

H.E. NO. 2013-3

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

In the Matter of

NORTH HUDSON REGIONAL FIRE & RESCUE,

Respondent,

-and-

Docket No. CO-2011-153

NORTH HUDSON FIREFIGHTERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission grant the North Hudson Firefighters Association's (Association) motion for summary judgment and deny North Hudson Regional Fire & Rescue's (Regional) cross motion for summary judgment on an unfair practice charge filed by the Association. The Association alleged in the charge that Regional violated subsections 5.4(a)(1) and (a)(5) of the New Jersey Employer-Employee Relations Act by unilaterally altering the past practice of providing retired firefighters the option of receiving their terminal leave payments in a lump sum and by requiring retirees to accept terminal leave payments in equal annual installments without negotiation. The Hearing Examiner found that the method of payment of terminal leave is a mandatorily negotiable term and condition of employment. The Hearing Examiner also rejected Regional's contention that negotiations over the payment of terminal leave was preempted by N.J.S.A. 40A:4-53(h) since the statute did not eliminate Regional's discretion in choosing the method of paying terminal leave. Moreover, the Hearing Examiner found that the charge should not be deferred to arbitration since the method of paying terminal leave is not covered by the terms of the parties' collective negotiations agreement.

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Charging Party.

Appearances:

For the Respondent
Scarinci & Hollenbeck, LLC
(Ramon E. Rivera, of counsel and on the brief)

For the Charging Party
Cohen, Leder, Montalbano & Grossman, LLC
(Bruce D. Leder, of counsel and on the brief)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION ON THE CHARGING PARTY'S MOTION
FOR SUMMARY JUDGMENT AND RESPONDENT'S CROSS MOTION FOR
SUMMARY JUDGMENT

On October 15, 2010, the North Hudson Firefighters Association (Charging Party or Association) filed an unfair practice charge against the North Hudson Regional Fire and Rescue (Respondent or Regional). The charge alleges that Respondent violated subsections 5.4(a)(1) and (a)(5) of the New Jersey Employer-Employee Relations Act^{1/} (Act), N.J.S.A. 34:13A-1 et

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,
(continued...)"

seq., when Regional's Management Committee adopted a resolution, without negotiations with the Association, that provided for the payment of terminal leave in equal annual installments over five (5) years, thereby altering the practice of providing retired firefighters the option of receiving their terminal leave payments in a lump sum.

A Complaint issued on September 16, 2011. Respondent filed its Answer on or about September 30, 2011, denying the material allegations in the charge and setting forth several affirmative defenses.

On November 1, 2011, the Association filed a Motion for Summary Judgment, together with a brief and Certification of Dominick Marino, President of the Association. After a Commission designee granted requests for extensions by Respondent to file a response and cross motion for summary judgment, the cross motion together with brief and a Certification of Jeffrey Welz, Regional's Director of Administration and Acting Chief Financial Officer, was filed. Charging Party then filed a brief in opposition to Regional's cross motion. The motion and cross

1/ (...continued)
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."

motion were referred by the Commission to former staff agent Steven Katz on March 26, 2012 and subsequently re-assigned to the undersigned. N.J.A.C. 19:14-6.4(a).^{2/}

In support of its motion, the Association contends that payment for terminal leave is a mandatorily negotiable term and condition of employment and that Regional violated the Act by unilaterally altering the practice of affording retirees the option to receive payment of terminal leave in a single lump sum. Moreover, the Association maintains that summary judgment is appropriate since there is no genuine issue of material fact over whether Regional refused to negotiate in good faith over the payment of terminal leave to retirees. Specifically, the Association asserts that at no time since 1999 has Regional required a retiree to accept terminal leave payments in installments, and it has altered this practice without negotiations.

In response, Regional contends this matter should be deferred in accordance with the grievance procedures set forth in Article 7 of the parties' collective negotiations agreement, since the charge essentially asserts a breach of contract claim under Article 7 and Article 26. In support of deferral, Regional also contends that by not filing a grievance, the Association failed to exhaust administrative remedies. Alternatively, if the

^{2/} Katz resigned his employment with the agency in April, 2012.

matter is not deferred, Regional maintains, first, that the method of payment for terminal leave is a managerial prerogative. Next, Regional argues that negotiations over the method of payment for terminal leave is preempted by N.J.S.A. 40A:4-53(h), which provides that a municipal entity may, at its sole discretion, require employees to receive severance liability payments (such as terminal leave) in equal annual installments over five (5) years.

The Association responds that deferral is not appropriate in this case since the parties' collective agreement is silent on the issue of how terminal leave payments should be made and, therefore, not controlled by any provision in the parties' collective agreement. It also disagrees that Regional has a managerial prerogative to act unilaterally in setting the method of terminal leave payment and that negotiations over terminal leave payments are preempted by N.J.S.A. 40A:4-53(h).

For the following reasons, the Association's motion for summary judgment is granted, and Regional's cross motion for summary judgment is denied.

STANDARD OF REVIEW

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. No credibility determinations may be made and the motion must be denied if material factual issues exist. N.J.A.C.

19:14-4.8(e); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). The summary judgment motion is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

FINDINGS OF FACT

Based on the parties' submissions I find the following undisputed, material facts:

1. Regional is a public employer within the meaning of the Act. The Association is the exclusive majority representative of all firefighters employed by Regional.

2. Regional was formed as a joint meeting pursuant to the Consolidated Municipal Service Act of 1952, N.J.S.A. 40:48B-1 et seq., and consists of the following municipalities in Hudson County: Guttenberg, North Bergen, Union City, Weehawken and West New York. On or about January 11, 1999, Regional commenced fire and rescue operations.

3. Regional and the Association are parties to a collective negotiations agreement effective July 1, 2004 through June 30, 2009. Regional and the Association are currently participating in interest arbitration over a successor collective negotiations agreement.

4. Article 7 of the collective agreement sets forth the parties' agreed-upon grievance procedures, consisting of three steps culminating in binding arbitration.

5. Article 26, entitled "Terminal Leave", provides, in pertinent part:

For all employees employed by the Regional after regionalization, upon retirement for a pension approved by the New Jersey Pension Department, an Employee shall receive payment for unused accumulated sick leave and vacation days up to a maximum of \$120 per twenty-four (24) hour day up to a maximum benefit of \$15,000. Those employees who work less than a twenty-four hour day shall have a rate system adjusted proportionately in relation to the above.

No method of payment for terminal leave is set out in this Article or anywhere else in the parties' collective agreement.

6. From 1999 until August 17, 2010, retirees had the option of receiving payment of terminal leave in a lump sum. At no time during this period were retirees required by Regional to accept terminal leave payments in installments.

7. On August 17, 2010, Regional's Management Committee adopted a resolution which provides, in pertinent part, as follows:

Any existing (whether in whole or in part) or future "severance liabilities" of the NHRFR [North Hudson Regional Fire and Rescue] **shall** be paid in equal annual installments over a period of five years pursuant to Public Law 2010, Chapter 46 [N.J.S.A. 40A:4-53] [emphasis added].

ANALYSIS

Regional raises four primary arguments in support of its motion:

(1) This matter should be deferred because the Association's charge alleges a breach of contract claim that is covered by the parties' collective negotiations agreement;

(2) The Charging Party failed to exhaust its administrative remedies by not filing a grievance;

(3) The method of payment of terminal leave is a non-negotiable, managerial prerogative; and

(4) Negotiations over the payment of terminal leave is preempted by N.J.S.A. 40A:4-53(h).

For the reasons stated below, I reject these arguments and deny Regional's motion.

Deferral

First, Regional contends the charge should be deferred because it alleges a breach of contract claim covered by the collective agreement's grievance procedures and terminal leave provisions. The Association disagrees.

Deferral to the parties' negotiated grievance procedure is appropriate when "a charge essentially alleges a violation of subsection 5.4(a)(5) interrelated with a breach of contract claim." State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419, 420 (¶15191 1984). The

Commission's policy on deferral "ensures that the parties' grievance procedures will be used, as section 5.3 [of the Act] commands, for any dispute **covered by the terms of such agreement.**" Id. at 421 [emphasis added]. In cases where the charging party alleges the respondent unilaterally changed an employment condition that is not covered by the parties' collective negotiations agreement, the Commission has asserted its jurisdiction to decide the charge. Middletown PBA, 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), see also Passaic Cty. Bd. of Ed., P.E.R.C. No. 89-98, 15 NJPER 257 (¶20106 1989). An employment condition is a term and condition of employment that is not covered by an agreement, but must be negotiated by the parties before being changed. Middletown PBA, 24 NJPER at 31.

Here, deferral is not appropriate. The parties' collective agreement is silent on the method of terminal leave payment. While Article 26 sets forth language on the rate of pay of terminal leave and provides a cap on the total amount of terminal leave paid to a retiree, Article 26 does not contain language that addresses how terminal leave payments should be distributed -- e.g., in installments or in a lump sum -- and there is no language in the collective agreement that an arbitrator can interpret or apply to resolve this issue.

Accordingly, since the Association contends Regional failed to negotiate in good faith prior to changing an existing employment condition, namely, the payment of terminal leave to retirees established by the parties longstanding past practice, the present dispute is properly before the Commission.

Middletown PBA, Human Services, Passaic Cty. Bd. of Ed.^{3/}

In support of deferral, Regional also contends that the Association failed to exhaust its administrative remedies by not filing a grievance since the instant dispute is covered by the collective agreement's grievance procedures. As previously explained, grievance arbitration is not appropriately applied to the instant matter which primarily asserts an unfair practice. The exhaustion of administrative remedies doctrine has no bearing in this case since the doctrine does not strip the Commission of its exclusive authority to prevent unfair practices under the Act. Mercer Cty. Comm. Coll., H.E. No. 84-25, 9 NJPER 674 (¶14294 1983), adopted by Comm'n at P.E.R.C. No. 84-62, see also City of Hackensack v. Winner, 82 N.J. 1, 25 (1980). Under

^{3/} In support of deferral, Regional also emphasizes on pages fifteen (15) and sixteen (16) of its brief the holdings in Snitow v. Rutgers University, 103 N.J. 116 (1986), Cermele v. Lawrence Township, 260 N.J. Super. 45 (App. Div. 1992), and New Jersey Turnpike Authority v. New Jersey Turnpike Supervisors Association, 276 N.J. Super. 329 (App. Div. 1994). These cases are inapposite as they do not address or apply the deferral standards for (a) (5) charges articulated in Human Services and Middletown PBA.

N.J.S.A. 34:13A-5.4(c), the "commission shall have **exclusive power** as hereinafter provided to prevent anyone from engaging in any unfair practice listed in subsections a and b" of N.J.S.A. 34:13A-5.4. N.J.S.A. 34:13A-5.4(c) [emphasis added]. Here, the Commission has the exclusive authority to prevent the unfair practice of unilaterally changing a term and condition of employment that is not covered by the parties' collective agreement and is set by past practice. Middletown PBA, Human Services. Accordingly, the exhaustion of administrative remedies doctrine does not restrict the Commission's authority to prevent such a practice. N.J.S.A. 34:13A-5.4, Middletown PBA, Human Services.

Based on the foregoing, the Association's charge should not be deferred.

Managerial Prerogative and Preemption

Regional argues that payment of terminal leave is not negotiable because it is a managerial prerogative and because negotiations over the payment of terminal leave is preempted by N.J.S.A. 40A:4-53(h). The Association disagrees. For the reasons stated below, I reject Regional's arguments and determine that the payment of terminal leave to retirees is mandatorily negotiable.

The Commission has consistently held that terminal leave is a deferred form of compensation and, like other forms of

compensation, is a mandatorily negotiable term and condition of employment. Therefore, the method of paying terminal leave in either a lump sum or at regular pay periods is mandatorily negotiable. Galloway Tp., P.E.R.C. No. 98-133, 24 NJPER 261 (¶29125 1998), see also Morris School Dist. Bd. of Ed., P.E.R.C. No. 97-142, 23 NJPER 437 (¶28200 1997), aff'd App. Div. Dkt. No. A-006013-96T2 (4/22/98); State of New Jersey (State Troopers), P.E.R.C. No. 92-3, 17 NJPER 374 (¶22175 1991), recon. den. P.E.R.C. No. 92-5, 17 NJPER 409 (¶22195 1991), aff'd NJPER Supp.2d 278 (¶225 App. Div. 1992), certif. den. 130 N.J. 596 (1992); Middlesex Cty. Prosecutor, P.E.R.C. No. 91-83, 17 NJPER 219 (¶22093 1991), aff'd NJPER Supp. 2d 280 (¶227 App. Div. 1992), Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987).

Regional argues, however, that the method of payment of terminal leave is a managerial prerogative because the decision to pay terminal leave impacts governmental policy considerations, namely its prerogative to determine its budget and "spend public funds wisely." Regional relies on Morris County Sheriff's Office v. Morris County Policeman's Benevolent Ass'n., Local 208, 418 N.J. Super. 64 (App. Div. 2011), in support of this position. Regional's reliance on Morris County is misplaced.

A similar argument was recently raised by an employer and rejected by the Appellate Division in Franklin Township v.

Franklin Township PBA Local 154 et al., 424 N.J. Super. 369 (App. Div. 2012). There, the Court considered whether or not work schedule modifications for police officers were negotiable. Like Regional, the Township relied on Morris County to support its position that scheduling modifications were non-negotiable managerial prerogatives, because they were designed to conserve municipal resources in the face of a fiscal crisis and "spend public funds wisely." Id. at 381-382. In rejecting the Township's argument, the Appellate Division explained:

The Township suggests our opinion in *In re Morris County Sheriff's Office*, supra [418 N.J. Super. 64] supports its action as an exercise of its governmental policy role 'to provide efficient and effective services within the police department in the face of burgeoning fiscal crises', maintaining the essential role of government to 'spend public funds wisely.' We disagree. Our comments in *In re Morris County Sheriff's Office* were directed to curb the abusive practice of "featherbedding", where officers chose to work holiday shifts receiving overtime rates of pay, but performed no services. 418 N.J. Super. at 77-78, 12 A.3d 214. The Morris County policy that ended this practice did not adversely affect any officers' contractual rate of pay or diminish annual weekly work hours; the newly enacted policy merely eliminated an unnecessary abusive overtime practice.

The proposal for shift modifications in this matter, however, is not targeted to curb abusive practices or the misuse of municipal resources. Rather, the proposed modifications strike at the heart of negotiated CNAs terms because they attempt to alter the level of compensation and work

hours of police employees without negotiation. [Id. at 381-382]^{4/}

The Appellate Division's analysis in Franklin Tp. is equally applicable in this matter. While Regional's decision to modify the payment of terminal leave was based on budgetary concerns, Regional does not express how negotiations over the method of terminal leave payment would significantly interfere with its formulation or implementation of governmental policy or substantially limit its policymaking functions. See generally, Paterson PBA No. 1 v. Paterson, 87 N.J. 78 (1981). Regional's legitimate and serious budgetary concerns, therefore, must be addressed through the negotiations process. Specifically, if economic conditions have changed and Regional believes the practice of affording retirees the option of receiving terminal leave payments in a single lump sum should be discontinued, it may assert that position in negotiations. Middletown PBA.

Next, I consider whether negotiations over terminal leave payments is preempted by N.J.S.A. 40A:4-53(h). A statute preempts negotiations over a term and condition of employment only when that statute "speaks in the imperative and eliminates the

^{4/} Morris County is also inapposite here because the appellate Court determined that the overtime assignments would significantly interfere with the employer's ability to implement the governmental policy of deploying staff to meet staffing needs. Morris County, 418 N.J. Super. at 76-77. Therefore, the employer had a managerial prerogative to act unilaterally in that case.

parties' discretion to vary that condition in a negotiated agreement." Hillsborough Bd. Of Ed., P.E.R.C. No. 2006-97, 32 NJPER 97 (2006). "An allegedly preemptive statute must be examined to see if it expressly, specifically, and comprehensively fixes an employment condition so firmly that it cannot be changed through negotiations." Hillsborough, citing Bethlehem Tp. Bd. Of Ed. V. Bethlehem Tp. Educ. Ass'n, 91 N.J. 38, 44 (1982). In other words, where an employer has discretion under a statute to alter a term and condition of employment, that statute cannot be preemptive of negotiations. A statute only preempts negotiations when "it leaves no room for discussion as to what is required of both the employer and the employee" and "says all there is to be said." Hillsborough, quoting Council of New Jersey State College Locals v. State Bd. Of Higher Ed., 91 N.J. 18, 30 (1982).

N.J.S.A. 40A:4-53(h) provides, in pertinent part, the following:

A local unit **may** adopt an ordinance authorizing special emergency appropriations for the carrying out of any of the following purposes:

(h) Contractually required severance liabilities resulting from the layoff or retirement of employees. Such liabilities shall be paid without interest and, at the sole discretion of the local unit, may be paid in equal annual installments over a period not to exceed five years. [emphasis added]

N.J.S.A. 40A:4-53(h) (appropriations statute).

This statute gives Regional discretion to pay terminal leave in installments and, therefore, does not relieve Regional of its duty under our Act to negotiate with the Association over proposed new rules that would modify the payment of terminal leave. N.J.S.A. 34:13A-5.3; State of New Jersey (State Troopers). Regional **may** adopt a resolution to pay terminal leave in installments for a period of up to five (5) years under N.J.S.A. 40A:4-53(h), but must exercise that discretion in a manner consistent with its obligation to negotiate with the Association over the payment of terminal leave. Evesham Municipal Utilities Auth., P.E.R.C. No. 2006-78, 32 NJPER 120 (¶56 2006) (employment conditions over which an employer has discretion require negotiations before setting or changing those conditions).

Based on the foregoing, I conclude that Regional does not have a managerial prerogative to set the method of terminal leave payment, that negotiations over the payment of terminal leave is not preempted by N.J.S.A. 40A:4-53(h), and that the method of terminal leave payment is a mandatorily negotiable term and condition of employment.

The Association's Motion for Summary Judgment

The Association's motion for summary judgment is granted since there are no genuine issues of material fact which dispute Regional's unilateral change to a longstanding past practice governing the method of payment of terminal leave. Regional does not dispute the existence of the practice dating back to 1999 where firefighters were afforded the option upon retirement of receiving terminal leave payments in a lump sum. Moreover, it is undisputed that Regional adopted a resolution without negotiations with the Association that changed this practice and required retirees to receive their terminal leave payments in installments. Consequently, Regional violated the Act by unilaterally altering the method of payment of terminal leave without prior negotiations with the Association.

CONCLUSIONS OF LAW

1. The Association's unfair practice charge is not deferrable.
2. The exhaustion of administrative remedies doctrine does not support deferral of the Association's charge.
3. Regional does not have a managerial prerogative to set the method of payment of terminal leave.
4. N.J.S.A. 40A:4-53(h) does not preempt negotiations over the payment of terminal leave.

5. The method of payment of terminal leave is a mandatorily negotiable term and condition of employment.

6. Regional violated subsections 5.4(a)(1) and (a)(5) of our Act by unilaterally altering the past practice of affording retirees the option of receiving payment of terminal leave in a lump sum.

RECOMMENDED ORDER

I recommend that the Commission **ORDER:**

A. That the North Hudson Regional Fire & Rescue cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing a practice of affording firefighters upon retirement the option of receiving payment of terminal leave in a lump sum.

2. 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, particularly by unilaterally changing a practice of affording retirees the option of receiving payment of terminal leave in a lump sum.

B. Respondent North Hudson Regional Fire & Rescue take the following affirmative action:

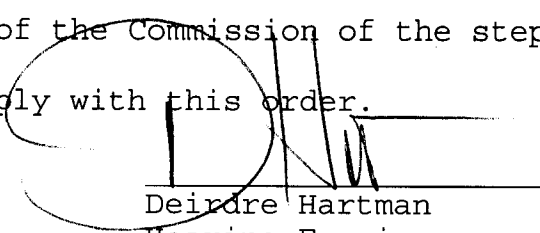
1. Restore the practice of affording retirees the option of receiving payment of terminal leave in a lump sum upon retirement.

2. Negotiate in good faith with the North Hudson Firefighters Association over changes to the practice of affording retirees the option of receiving payment of terminal leave in a lump sum.

3. Provide retirees who are currently receiving payment of terminal leave in installments pursuant to Regional's August 17, 2010 Resolution the option of receiving the balance of the terminal leave due to them in a lump sum.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

5. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.



Deirdre Hartman
Hearing Examiner

DATED: July 16, 2012
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 30, 2012.



NOTICE TO 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 interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing a practice of affording firefighters upon retirement the option of receiving payment of terminal leave in a lump sum.

WE WILL cease and desist from 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, particularly by unilaterally changing a practice of affording retirees the option of receiving payment of terminal leave in a lump sum.

WE WILL restore the practice of affording retirees the option of receiving payment of terminal leave in a lump sum upon retirement.

WE WILL negotiate in good faith with the North Hudson Firefighters Association over changes to the practice of affording retirees the option of receiving payment of terminal leave in a lump sum.

WE WILL provide retirees who are currently receiving payment of terminal leave in installments pursuant to Regional's August 17, 2010 Resolution the option of receiving the balance of the terminal leave due to them in a lump sum.

Docket No. CO-2011-153

North Hudson Regional Fire & Rescue
(Public Employer)

Date: _____

By: _____

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, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372