

P.E.R.C. No. 91-22

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PROSECUTOR OF MIDDLESEX COUNTY,

Respondent,

-and-

Docket No. CO-H-89-355

PBA NO. 214, MIDDLESEX COUNTY  
PROSECUTOR'S DETECTIVES AND  
INVESTIGATORS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Prosecutor of Middlesex County violated the New Jersey Employer-Employee Relations Act by rescinding credit for prior governmental services for purposes of calculating longevity, vacation and sick leave benefits of employees represented by PBA No. 214, Middlesex County Prosecutor's Detectives and Investigators.

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PROSECUTOR OF MIDDLESEX COUNTY,

Respondent,

-and-

Docket No. CO-H-89-355

PBA NO. 214, MIDDLESEX COUNTY  
PROSECUTOR'S DETECTIVES AND  
INVESTIGATORS,

Charging Party.

Appearances:

For the Respondent,  
John J. Hoagland, Middlesex County Counsel  
(Gale P. Paley, Assistant County Counsel)

For the Charging Party,  
Zazzali, Zazzali, Fagella & Nowak, attorneys  
(Paul L. Kleinbaum, of counsel)

DECISION AND ORDER

On June 1, 1987, PBA No. 214, Middlesex County Prosecutor's Detectives and Investigators filed an unfair practice charge against the Prosecutor of Middlesex County in his capacity of public employer. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),<sup>1/</sup> when it unilaterally

---

<sup>1/</sup> These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (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...."

stopped granting newly-hired employees credit for prior governmental employment. This credit was used to calculate longevity, vacation and sick leave benefits.

On March 5, 1990, a Complaint issued. The employer's Answer asserted that it had a right to stop granting credit and that no employee lost any benefits.

The PBA moved for summary judgment. The parties filed affidavits and briefs. Pursuant to N.J.A.C. 19:14-4.8, the motion was referred to Hearing Examiner Arnold H. Zudick. On May 15, 1990, he recommended granting the motion and issuing a remedial order including the posting of a notice. H.E. No. 90-49, 16 NJPER 339 (¶21140 1990).

On June 19, 1990, the employer filed exceptions. It asserts that summary judgment should have been denied; that it did not act unilaterally because its funding source, the freeholders, rescinded the credit; that negotiation was preempted; and that the recommended notice is too broad.

On June 19, 1990, the PBA responded. It asks that we adopt the Hearing Examiner's recommendations.

We have reviewed the record. The Hearing Examiner's finding of fact (H.E. at pp. 3-5) are undisputed and accurate. We incorporate them here.

We have also reviewed the Hearing Examiner's conclusions of law (H.E. at 5-9). They are sound and well-expressed. We incorporate them here.

In March 1989, the Freeholder Board passed a resolution rescinding its 1980 resolution granting employees credit for prior governmental service. The Prosecutor had granted prior credit in conformity with the 1980 resolution and unilaterally ended that practice in conformity with the 1989 resolution.<sup>2/</sup> The Freeholder Board's action may have motivated the employer's action, but it did not preempt its obligation to negotiate before changing terms and conditions of employment. See State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978) (only statutes and regulations preempt negotiations); City of Vineland, P.E.R.C. No. 90-105, 16 NJPER 317 (¶21130 1990) (ordinances do not preempt).

ORDER

The Prosecutor of Middlesex County is ordered to:

I. Cease and desist from:

A. Interfering with, restraining or coercing employees in the exercise of their rights guaranteed to them by the Act, particularly by not negotiating with PBA No. 214, Middlesex County Prosecutor's Detectives and Investigators before rescinding credit for prior governmental service for purposes of calculating longevity, vacation and sick leave benefits.

---

<sup>2/</sup> There is no dispute that the Prosecutor is the employer of unit employees. See, Bergen Cty. Prosecutor, P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978), aff'd 172 N.J. Super 363 (App. Div. 1980).

II. Take this action:

A. Reinststate the credit for prior governmental service for employees represented by the PBA.

B. Apply the credit to all eligible PBA unit members, including those employed since March 16, 1989, as if the credit had not been rescinded.

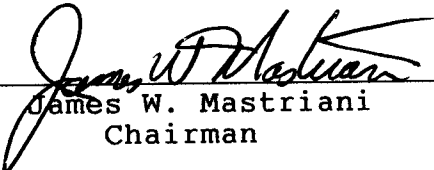
C. Negotiate with the PBA over any future proposal to rescind the credit.

D. 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.

E. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

The remaining allegations of the Complaint are dismissed.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Smith, Wenzler, Johnson, Ruggiero, Reid and Bertolino voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey  
August 13, 1990  
ISSUED: August 15, 1990



# 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 NOT** interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to reinstate the credit for prior governmental service for employees represented by PBA No. 214, Middlesex County Prosecutor's Detectives and Investigators.

**WE WILL** apply the credit to all eligible PBA unit members, including those employed since March 16, 1989, as if the credit had not been rescinded.

**WE WILL** negotiate with the PBA over any future proposal to rescind the credit.

Docket No. CO-H-89-355

PROSECUTOR OF MIDDLESEX COUNTY

(Public Employer)

Dated: \_\_\_\_\_

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, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

H.E. NO. 90-49

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

In the Matter of

PROSECUTOR OF MIDDLESEX COUNTY,

Respondent,

-and-

Docket No. CO-H-89-355

PBA #214, MIDDLESEX COUNTY  
PROSECUTOR'S DETECTIVES AND  
INVESTIGATORS,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission in a decision on a motion for summary judgment recommends the Commission find that the Middlesex County Prosecutor violated the New Jersey Employer-Employee Relations Act when it unilaterally rescinded a credit for prior governmental service. The credit was an established term and condition of employment and the Prosecutor implemented the rescission without first negotiating with PBA. The Hearing Examiner on his own motion also recommended dismissal of an allegation that the Prosecutor was refusing to implement an arbitration award. The Hearing Examiner concluded that the Superior Court, not the Commission, had primary jurisdiction to enforce the award.

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. 90-49

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

In the Matter of

PROSECUTOR OF MIDDLESEX COUNTY,

Respondent,

-and-

Docket No. CO-H-89-355

PBA #214, MIDDLESEX COUNTY  
PROSECUTOR'S DETECTIVES AND  
INVESTIGATORS,

Charging Party.

Appearances:

For the Respondent  
John J. Hoagland, Middlesex County Counsel  
(Gale P. Paley, Assistant County Counsel, of counsel)

For the Charging Party  
Zazzali, Zazzali, Fagella & Nowak, Attorneys  
(Paul L. Kleinbaum, of counsel)

HEARING EXAMINER'S DECISION  
ON MOTION FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public  
Employment Relations Commission (Commission) on June 1, 1989 by PBA  
#214, Middlesex County Prosecutor's Detectives and Investigators  
(PBA), alleging that the Middlesex County Prosecutor (Prosecutor)  
violated subsections 5.4(a)(1) and (5) of the New Jersey  
Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.



(Act).<sup>1/</sup> The PBA alleged that the Prosecutor violated the Act by: unilaterally rescinding a policy granting employees credit for prior governmental employment; repudiating the parties' collective agreement; and repudiating a confirmed arbitration award granting credit for prior governmental service. The PBA seeks a cease and desist order, a return to the status quo, an order to negotiate, and costs and fees.

On July 25, 1989 the PBA filed a Motion for Summary Judgment with supporting brief and affidavits. By letter of August 22, 1989 the PBA requested the Motion be held in abeyance pending an exploratory conference and complaint issuance. The PBA requested the Motion be reinstated after complaint issued. By letter of December 14, 1989 the PBA notified the Commission that the matter could not be resolved and it requested a complaint issue.

A Complaint issued on March 5, 1990. By letter of March 12, 1990 the Chairman reinstated the Motion and pursuant to N.J.A.C. 19:14-4.8 referred the Motion to me for decision.

The Prosecutor filed a brief and affidavit in opposition to the Motion on March 30, 1990, and filed an Answer to the Complaint on May 2, 1990.

---

<sup>1/</sup> These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

Based upon the briefs, affidavits and Answer I make the following undisputed:

Findings of Fact

1. During the early 1970's the Middlesex County Board of Freeholders (County) passed a resolution pursuant to N.J.S.A. 40A:9-5 granting County employees credit for prior service with other governmental entities.<sup>2/</sup> That same credit was granted to employees of the Prosecutor.

On January 21, 1980 the Appellate Division in Kenney v. East Brunswick Tp., 172 N.J. Super. 45 (App. Div. 1980), found that statute unconstitutional. Consistent with its desire to adopt a new program for granting credit for prior governmental service, however, the County, on September 18, 1980, passed a new resolution granting credit for such service. That credit was again granted to employees of the Prosecutor.

2. Article 20 of the 1988-89 collective agreement between the Prosecutor and PBA contained the following "Savings Clause."

---

<sup>2/</sup> N.J.S.A. 40A:9-5, effective July 1, 1979, provided:

Whenever heretofore or hereafter a transfer has been or shall be effected by appointment, assignment or promotion of a municipal employee to any other department or position in municipal employment, or to a position or department of the county government; or of a county employee to any other position or department in county employment, or to a department position of a municipal government, in counties of the first or second class, the period of such prior service in said county or municipal employment, for any purpose whatsoever, shall be computed as if the whole period of employment of such employee had been in the service of the department, or in the position, to which the said employee had been transferred.

XX. SAVINGS CLAUSE

It is mutually understood and agreed that all benefits currently enjoyed by employees shall remain in effect and become a part of this Agreement, including any and all verbal or written agreements pertaining to working conditions made with the Middlesex County Prosecutor.

It is agreed that all general fringe benefits given to all other County employees by General County Policy, will also be granted to the employees covered by this Agreement.

The second paragraph of Article 21 of the parties' 1980-81 collective agreement was identical to the second paragraph of Article 20 of the 1988-89 agreement. The 1980 resolution was incorporated into the parties' collective agreement through Article 20.

3. On July 24, 1987 the PBA filed a grievance alleging that the Prosecutor violated Article 20 of the parties' collective agreement by failing to provide the prior service credit to certain Prosecutor employees. An arbitration hearing was held on January 4, 1988, and the arbitrator issued an Award on January 25, 1988 finding that the Prosecutor must grant the credit, pursuant to the 1980 resolution and Article 20, and provide the appropriate amount of sick leave, vacation time, and longevity credit in accordance with the Award. The Award was confirmed by Superior Court Judge J. Norris Harding on August 5, 1988.

On February 27, 1989 the parties entered into a written agreement to implement the Award. That agreement provided for the receipt of retroactive vacation and sick days, and longevity

payments, and included a list of employees who were entitled to receive the prior service credit in those benefit areas.

4. On March 16, 1989 the County passed a resolution prospectively rescinding the 1980 resolution granting the prior service credit. The Prosecutor implemented the March resolution - at least on a prospective basis - without first negotiating the rescission of that credit with the PBA.

#### Disputed Factual Issue

A disputed factual issue exists as to whether the Prosecutor has failed or refused to implement the Award and February agreement.

#### Analysis

There are two issues in this case. 1) Did the Prosecutor violate the Act by unilaterally rescinding the credit for prior governmental service, and/or 2) Did the Prosecutor fail or refuse to implement the Award and February 1989 agreement?

The law regarding summary judgment is well settled:

Pursuant to N.J.A.C. 19:14-4.8(d), summary judgment may be granted "[i]f it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law...." But summary judgment is to be granted with extreme caution. The moving papers must be considered in the light most favorable to the opposing party, all doubts must be resolved against the movant, and the summary judgment procedure may not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182, 185 (App Div. 1981); Essex Cty. Ed. Services Comm'n., 9 NJPER 19 (¶14009 1982).

State of N.J. (Dept. of Human Services), P.E.R.C. No. 89-52, 14 NJPER 695, 696 (¶19297 1988)

See also Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).

### The Unilateral Change

The facts regarding the first issue are undisputed. The Prosecutor unilaterally rescinded - at least prospectively - the granting of a credit for prior governmental service. If that credit was an established and negotiable term and condition of employment, the Prosecutor's unilateral elimination of that credit violated the Act. If the Prosecutor acted out of governmental necessity, his actions may not have been in violation of the Act.

Credit for prior governmental service authorized by past practice and/or a collective agreement, and not otherwise controlled by statute, is a negotiable term and condition of employment. See Belleville Ed. Assn. v. Belleville Bd. Ed., 209 N.J. Super. 93 (App. Div. 1986)(Belleville), (the Court interpreted the parties' agreement to include a credit for new appointees for prior public school teaching experience in other districts). Here the prior service credit was incorporated into the parties' collective agreement by Article 20 (and originally incorporated by Article 21) and directly enhanced sick time, vacation leave and longevity benefits for eligible unit members. There is no statute otherwise controlling or restricting the credit, thus the credit is an established term and condition of employment contained in the parties' contract.

When a public employer wishes to change an established term and condition of employment, it has the burden to initiate negotiations with the majority representative over any proposed change to or elimination of an established benefit prior to implementing any change. New Brunswick Bd. Ed., P.E.R.C. No. 78-47, 4 NJPER 84, 85 (¶4040 1978). Failure to engage in such negotiations violates the Act. Similarly, the unilateral withdrawal of an existing benefit violates the Act. Hunterdon County, P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986), P.E.R.C. No. 87-150, 13 NJPER 506 (¶18188 1987), aff'd App. Div. Dkt. No. A-5558-86T8 (3/21/88), aff'd 116 N.J. 322 (1989).

Here the facts are undisputed, and even giving the Prosecutor every favorable inference, I find the Prosecutor violated the Act by unilaterally rescinding the prior service credit. In its defense, the Prosecutor argued that: the County had the right to pass the March resolution; the resolution was passed and implemented in the public interest; the rescission of the credit was prospective only; no employee employed by the Prosecutor as of the March resolution lost any benefit; and that Article 20 did not guarantee the credit for employees employed after the passage of the March resolution.

Those defenses lack merit. This case does not concern the County's passage of the March resolution, it concerns the Prosecutor's unilateral implementation of that resolution with respect to employees represented by the PBA. The Court in IFPTE

Local 195 v. State, 88 N.J. 393 (1982) addressed the subject of negotiability and said:

To summarize, a subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

88 N.J. at 404-405.

Here the credit directly affects the employees' welfare, was not fully or partially preempted, and negotiations would not have significantly interfered with the determination of governmental policy. The County's purpose for passing the March resolution "in the public interest" was economic. The Prosecutor unilaterally implemented that resolution but offered no evidence or argument to suggest that such implementation was necessary to deliver its governmental services. Rather, the facts show that the dominant concern here was economic, and changes made in employee benefits for economic reasons must be negotiated with the majority representative prior to implementation. See Piscataway Tp. Bd. Ed. v. Piscataway Tp. Principals Assoc., 164 N.J. Super. 98, 101 (App. Div. 1978); Sayreville Bd. Ed., P.E.R.C. No. 83-105, 9 NJPER 138, 141 (¶14066 1983).

It is immaterial that rescission of the credit was prospective only and that no employee employed prior to March 1989 lost any benefit. The Prosecutor's interpretation of Article 20 is wrong. The contract was in effect until December 31, 1989, and remains (remained) in effect as the status quo until a new agreement is (was) reached. An employee employed at any time during the life of the agreement or the status quo period, was "covered" by Article 20 of that agreement. There was no language in Article 20 that could be interpreted or even inferred as limiting the protections of that Article to employees employed up to a certain date. Thus, the mere fact that the credit was rescinded prospectively, or that no employee as of March 1989 lost any benefit, does not excuse the Prosecutor from fulfilling his obligation to negotiate with the PBA prior to implementing changes in established terms and conditions of employment.

The Prosecutor must reinstate the credit with respect to employees represented by the PBA, apply the credit to any employees hired into the PBA's unit since the March resolution, and negotiate with the PBA prior to rescinding the credit.

#### The Arbitration Award

The facts regarding the implementation of the Award are disputed. Affidavits supporting the PBA's Motion claim the Prosecutor indicated he would not abide by the Award. The affidavit supporting the Prosecutor claims the Award has been and is being implemented. Normally when there are disputed facts on a particular



issue in a summary judgment matter the motion is denied as to that issue and the issue becomes the subject of a plenary hearing. In this case, however, I dismiss this issue on my own motion. Particularly since there has already been court action regarding the Award, I find that the Superior Court, not the Commission, has primary jurisdiction to consider that issue.

N.J.S.A. 2A:24-7 provides that the Superior Court has jurisdiction to confirm an arbitration award. On August 5, 1988 the PBA sought and obtained Judge Harding's confirmation of the Award. N.J.S.A. 2A:24-10 provides that the same court may enforce the Award. The February 1989 agreement between the parties was merely the vehicle by which the Award was implemented. If the PBA believes that the Prosecutor is not implementing or following the agreement/Award, then it may seek enforcement of the agreement/Award in Superior Court. Accord Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. Ed., 78 N.J. 144, 153-155 (1978); Belleville; State of N.J. (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62, 65 note 16 (1977).

Thus, I recommend dismissal of that element of the Charge.<sup>3/</sup>

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

---

<sup>3/</sup> If the Commission adopts my status quo recommendation and the Prosecutor retroactively reinstates the prior service credit, it may obviate further action on the agreement/Award issue.

Recommended Order

I recommend the Commission ORDER:

A. That the Prosecutor cease and desist from:

Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the PBA over the rescission of the credit for prior governmental service prior to implementation.

B. That the Prosecutor take the following affirmative action:

1. Restore the status quo ante by reinstating the credit for prior governmental service for Prosecutor employees represented by the PBA and include that credit in Article 20 of the parties' agreement.

2. Apply the credit to all eligible PBA unit members, including those employed since March 16, 1989, as if there had been no rescission of the credit.

3. Negotiate with the PBA over any future attempt to rescind the credit prior to implementing any rescission.

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

C. That the charge regarding the implementation of the Arbitration Award be dismissed.

D. That costs and fees be denied.

  
Arnold H. Zudick  
Hearing Examiner

Dated: May 15, 1990  
Trenton, New Jersey

# NOTICE TO ALL EMPLOYEES

## PURSUANT TO

AN ORDER OF THE

## PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

## NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

I WILL cease and desist from interfering with, restraining or coercing my employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the PBA over the rescission of the credit for prior governmental service prior to implementation.

I WILL reinstate the prior service credit for my employees represented by the PBA as part of Article 20 of the collective agreement.

I WILL apply the credit to all eligible PBA unit members, including those employed since March 16, 1989, as if there had been no rescission of the credit.

I WILL offer to negotiate with the PBA over any future attempt to rescind the credit prior to implementation.

Docket No. CO-H-89-355

PROSECUTOR OF MIDDLESEX COUNTY  
(Public Employer)

Dated \_\_\_\_\_

By \_\_\_\_\_  
(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.