I.R. NO. 99-24

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF WEST NEW YORK,

Respondent,

-and-

Docket No. CO-99-357

WEST NEW YORK PBA LOCAL No. 361,

Charging Party.

SYNOPSIS

The Town issued an order to unit employees categorically denying any request for vacation in excess of two weeks during the summer vacation period. The PBA claimed that in the past, employees could submit such requests and have them decided upon on a case-by-case basis and that the Town's categorical denial of such vacation requests constituted a unilateral change in terms and conditions of employment. The Commission Designee found that the PBA met the requisite elements for interim relief and ordered the Town to rescind its order.

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Appearances:

For the Respondent,
Murray, Murray & Corrigan, attorneys
(Lawrence M. Fox, of counsel)

For the Charging Party,
Loccke & Correia, attorneys
(Joseph Licata, of counsel)

INTERLOCUTORY DECISION

On May 7, 1999, West New York PBA Local No. 361 (PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Town of West New York (Town) committed an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The PBA alleges that the Town violated N.J.S.A. 34:13A-5.4a(1) and (5).[1/] The unfair practice charge was

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,

Footnote Continued on Next Page

accompanied by an application for interim relief. On May 11, 1999, an order to show cause was executed and a return date was set for June 3, 1999. Accompanying the PBA's application for interim relief was its brief, affidavits and other exhibits in accordance with Commission rules. The order to show cause directed the Town to serve its responsive brief and any opposing affidavits or verified pleadings, together with proof of service, on the Commission and the PBA no later than the close of business (5 p.m.) May 28, 1999. The Town filed its responsive papers on June 2, 1999.

As an initial matter during oral argument, the PBA moved to strike the Town's opposing papers from consideration in this matter. The PBA argues that while the order to show cause required it to serve the executed order upon the Town by the close of business on May 18, 1999, it sent the Town's attorneys the signed order to show cause by way of facsimile and regular mail on May 12, 1999. Moreover, the PBA notes that it mailed the Town's attorney its supporting papers on May 6, 1999, even before it was required to do so by the order to show cause. The PBA further argues that although the Town had filed its responsive papers with the

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1/ Footnote Continued From Previous Page

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."

Commission during the morning of June 2, by way of facsimile, it did not send its responsive papers to the PBA's attorney until sometime that afternoon, several hours later.

The Town indicated that while it thought the responsive papers would be sent to the Commission and the PBA prior to the due date set by the order to show cause, it later discovered that the papers had not been transmitted due to oversight and distributed them on June 2, 1999. Consequently, I found that the Town had not complied with the submission date established by the order to show cause and granted the PBA's motion to strike the Town's responsive papers. However, I allowed the Town to argue orally which, along with the PBA, took place on the scheduled return date. The following facts appear.

The PBA represents a unit consisting of all police officers and detectives below the rank of sergeant employed by the Town. The latest collective negotiations agreement covering the period January 1, 1992 through June 30, 1994,[2/] contains Article VIII, Vacations and Vacation Pay, Section 2, which states the following:

> The vacation period shall be between January 1 and December 15. All vacation leave shall be subject to the approval of the Chief of Police, which approval shall not be unreasonably withheld. Vacation leave may be taken between December 15 and December 31 only under extraordinary circumstances and such must be with

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2/ An interest arbitration award was issued covering the contract term July 1, 1995 through June 30, 1998 and a memorandum of understanding was reached between the parties covering the term July 1, 1998 through June 30, 2002.

> the approval of the Chief of Police, which approval shall not be unreasonably withheld. An employee, at his request, shall be provided no less than eight (8) consecutive work days within the period of June 15 to September 15. Vacation days shall be placed in the vacation days book and shall be taken during the calendar year subject to: (1) a schedule to be submitted and approved; and, (2) the needs of the Department. Vacation leave days may be taken in single day segments.

On January 1, 1998, Police Director Joseph M. Pelliccio issued a memorandum to all police personnel stating the following:

> 1. No personnel will be permitted excused days off on:
>   a. July 4
>   b. October 30 - October 31
>   c. December 15 - December 31
>
> 2. Vacation period runs from 1 January - 14 December, no one will be granted vacation from 15 - 31 December.
>
> 3. Any vacation longer than 2 weeks in duration must be approved, through the chain of command, by the deputy chief in charge.
>
> 4. Requests for days off must be submitted 72 hrs. in advance.

Officers' work week consists of 4 consecutive days. Accordingly, a two week vacation consists of 8 work days off. For at least the last 10 years, requests for vacations in excess of two weeks would be considered and approved as long as (1) the request was submitted prior to April 15 of the calendar year in which the vacation was sought and (2) no more than two (2) other officers would also be on vacation leave during the period of the officer's request for vacation in excess of two weeks.

On April 22, 1999, Deputy Chief O'Donnell[3/] issued a verbal order to all police personnel providing that all vacation requests which had been submitted for more than two weeks (8 work days) during the summer months will be categorically denied. A number of police officers had requested vacations in excess of two weeks.

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

The PBA contends that the issuance of O'Donnell's verbal order categorically denying vacations in excess of two weeks constitutes a unilateral change in terms and conditions of employment. It argues that the long-standing practice requires the Town to consider unit employees' requests for vacation in excess of two weeks on a case-by-case basis with due regard to the prior

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3/ Currently there is no chief of police employed by the Town.

method of determining whether to approve such requests. It further contends that the language contained in the parties' collective agreement stating that an employee be provided with no less then eight consecutive work days vacation within the June 15 to September 15 period, does not establish the conditions of employment concerning vacation requests which exceed eight consecutive work days.

In oral argument, the Town asserted that O'Donnell's directive did not constitute a blanket denial of vacations in excess of two weeks. Rather, employees could request a maximum of two weeks vacation in advance and seek approval for additional vacation time closer to the time of the actual vacation period. It also argues that the issue of vacation time is controlled by the collective agreement, Article VIII, Section 2 and the Town's actions regarding vacation request approvals complies with the collective agreement. It further contends that the Town's vacation policy is a legitimate exercise of its managerial prerogative as provided under the management rights article of the collective agreement.

Section 5.3 of the Act states, in relevant part, the following:

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

The Commission has consistently held that the granting and scheduling of time off is mandatorily negotiable so long as the selection system does not interfere with the employer's minimum

staffing determinations. City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), aff'd NJPER Supp.2d 141 (¶125 App. Div. 1984); Town of West New York, P.E.R.C. No. 89-131, 15 NJPER 413 (¶20169 1989); City of Orange Tp., P.E.R.C. No. 89-64, 15 NJPER 26 (¶20011 1988); Town of Harrison, P.E.R.C. No. 83-114, 9 NJPER 160 (¶14075 1983); Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 457 (¶12202 1981); County of Essex, I.R. No. 90-2, 15 NJPER 459 (¶20188 1989). Thus, within the framework of the Employer's staffing requirements, the scheduling of vacations--the total amount of vacation time to which employees are entitled, the procedures for vacation selection, the time when employees may select vacations and the amount of consecutive vacation time which may be taken--is mandatorily negotiable.

By definition, an established practice is a term and condition of employment which is not enunciated in the parties' agreement but arises from the mutual consent of the parties, implied from their conduct. Caldwell-W. Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536 (¶10276 1979), aff'd. in pt., rev'd in pt., 180 N.J. Super. 440 (App. Div. 1981); see also Township of Middletown, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997). In this case, it appears that the established practice allows for unit employees to request vacations in excess of two weeks, provided they were submitted prior to April 15. During oral argument, the PBA indicated that it did not take issue with Director Pelliccio's January 1, 1998 memorandum requiring that vacations in excess of two

weeks be approved through the chain of command by the deputy chief in charge. Apparently, such vacation requests had bean approved provided no more than two other officers were on vacation leave during the period the officer sought to be on vacation in excess of two weeks. Since O'Donnell's April 22 verbal order categorically denying vacation requests appears to change the procedure by which vacations in excess of two weeks were handled, a mandatory subject of negotiations, I find that such change in procedure may constitute a modification in the established practice and, thus, a unilateral change in terms and conditions of employment in violation of Section 5.4a(5) of the Act.

The Town contends that its actions comply with the terms of the collective agreement. The collective agreement controls over inconsistent past practices where the mutual intent of the parties can be discerned with no other guide then a simple reading of the pertinent language. Sussex-Wantage Reg. Bd. of Ed, P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985); New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978) mot. for recon. den. 4 NJPER 156 (¶4073 1978). However, I do not find the language contained in the vacation article of the collective agreement, Article VIII, Section 2, to control the issue in dispute here. The language in the vacation article provides employees with an entitlement to a minimum of eight consecutive work days but is silent with respect to the manner in which requests for vacation leave which exceed two weeks are handled. A waiver of Section 5.3

rights will not be found unless a contract clearly and unequivocally authorizes a unilateral change. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). A final determination concerning whether the contract language controls the issue of vacation requests in excess of two weeks can only be made through the parties grievance procedure which is designed to provide contract interpretations. Subject to the specific terms of the collective agreement, the parties are free in another proceeding to obtain such contract interpretation. At this juncture, as indicated above, it does not appear to me that a plain reading of the contract language controls the past practice. During oral argument, the Town also asserted that the Management Rights clause in the collective agreement gave it the authority to schedule its employees and, consequently, categorically deny vacation requests in excess of two weeks. I find that the Management Rights clause does not appear to serve as a waiver of the employees' Section 5.3 rights in this instance.

In oral argument the Town asserted that the Commission should not assert jurisdiction over this matter since mere breaches of contract do not rise to the level of an unfair practice. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). As explained above, I have found that it is not clear that Article VIII, Section 2 of the collective agreement controls the issue in dispute here. Since it appears that the issue raised by the PBA concerns the unilateral change in the

parties' past practice, Human Services does not apply and the assertion of Commission jurisdiction in this matter is appropriate. Consequently, I find that the PBA has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

I also find that the PBA has established that unit employees would be irreparably harmed if interim relief were not granted. As this decision issues, the June 15 through September 15 vacation period is about to begin. If employees are not told how many vacation days they may take, they permanently loose the opportunity to formulate summer vacation plans. Additionally, by the time this unfair practice charge is resolved, the Commission will be unable to fashion an adequate remedy which makes employees whole for the 1999 summer vacation season if the PBA is successful in its claim.

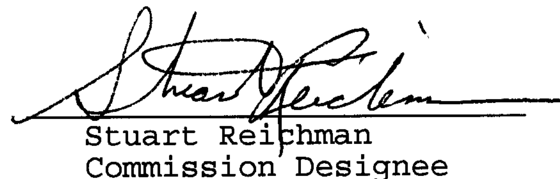
In weighing the relative hardships to the parties, I find that the greater hardship would fall upon the employees if interim relief is not granted. The grant of interim relief is intended to return the parties to the status quo ante. Employees stand to lose the ability to plan a summer vacation in excess of two weeks, as the result of the Town's action. By granting interim relief and returning the parties to the status quo ante, the Town is only being required to make a decision in accordance with the manner in which it has done so over the past ten years. Nothing in this order requires the Town to relinquish its managerial right to grant or deny vacations without considering its minimum staffing levels,

asserting its rights under the collective agreement or otherwise determining vacation requests based on legitimate operational considerations. By granting interim relief, I only enjoin the Town from issuing a blanket denial of vacation requests in excess of two weeks and from unilaterally implementing a change in the manner in which such requests were considered in the past.

The Town conceded during oral argument that it has options to ensure minimum staffing levels are maintained. It indicated that it has the right to have officers work overtime and, in emergent situations, can order officers to return from vacation. Thus, public safety is maintained and the public interest is not injured by requiring the Town to rescind its categorical denial of vacation requests in excess of two weeks.

ORDER

The Town of West New York is restrained from unilaterally changing terms and conditions of employment by issuing a categorical denial of all requests seeking vacation in excess of two weeks and is directed to consider vacation application on a case-by-case basis with due regard for the method employed in the past to determine whether to grant such vacation requests. This interim order will remain in effect pending a final Commission order in this matter. The unfair practice charge will proceed through the normal unfair practice processing mechanism.



Stuart Reichman
Commission Designee

DATED: June 10, 1999
Trenton, New Jersey