

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

In the Matter of

TOWN OF KEARNY,

Respondent,

-and-

Docket No. CO-H-97-96

KEARNY COUNCIL NO. 11,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Town of Kearny violated 5.4a(1) and (5) of the Act when it adopted an employee handbook which changed a number of existing terms and conditions of employment without negotiations. Further, the Town violated 5.4a(1) of the Act by including language in the manual reserving its sole and absolute authority to change existing practices. Finally, the Town violated the Act when it required employees to sign an acknowledgement of the manual's provisions or face discipline.

The Hearing Examiner agrees with the Town that one provision of the manual requiring employees to submit written proof of jury duty attendance is a managerial prerogative.

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 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.

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Appearances:

For the Respondent, Boffa, Shaljian, Cammarata
& O'Connor, Attorneys
(Thomas Cammarata, of counsel)

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

**HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION**

On September 23, 1996, Kearny Council No. 11 ("Council 11") filed an unfair practice charge alleging that the Town of Kearny ("Town") violated the New Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-5.4a, paragraph (5)^{1/} when it unilaterally adopted a new personnel manual which changed certain terms and conditions of employment, specifically:

^{1/} This provision prohibits public employers, their representatives or agents from: "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

definition of full-time employee, vacation request procedure, forfeiture of unused vacation leave, accumulation of sick leave, bereavement leave, designation of pay days, work schedules, and overtime compensation. Council 11 also charges that the Town sought to require employees to waive their rights under the Act by insisting upon threat of discipline that employees sign an acknowledgment of the manual.

The Director of Unfair Practices issued a Complaint and Notice of Hearing on May 6, 1997. On May 21, 1997, the Town filed an Answer. It admits adopting an employee handbook, but denies violating the terms of the parties' collective agreement, threatening employees with discipline, or requiring employees to waive statutory rights. It asserts that its actions were the exercise of managerial prerogatives.

On July 2, 1997, Council 11 amended its charge to add that the Town's actions also violated 5.4a(1) and (3) of the Act.^{2/} I conducted a hearing on July 14, 1997.^{3/} At the

^{2/} 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. (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."

^{3/} The transcript from the hearing will be referred to as "T." Commission exhibits will be referred to as "C", joint exhibits as "J", Charging Party's exhibits as "CP", and Respondent's as "R."

hearing, Council 11 again amended its charge to add that the manual changed the following additional working conditions: jury duty payments (T38-T39), drug testing procedures (T49), and job assignment upon return from personal leave (T46-T47). I permitted the Complaint to be amended to include both of these amendments. The Town amended its Answer to deny the additional allegations. The parties then stipulated certain facts, examined witnesses and presented exhibits. The parties filed post-hearing briefs by November 6, 1997.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. Council 11 represents about 110 blue-collar and white-collar employees in the Town's police department, public works department, water department, library, health department, and other municipal offices (J-1; T26, T31).

The parties' most recent collective agreement expired on December 31, 1994 (J-1). At the time of this hearing, the parties were negotiating the terms of a successor agreement (J-A; T26).

2. In July 1995, the Town appointed Robert Czech as its first administrator. Czech's mission was to centralize personnel and purchasing functions, provide overall coordination of the Town's day-to-day operations and act as liaison between the governing body and the Town's various departments (T84-T85).

3. After reviewing the Town's policies and procedures, Czech sought to develop a centralized personnel policies document. He discussed the matter with Public Works General Superintendent Richard Ferraioli. Czech learned from Ferraioli that he and Recycling Coordinator James Waller had developed an employee handbook covering public works employees (R-1; R-2). On August 31, 1994, Ferraioli implemented the manual and instructed public works supervisors to require employees to sign an acknowledgment form, and discipline employees refusing to do so. The employee acknowledgment form states that "...revised information may supercede, modify or eliminate existing policies. Only the General Superintendent of Kearny DPW has the ability to adopt any revisions to the policies in this handbook (R-2, attachments)."^{4/}

Czech asked Waller to work with his personnel technician to develop a Town-wide personnel manual, using the public works manual as a basis (T85-T86). Czech wanted the manual to be a resource for all Town employees. Because the Town's employees

^{4/} I find as a fact that the Town, through Ferraioli, implemented the 1994 handbook for public works employees. Although the parties stipulated that no record could be found of any municipal ordinance approving the 1994 public works handbook, nevertheless, according to Ferraioli's August 31, 1994 memo to the department's supervisors, "The handbook has been reviewed by the mayor, each council person, and the town attorney and has met with their approval" (R-1).

are organized into six negotiations units^{5/} with differing terms and conditions of employment, Czech did not want the manual to specifically address working conditions unique to each negotiations unit (T86-T87).

4. On or about May 1, 1996, Czech issued the Employee Handbook (J-2). The handbook was given to department heads for distribution to each employee with an "Employee Acknowledgment Form" (J-3), which provided in relevant part,

Since the information, policies, and benefits described here are necessarily subject to change, I acknowledge that revisions to the handbook may occur. All such changes will be communicated through official notices and I understand that revised information may supersede, modify, or eliminate existing policies. Only the Town Administrator of the Town of Kearny has the ability to adopt any revisions to the policies in this handbook.

I acknowledge that I understand that the policies, practices, and procedures published by the Town of Kearny in this handbook are not in any way to be interpreted as a contract of employment between the Town and its employees nor is [it] a legal document.

I acknowledge that I understand that this manual supersedes and replaces all prior or existing manuals, written policies, or practices in effect prior to the effective date of this manual. I further acknowledge I have received the handbook, and I understand that it is my responsibility to read and comply with the policies contained in this handbook and any revisions made to it. (J-3; underlined text in italics in original).

^{5/} The units include police, police superiors, fire, fire superiors, crossing guards, and employees represented by Council 11.

5. Council 11 President Brenda McIntyre first learned of the handbook a few days before it was distributed to all departments. McIntyre wrote to the mayor and council asking to discuss and negotiate the terms of the manual. She received no response. McIntyre advised her members to refuse to sign the acknowledgment because Council 11 believed that it amounted to a waiver of contractual rights. Many employees did so refuse (T27-T29).

6. Czech responded by issuing a memorandum on June 7, 1996 directing department heads to make sure each employee signed for the manual (J-A; J-4).

7. On June 10, Council 11's attorney Paul Kleinbaum then wrote to Czech, objecting to the manual and the language of the acknowledgment form (J-A; J-5). Czech also learned that employees were refusing to sign because they felt he was trying to force a contract on them (T92).

8. As a result, Czech distributed a revised acknowledgment form (J-6) on June 12, which provides in part,

Since the information, policies, and benefits described here are necessarily subject to change, I acknowledge that revisions to the handbook may occur. All such changes will be communicated through official notices and I understand that revised information may supersede, modify, or eliminate existing policies. Only the Town Administrator of the Town of Kearny has the ability to adopt any revisions to the policies in this handbook.

I acknowledge that I understand that the policies, practices, and procedures published by the Town of Kearny in this handbook are not in any way to be interpreted as a contract of employment between the Town and its employees nor is [it] a legal document.

I acknowledge I have received the handbook, and I understand that it is my responsibility to read and comply with the policies contained in this handbook and any revisions made to it. This handbook as indicated throughout its contents, where applicable, does not supercede and is subject to any bargaining unit agreements and/or employment contracts. (J-6; underlined text in italics in original.)

The new acknowledgment form was given to the Town's department heads with instructions to have each employee sign it or risk discipline. The department heads distributed the manual on or about June 19, 1996, together with the revised acknowledgment form, and told employees they may be disciplined for failing to sign it (J-A; J-7).

9. Because this memo threatened employees with discipline, McIntyre advised her members on June 20 to sign the acknowledgment form and that Council 11 would file charges against the Town. McIntyre simultaneously notified Czech that unfair practice charges would be filed (J-A; J-8; J-9).

10. The Town did not negotiate any provisions of the employee handbook with Council #11 before it was issued (J-A).

11. The handbook (J-2) provides in an introductory statement, section 40,

This handbook is designed to acquaint you with employment with the town of Kearny and provide you with information about working conditions, employee benefits, and some of the policies affecting your employment....This manual is not an employment contract and is not intended to create contractual obligations of any kind. As time passes and circumstances change, the need may arise and the Town of Kearny reserves the right to revise, supplement, or rescind any policies or portion of the handbook from time to time as it deems appropriate, in its sole and absolute discretion....(J-2).

In section 101, "Nature of Employment", the manual provides,

This manual supersedes and replaces all prior existing manuals, written policies, oral policies, or practices in effect prior to the effective date of this manual....

...The Town of Kearny reserves the right to change, revise, or eliminate any of the policies in this handbook. The only recognized deviations from the stated policies are those authorized and signed by the Town Administrator of the Town of Kearny.^{6/}

Designation of Full-Time Status

12. Section 201 of the manual, entitled "Employment Categories", delineates employees into the following groups: "regular full-time, regular part-time, part-time, temporary and per diem" (J-2, section 201). This section defines "regular full-time" employees as those working a regular five-day workweek for a total of 35 hours a week, including a lunch period, with daily hours of 8:30 am to 4:30 p.m. "Regular part-time" is defined as those employees working less than a full-time schedule, but at least 35 hours a week and "part-time employees" is defined as those regularly scheduled to work less than 35 hours per week" (J-2, section 201).

The parties' 1992-94 contract provides at Article VIII, Hours,

^{6/} Czech testified that he did not intend that the manual would supercede contract provisions or "modify or eliminate any past practices which are considered part of the contract" (T108-T109; T111-T112). However, I do not credit that assertion as it applies to past practices, in light of the manual's strong language giving the Town administrator "absolute authority" to change policies and practices (J-2).

Section 2: The workday shall consist of eight (8) hours or as currently constituted.

Section 3: None of the foregoing hours or days shall be changed except as agreed upon by the parties.

Section 4: All new employees hired after 7/1/93 shall work a minimum 7-hour day for any position in which current employees work 7 hours per day or less. The salary for these positions shall be as stipulated for the applicable title as stated in the most current salary ordinance. Overtime for these positions for any new employees shall be paid after 35 hours per week (J-1, p. 11).

The practice regarding working hours is that some employees work 9 to 4, some 8 to 4, and some 8:30 to 4:30, with or without paid lunch, depending upon their department assignment, and when they began employment with the Town. In negotiations for the 1992-9994 contract, the parties agreed that all new employees would work either 8 to 4 or 8:30 to 4:30, while more senior employees in certain departments could continue to work 9 to 4 p.m., for a total of 30 hours a week. Employees working any of the above schedules have been considered as full-time employees and have been receiving full vacation and health benefits (T31-T33; T34; T70-T72; T74-T75).

Since the implementation of the handbook, no employee has had his or her hours changed, nor have employees lost existing vacation or other benefits (T71).

Vacation Request Procedures

13. Section 303 of the manual concerns employee vacation benefits. It states in part,

...the scheduling of vacations will be left to Department Heads. A "request for vacation" form for each year will be distributed to all employees with the last paycheck of the prior year. Request for Vacation forms must be completed by each employee and account for all earned vacation time for the year. The form must be submitted by each employee to their Department head not later than January 31 each year...

It is the policy of the Town of Kearny that paid vacation time be used in minimum increments of at least one full week where possible. Request for vacation of full weeks will be given priority over requests for vacation of less than a full week. (J-2, section 303.)

The parties' collective negotiations agreement, J-1, provides in Article XI, section 2,

In order not to interfere with the proper and efficient operation of the employer, it is agreed that the scheduling of vacations must be left to the discretion of the employer, but such discretion shall not be arbitrarily exercised and seniority shall be a governing factor (J-1, p. 15).

The practice for this unit's employees has been that there was no deadline for submitting vacation requests, and that vacations could be taken with approval of the department head, if the departmental work schedule permitted. There was no minimum vacation period required, and in fact, employees could request vacation time to be taken in days (T34-T35). Further, the practice has been that seniority was the only factor considered by department heads in granting vacations (T34-T35; T37; T60-T61; T74).

Vacation Carry-Over:

14. Manual section 303 concerning vacation continues as follows,

In the event that available vacation is not used by the end of the benefit year, employees will forfeit the unused time. Special requests to carry over vacation time to a new year must be made to the Town Administrator sufficiently in advance of the last meeting of the year so such Administrator can submit his/her recommendations to the Town Council for action on such requests before the end of the year. In any event, all such requests must be submitted not later than November 15th each year.

The practice for requesting vacation carryover has been to submit the request to the department head, who would forward it to council. Employees have not been denied requests to carry unused vacation time over to the following calendar year if the request is submitted to the governing body by the last council meeting in December (T35-T36; T37-T38; T54; T57-T60).

Czech also serves as Town Clerk, and as such sets up the agenda for meetings of the Mayor and Council. Czech expected the requests for vacation carryover to come through him to the governing body (T57).

Vacation Proration Upon Retirement

15. The manual states at section 303, p. 2:

A retiring employee may use vacation time on a pro-rated basis up to the retirement date unless specifically stipulated in collective bargaining agreements or employment contracts.

Retiring employees have been routinely given their full annual vacation allotment in the year in which they retire; that is, vacation leave has not been pro-rated (T36-T37).

Since the manual was implemented in May 1996, retiring employees have continued to receive their full year's vacation time (T61-T62).

Jury Duty Verification:

16. Section 311, "Jury Duty" of the Handbook states, ...Employees in an eligible classification will be paid his/her full, regular base weekly wage for the entire period of the jury duty...Employees must show the jury duty summons to their supervisor as soon as possible so that the supervisor may make arrangements to accommodate their absence. To be paid for jury duty, the employee must present to his/her supervisor attendance records from the court indicating that the employee was present in court for jury duty. Failure to provide the supervisor with verification of the employee's attendance at court for jury duty will result in the employee losing that day's pay. (emphasis added).

It is this last part -- the requirement that the employee produce attendance verification -- that is a change in the past practice. Prior to the manual, employees summoned for jury duty would produce the summons to their department head and were excused for the period of jury duty. Employees were not required to produce proof of jury service from the court after the fact (T42-T43; T63).

Pay Day

17. The manual provides at section 403, "Paydays", that full-time employees are paid weekly every Friday. Payroll checks will be issued to the Department representatives at 11:00 a.m. every Friday with no exceptions. (J-2, section 403).

Pay checks have been distributed on Thursdays after 3:00 p.m., although the checks are dated the following day^{7/} (T42-T43; T50-T53; T73-T74).

^{7/} McIntyre admitted that for a brief period of time public works employees were having their checks held until Fridays because of absenteeism problems. However, the Thursday pay check distribution resumed.

On June 7, 1996, the police chief distributed a memo to all department personnel stating, "Commencing the first pay period in July, checks will be distributed on Friday. When further information is received all personnel will be notified" (J-10). However, this change in paydays was never implemented.

Leave of Absence Position Retention:

18. The manual section 601, "Medical or family leaves of Absence", provides,

When a medical leave ends, the employee will be reinstated to the same position, if it is available, or to an equivalent position for which the employee is qualified.

Section 603 of the manual states,

When a personal leave ends, every reasonable effort will be made to return the employee to the same position, if it is available, or to a similar available position for which the employee is qualified. However, the Town of Kearny cannot guarantee reinstatement to the original position in all cases.

The contract is silent on the issue of employee returns from leave of absence. However, the practice has been that the employee has been returned to the former position (T47-T48). Since the handbook issued, no employee has taken a leave (T70).

Overtime Compensation:

19. Section 507 of the manual, "Overtime and Compensatory Time", provides,

...Overtime compensation is paid to all non-exempt employees in accordance with federal and State wage and hour restrictions.

Compensatory Time Off

It is the policy of the Town of Kearny to pay for overtime work rather than give equivalent time off. There may, however, be occasional instances where for budgetary consideration or where an employee requests such time off in lieu of payment, that the Department Head may grant such request if in his/her judgment the workload of the department permits. Where time off in lieu of payment is given, such time must be used within two weeks. (J-2, section 507).

Employees have been given monetary compensation for overtime, and compensatory time has not been recognized. No employee was paid in compensatory time rather than cash, whether because of budget constraints or for any other reason (T45-T46).

Drug Testing

20. The manual at section 714 states in part,

To help ensure a safe and healthful working environment, job applicants and employees may be asked to provide body substance samples (such as urine and/or blood) to determine the illicit or illegal use of drugs and alcohol. Refusal to submit to drug testing may result in disciplinary action, up to and including termination of employment.

Only employees requiring a CDL truck driving license have been subject to drug testing (T49-T50). The Town has not sought to negotiate over drug testing procedures with Council 11. Since the manual issued, no additional unit employees have been subjected to drug testing, however candidates for employment have been tested (T50; T72-T73).

ANALYSIS

Council 11 alleges that the Town violated 5.4a, paragraphs (1), (3) and (5) of the Act when it adopted the employee handbook

which changed certain terms and conditions of employment without negotiations. Council 11 also charges that ordering employees to sign the acknowledgment form under threat of discipline amounted to coercing them into waiving statutory rights to negotiate in violation of 5.4a(1) of the Act.

The Town argues that it has a managerial prerogative to adopt an employee handbook and require employees to acknowledge it. It further asserts that the handbook did not violate Council 11's contract terms.

First, the employer's decision to create a personnel manual is not, in and of itself, a violation of the Act. See, City of Trenton, D.U.P. No. 95-12, 21 NJPER 10 (¶26004 1994). In that matter, the Director found that, absent an impact on identifiable, negotiable terms and conditions of employment, an employer did not violate its negotiations obligations by adopting departmental rules and regulations over policy issues. An employer may adopt policies governing its workforce, provided those policies do not impact on negotiable terms and conditions of the employees' employment. Trenton.

However, N.J.S.A. 34:13A-5.3 defines an employer's duty to negotiate before changing working conditions:

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

This statutory provision has been interpreted to require employers to negotiate with employee representatives before changing employee terms and conditions of employment. See, Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989); Galloway Tp. Bd. of Ed. v. Galloway Tp. Education Ass'n., 78 N.J. 25, 48 (1978); Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997).

A public employer may violate its negotiations obligation in two ways: (1) repudiating a term and condition of employment it had agreed would remain in effect throughout the collective agreement's life, and (2) implementing a new rule concerning a term and condition of employment without first negotiating in good faith to impasse or having a contractual defense. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). To find such a violation, Council 11 bears the burden of proving: (1) a change (2) in a term and condition of employment (3) without negotiations. The Town may defeat such a claim if it has a managerial prerogative or contractual right to make the change. Id.

Here, two of the employee handbook's provisions fall into the first category, that is, they are expressly covered by the contract.

First, the "employment categories" section of the handbook (section 201) is contradictory to the parties' express contract language which preserves existing work schedules.

Second, section 303 of the handbook, which describes vacation selection policy as giving priority to full-week choices

over partial weeks, is asserted to be in violation of the parties' contract.

However, both the manual at the introductory section, and the employee acknowledgment form, expressly state that the manual "does not supercede and is subject to any bargaining unit agreements" (J-6). Therefore, although these two sections appear in the manual, the contract exemption language in the manual effectively nullifies these two clauses as it applies to Council 11's unit.

The remainder of the working conditions changed by the manual are not expressly set forth in the parties' written agreement, but are established practices. It appears that the Town is arguing that, unlike express terms of the contract, to which it understands to be bound, it is free to change unwritten established practices by administrative order. In fact, the manual states,

Town of Kearny reserves the right to revise, supplement, or rescind any policies or portion of the handbook from time to time as it deems appropriate, in its sole and absolute discretion.

This manual supersedes and replaces all prior existing manuals, written policies, oral policies or practices in effect prior to the effective date of this manual....

...The Town of Kearny reserves the right to change, revise, or eliminate any of the policies in this handbook. (J-2, emphasis added)

In Ocean Tp., P.E.R.C. No. 81-133, 7 NJPER 333 (¶12149 1981), the Commission held that an employer could not lawfully retain unlimited power to adopt or modify rules and regulations which impact on

negotiable terms and conditions of employment. See also, Borough of Mountainside, P.E.R.C. No. 83-94, 9 NJPER 81 (¶14044 1982).

Further, the Act requires more of the parties than maintaining written contract terms once the contract expires. The Act also requires the employer to negotiate over any proposed changes in existing practices. Galloway. As stated in Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138, 140 (¶14066 1983):

[A]n employer violates its duty to negotiate when it unilaterally alters an existing practice or rule governing a term and condition of employment ... even though that practice or rule is not specifically set forth in a contract.... Thus, even if the contract did not bar the instant changes, it does not provide a defense for the Board since it does not expressly and specifically authorize such changes.

Here, the parties' agreement expired and they were in the midst of negotiating a successor when the Town implemented its manual, which announced that it was unilaterally "superceding and replacing" a number of established practices. Unilateral action is the very antithesis of the statutorily mandated duty to collectively negotiate over terms and conditions before they are established. Galloway.

The record demonstrates that the following existing practices were changed by the manual: the definition of full-time and part-time employment status as it relates to vacation and health benefit eligibility, vacation selection procedures (i.e., minimum days and submission deadlines, the requirement to submit vacation carryover requests by November 15, the pro-rating of vacation leave time for retiring employees, jury duty verification requirements,

the designation of payday, position retention for employees returning from leaves of absence and overtime compensation.

In addition, I find that the expansion of drug testing to all employees is also a change. Drug testing for all unit employees goes well beyond the testing which had been done for certain employees required to hold a CDL license, who almost certainly are a small part of this blue-collar and white-collar employee unit.

The employer argues that no Council 11 unit employees ever suffered a change in terms and conditions of employment, despite the inclusion of the above provisions in the manual. Even assuming that the Town had not yet enforced the manual's provisions as to these unit employees, I find that their inclusion in the manual creates a change in employees' existing working conditions.

Where the employer puts employees on notice that it has changed terms and conditions of employment, both the announcement and the implementation of the change constitute unfair practices. See Warren Hills Reg. Bd. of Ed., P.E.R.C. No. 78-69, 4 NJPER 188 (¶4094 1978); City of Linwood, H.E. NO. 98-16, 24 NJPER 133 (¶29068 1997). Although no employees have yet been directly effected by the provisions of the manual, I find that the adoption and distribution of the manual acted as the Town's announcement of a change in the existing terms and conditions of employment.

It is undisputed that the Town did not engage in collective negotiations regarding any provision of the manual, including those that change existing practices. Thus, absent proof of a contract

right or managerial prerogative to make the change, a violation must be found. Elmwood Park.

The Town does not assert any contract right to make the changes. Nor does it dispute that most of the identified terms and conditions are negotiable. It does argue that two manual provisions --vacation scheduling procedures and jury duty service verification--are managerial prerogatives and therefore not mandatorily negotiable.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[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. [Id. at 404-405]

Here, the Town contends that requiring the employees to submit proof of jury duty service is akin to the employer's managerial right to verify an employee's legitimate use of sick leave by producing a doctor's note. I agree. The Commission and the courts have previously held that an employer has a managerial

right to use reasonable means to verify employee illness or disability. City of Elizabeth, P.E.R.C. No. 84-75, 10 NJPER 39 (¶15022 1983), aff'd 198 N.J. Super. 382 (App. Div. 1985); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). In addition, an employer has a prerogative to verify that contractually agreed restrictions on the use of personal leave are being obeyed. Barneгат Tp. Bd. of Ed., P.E.R.C. No. 84-123, 10 NJPER 269 (¶15133 1984); Wood-Ridge Bd. of Ed., P.E.R.C. No. 92-7, 17 NJPER 380 (¶22179 1992). Similarly, an employer has a managerial right to take steps to verify that employees are using paid jury duty leave for its intended purpose. I find that the Town's policy requiring employees to submit verification of jury duty service is not mandatorily negotiable.

Second, the Town asserts that the establishment of procedures for requesting vacation and for requesting carry-over from one year to the next are managerial prerogatives. No case support was given for this proposition.

Scheduling of vacation leave is mandatorily negotiable, provided the agreed-upon system does not prevent the employer from meeting its staffing requirements. Pennsauken Tp., P.E.R.C. No. 92-39, 17 NJPER 478 (¶22232 1991); 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); Middle Tp., P.E.R.C. No. 88-22, 13 NJPER 724

(¶18272 1987); Marlboro Tp., P.E.R.C. No. 87-124, 13 NJPER 301 (¶18126 1987). However, an employer may not unilaterally implement a per se rule setting a minimum vacation period without demonstrating that its minimum staffing requirements would be otherwise jeopardized. Pennsauken; Logan Tp., I.R. No. 95-23, 21 NJPER 243 (¶26152 1995).

Here, the non-contractual components of the vacation provisions involved the date for submission of year-end carryover requests, and the vacation selection procedures. The scheduling and selection of vacation leave time intimately and directly affects the work and welfare of public employees. The Town has not articulated any rationale to establish that a negotiated agreement would significantly interfere with its determination of governmental policy. Therefore, I find that the submission date for year-end carryover requests, the vacation selection procedures (i.e., the number of minimum vacation days to be requested and the vacation selection due date) are all mandatorily negotiable.

There is no argument about the negotiability of the remaining terms and conditions of employment. Therefore, I find that the Town violated 5.4a(1) and (5) of Act when it announced these changes in employees' terms and conditions of employment without first negotiating the proposed changes with Council 11: (a) the definition of full-time employees and part-time employees as it applies to eligibility for vacation and health benefits; (b) vacation carryover and vacation selection procedures; vacation

proration for retiring employees, (c) paycheck distribution, (e) overtime compensation, (f) position retention upon return from leave; and (g) drug testing for employees other than those requiring a CDL driver's license.

In addition, Council 11 charges that the Town sought to require employees to waive their rights under the Act by insisting upon threat of discipline that employees sign an acknowledgment of the manual, in violation of 5.4a(1).

An employer independently violates 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Gorman, Basic Text on Labor Law, at 132-34 (1976). The charging party need not prove an illegal motive. Hardin, The Developing Labor Law, at 75-78 (1992).

Here, the employees were required to acknowledge in writing that the Town (and only the Town) had absolute authority to change existing practices, except only if they were covered by the contract. Those statements appear in both the manual and the acknowledgment form. The message to the employees, particularly during the period of negotiations for a successor contract, is that the Town retains the authority to unilaterally control working conditions. Therefore, I find that the Town's mid-negotiations adoption of the handbook with the offensive provisions, together

with its directive to employees to acknowledge the Town's unilateral right to change past practices, had a chilling effect on the negotiations process and violate 5.4a(1) of the Act.

The record does not show that the Town changed existing terms and conditions of employment with regard to accumulation of sick leave time, bereavement leave, or work schedules. There is also no record evidence to support a finding that the Town discriminated against unit employees because of any protected activities in violation of 5.4a(3) of the Act.

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

CONCLUSIONS OF LAW

1. I find that the Town violated 5.4a(1) and (5) of Act when it announced the following changes in employees' terms and conditions of employment without first negotiating the proposed changes with Council 11: (a) the definition of full-time employees and part-time employees as it applies to eligibility for vacation and health benefits; (b) vacation carry-over and selection procedures; (c) vacation proration for retiring employees; (d) paycheck distribution; and (e) overtime compensation; (f) position retention upon return from leave; and (g) drug testing for employees other than those requiring a CDL driver's license.

2. I find that the Town violated 5.4a(1) of the Act by adopting a handbook which announced its "sole and absolute

discretion" to "revise, supplement, or rescind any policies...." In addition, I find that the Town violated 5.4a(1) of the Act by insisting, upon threat of discipline, that employees sign acknowledgment forms which included statements conceding authority to the Town to unilaterally change established practices without negotiations.

3. I find no evidence that the Town changed past practices concerning accumulation of sick leave, bereavement leave, or work schedules. Therefore, I find that the adoption of these sections of the manual did not violate the Act.

4. I find that the Town did not violate the Act when it adopted a manual provision concerning jury duty verification.

5. I find the Town did not discriminate against unit employees because of their protected activity in violation of 5.4a(3) of the Act.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

1. That the Town cease and desist from:

A. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by implementation of an employee handbook which changed the employees' terms and conditions of employment.

B. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the

Act by adopting a handbook which announces its "sole and absolute discretion" to "revise, supplement, or rescind any policies....", and by insisting, upon threat of discipline, that employees sign an acknowledgment form which included statements conceding authority to the Town to unilaterally change established practices without negotiations.

C. Refusing to negotiate in good faith with Council 11 before changing existing terms and conditions of employment through an employee handbook, particularly (a) the definition of full-time employees and part-time employees as it applies to eligibility for vacation and health benefits; (b) vacation carry-over and selection procedures; (c) vacation proration for retiring employees; (d) paycheck distribution; (e) overtime compensation; (f) position retention upon return from leave; and (g) drug testing for employees other than those requiring a CDL driver's license.

2. That the Town take the following affirmative action:

A. Rescind the following portions of the employee manual: (a) the definition of full-time employees and part-time employees as it applies to eligibility for vacation and health benefits; (b) vacation carry-over and selection procedures; (c) vacation proration for retiring employees; (d) paycheck distribution; (e) overtime compensation; (f) position retention upon return from leave; and (g) drug testing for employees other than those requiring a CDL driver's license.

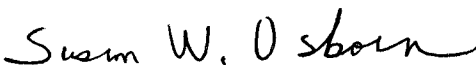
B. Rescind the following section of the manual:

This manual supersedes and replaces all prior existing manuals, written policies, oral policies, or practices in effect prior to the effective date of this manual....

...The Town of Kearny reserves the right to change, revise, or eliminate any of the policies in this handbook. The only recognized deviations from the stated policies are those authorized and signed by the Town Administrator of the Town of Kearny.

B. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon their receipt and after being signed by the Respondent's authorized representative, shall be 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.

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



Susan Wood Osborn
Hearing Examiner

Dated: May 28, 1998
Trenton, New Jersey



NO. 98-28

RECOMMENDED



**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 implementation of an employee handbook which changed the employees' terms and conditions of employment.

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act by adopting a handbook which announces our "sole and absolute discretion" to "revise, supplement, or rescind any policies....", and by insisting upon threat of discipline that employees sign acknowledgment form with essentially the same statements.

WE WILL cease and desist from refusing to negotiate in good faith with Council 11 before adopting provisions in an employee manual which changes existing terms and conditions of employment.

WE WILL rescind the following portions of the employee manual: (a) the definition of full-time employees and part-time employees as it applies to eligibility for vacation and health benefits; (b) vacation carry-over and selection procedures; (c) vacation proration for retiring employees; (d) paycheck distribution; (e) overtime compensation, (f) position retention upon return from leave; and (g) drug testing for employees other than those requiring a CDL driver's license.

WE WILL rescind the following section of the manual:

This manual supersedes and replaces all prior existing manuals, written policies, oral policies, or practices in effect prior to the effective date of this manual....

...The Town of Kearny reserves the right to change, revise, or eliminate any of the policies in this handbook. The only recognized deviations from the stated policies are those authorized and signed by the Town Administrator of the Town of Kearny.

Docket No. CO-H-97-96

Town of Kearny
(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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372