suggests that the Borough would achieve any savings by granting Candeletti's request for an additional month's pay. Candeletti realized that his request for this bonus terminal leave package was denied when Lt. Berta was promoted to the only available captain slot (T114, T120).

Candeletti subsequently proposed another bonus terminal leave package for himself by letter of January 25, 2005 addressed to the Borough Business Administrator John Perkins (CP-6). In that correspondence, Candeletti requested that he be given three months additional pay as was provided to Lt. David Cassirer. CP-6 was not sent or copied to the PBA, and Candeletti, wrote in CP-6 his willingness to meet with the Mayor and Council to discuss his request. Nothing in CP-6 suggested how the Borough would achieve any savings by granting Candeletti an additional three months pay. Candeletti testified in this case and did not articulate how the Borough would realize any savings by granting his bonus terminal leave request.

Initially, Chief Bogovich did not recommend that Candeletti receive any bonus terminal leave because his retirement would not generate savings to the Borough (T138-T139; R-6). The timing of Candeletti's retirement date, coupled with the Borough's projected hiring date of replacement officers, would likely generate overtime eliminating any savings created by Candeletti coming off of the payroll earlier than mid-August 2005 (T143-T144, T164; R-6).

Candeletti did not receive any bonus terminal leave upon retirement (T115, T152). The Borough's decision not to provide him with bonus terminal leave was purely financial (T159, T171).

9. The PBA was aware of and provided guidance to Candeletti during his discussions with the Borough over his bonus terminal leave request (T101). When it became apparent that Candeletti was not being given a bonus terminal leave benefit, the PBA demanded negotiations on the subject, including a written demand dated April 22, 2005 (T102, T103; CP-2A). It then filed the subject charge against the Borough on April 26, 2005 (C-1A).

By letter of May 2, 2005 (CP-3), the Borough responded to the PBA's April 22, 2005 demand for negotiations, denying it changed or modified any terms and conditions of employment, and noted that its actions regarding bonus terminal leave were lawful and that no negotiations were required. That letter provided in pertinent part:

The premise of your position on terminal leave as enunciated throughout your letter is incorrect. Since the Borough of Ridgefield has not changed, modified or altered its position on terminal leave, your request to return to the *status quo* with regard to terminal leave is rather hard to fathom. The members of the PBA, both past and present, can attest to the fact that the issues surrounding terminal leave have always been handled on a case by case basis upon the retirement of police officers. This case by case treatment of terminal leave has been the unwritten policy of the Borough of Ridgefield for many years. The PBA has lived with this policy since its inception as a bargaining unit. To assert that suddenly the PBA has discovered this longstanding Borough practice defies both logic and the circumstances surrounding the good relationship between this Borough and the PBA.

Your letter details to some extent the legal arguments you wish to pursue. Therefore, I would briefly outline to you my reaction to these arguments. The Borough of Ridgefield has handled each retiring police officer on a *sui generis* basis with regard to terminal leave. This case by case treatment is quite a different situation from the one described in the Middletown matter cited in your correspondence to me. During the many years that the Borough has been deciding terminal leave for officers on a case by case basis, the Borough's police officers and their negotiating body have acquiesced to this arrangement. Unlike the Middletown case, there has never been a grievance filed or settled in connection with terminal leave. Although the Borough's practice in connection with terminal leave has been well known by the police department and its union, no one has heretofore objected to the Borough's handling of terminal leave.

10. On May 4, 2005, Chief Bogovich wrote a memorandum (CP-12) to Borough Administrator Perkins, revising his earlier

recommendation denying Candeletti any bonus terminal leave and suggesting that Candeletti be given whatever extra (bonus) terminal leave deemed fair (CP-12). Bogovich wrote that Candeletti's taking a bonus terminal leave of one month would not affect the overtime budget, but nothing in CP-12 suggested that granting such leave would generate savings. The leave request was denied.

11. The Borough and PBA were involved in contract negotiations during 2004 which resulted in a Memorandum of Agreement (MOA) signed on January 12, 2005 (T110; R-10). The bonus terminal leave benefit issue was never raised during contract negotiations (T110-T111), was not included in the parties January 2005 MOA, nor was any reference to it included in the parties January 1, 2004-December 31, 2008 collective agreement signed on February 24, 2006 (J-1).

ANALYSIS

The PBA contends that the Borough unilaterally altered a term and condition of employment when it refused to provide Lt. William Candeletti with bonus terminal leave upon his retirement. The PBA maintains that Candeletti was due the equivalent of one to three months salary above and beyond payment for his accumulated unused vacation, sick time, and return days. When it became apparent that Candeletti would not be given any bonus

terminal leave compensation, the PBA demanded negotiations on the subject with the Borough.

The Borough denies that there was a consistent practice of providing retiring officers the equivalent of one to three months bonus pay upon retirement. It contends that the granting of bonus terminal leave was always done on a case-by-case basis and only given when the retirement would result in savings. The Borough also argues that it had the discretion to determine the type and amount, if any, of bonus leave. It maintains that the PBA had acquiesced to its direct discussions of bonus terminal leave with the retiring officer and that the PBA has waived the right to negotiate over the subject of bonus terminal leave.

At certain points during the presentation of the case it was suggested the Borough asserted a managerial prerogative to decide what if any bonus terminal leave to provide employees. Even though the "prerogative" term was used, the Borough's case was not primarily based upon a managerial prerogative defense. The Borough argued that with respect to Lt. Candeletti it did not deviate from the method of determining what--if any--bonus terminal leave to provide an employee. Its defense was primarily based on the facts of the case.

To be clear, terminal leave, such as the bonus terminal leave as defined by this case, implicates negotiable terms and conditions of employment. See Galloway Tp., P.E.R.C. No. 98-133,

24 NJPER 261 (¶29125 1998); Middlesex Cty. Pros., P.E.R.C. No. 91-83, 17 NJPER 219 (¶22093 1991).

The pertinent issues in this case, however, are whether the Borough deviated from or changed the method for determining whether bonus terminal leave should be granted, and if it did, was it obligated to first negotiate with the PBA. I find it did not deviate from or change the bonus terminal leave methodology and was not obligated to negotiate with the PBA in April 2005.

In order to determine whether the Borough deviated from the method of determining bonus terminal leave, the history and methodology of granting that benefit must be defined. I find the bonus terminal leave benefit has existed from approximately 1992 through at least 2006, and involved an officer individually requesting certain bonus terminal leave benefits. The Borough considered such requests, determined whether granting some or all of the request would result in savings to the Borough, and the Borough would then unilaterally deny all, or grant some or all of the request. Since 1992, not all retiring officers received bonus terminal leave. The evidence showed a history of interaction between individual employees and the Borough, not between the PBA and the Borough. The evidence did not identify any specific amount or type of bonus terminal leave that employees might receive. The evidence shows that the type and amount of bonus terminal leave, if any, was offered at the

Borough's discretion. The bonus terminal leave benefit was not a practice between the PBA and the Borough, it was an existing working condition unilaterally determined by the Borough.

The PBA in its brief, attempted to limit the focus of the history to that period of time from 2004-2006. While that time frame is historically incomplete regarding the issue here, it nevertheless demonstrates the same methodology; individual employees made the request, and the Borough considered the request and unilaterally determined if granting the request was warranted. Even during 2004 - 2006, there was no set amount or type of bonus leave; the Borough had the discretion to make such determinations.

The PBA did not dispute evidence of the benefit's history; it objected to the benefit being denied to Candeletti. Lt. Candeletti followed the historical method of individually requesting certain bonus terminal leave, and the Borough followed the historical method of considering whether granting his request would result in savings for the Borough. When it was determined that Candeletti's proposed bonus would not generate savings, the request was denied. There was no deviation from the historical method used to determine if a bonus should be given, no showing that the Borough didn't consider the request under the same guidelines as it did for other employees. The evidence does not show that individual employee requests were automatically

granted; rather, it shows that the Borough considered each request on a case-by-case basis, assessing the financial savings. Under the existing working condition methodology, the Borough retained the right to deny requests that did not generate financial savings. Accordingly, its actions here did not result in a change of terms and conditions of employment.

Similarly, the Borough did not violate the Act by refusing the PBA's April 22, 2005 demand to negotiate over bonus terminal leave. First, the Borough had not changed an existing working condition. Second, the PBA had been aware of the working condition throughout the time it was negotiating J-1, its 2004-2008 collective agreement, it did not place that issue on the table during negotiations and, therefore, sought no change in that condition. Having signed the new MOA in January 2005, the PBA, absent the Borough's attempt to change or eliminate the working condition, could not then require the Borough to negotiate to change the condition.

The PBA's reliance upon Township of Middletown, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd. 334 N.J. Super. 512 (App. Div. 1999), aff'd. 166 N.J. 112 (2000), to support its position here is distinguishable from the instant facts. In Middletown, the Township had an existing working condition of placing new police officers with police academy training and at least one year's police experience at step three of the salary

guide. One time when the Township deviated from that condition, the union filed a charge. The Commission found that the Township violated the Act by placing a new hire at step two of the guide. The Commission noted that the evidence did not prove that the salary guide placement was case-by-case. Id. at 29.

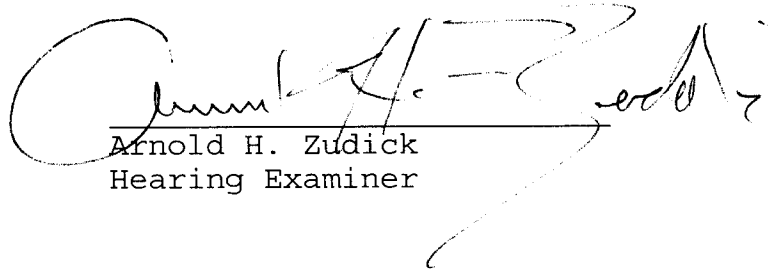
The instant case differs from Middletown in two important ways. First, in Middletown, the Commission found that the Township changed the working condition. Although the PBA here also argued the Borough changed the bonus terminal leave benefit, I found it did not deviate from the way that benefit was determined. Second, in Middletown, the Commission made the point that the Township's placement of such qualified employees on the guide was not on a case-by-base basis. The facts here, however, show that the Borough's decision whether to grant bonus terminal leave, and if so how much, was always on a case-by-case basis with the Borough making the unilateral determination on whether to grant the benefit.

Having concluded that the Borough did not change the method for determining whether and how much of a bonus terminal leave benefit should be given, there is no bases for finding that the Borough violated the Act.

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

RECOMMENDATION

The complaint should be dismissed.



Arnold H. Zudick
Hearing Examiner

DATED: June 29, 2007
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by July 9, 2007.