H.E. NO. 2016-18

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

In the Matter of

CITY OF PERTH AMBOY,

Respondent,

-and- Docket No. CO-2015-059

PERTH AMBOY POLICE BENEVOLENT
ASSOCIATION, LOCAL 13,

Charging Party.

SYNOPSIS

A Hearing Examiner denies Charging Party's motion for summary judgment and grants Repondent's cross motion. She determined that two statutes granting paid military leave do not preempt the employer's discretion to change work schedules for purposes of calculating when the officer has received the full entitlement to paid leave time under the statutes. The Hearing Examiner further concluded that even though the City unilaterally imposed a general order setting out the City's military leave policy, the MOA reached by the parties in settlement of a previous unfair practice charge discharged the Respondent's negotiations obligation regarding the general order. Also, by the terms of the MOA, the PBA waived its right to further negotiations on the issues covered by the general order until the expiration of the parties current collective agreement.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
Decotiis, Fitzpatrick and Cole, LLP, attorneys
(Arlene Quinones Perez, of counsel)

For the Charging Party,
(Marc D. Abramson, Labor Relations Consultant)

HEARING EXAMINER'S DECISION
ON MOTION AND CROSS MOTION
FOR SUMMARY JUDGMENT

On September 18, 2014, the Perth Amboy PBA Local 13 (Charging Party or PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the City of Perth Amboy (Respondent or City) violated 5.4a(1), (2) and (5) of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq.[1/] The PBA alleges specifically

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the (continued...)

that the City unilaterally changed its calculation of time off for military leave for two unit members by applying a five days on and two days off work schedule (based on an eight hour work day). This calculation has allegedly resulted in terminating the two unit members' leaves of absences prematurely.

The Charging Party argues that the calculation is contrary to past practice whereby calculations for military leave were based on the officer's actual work schedule. In this case, both unit members work a four days on and four days off work schedule (based on ten-hour work days). As a result, Charging Party contends that the City has required that both unit members use more of their vacation, compensatory and personal time to remain on paid leave. It further contends these actions represent a refusal to negotiate in good faith the change in military leave calculation as well as a refusal to negotiate the impact of these unilateral changes. The Charging Party seeks the following remedies: a finding that the City through its actions violated the Act; a return to the status quo ante; and a make whole remedy

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1/ (...continued)
rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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."

for any losses both monetary and loss of time as a result of the implementation of the new policy as well as a posting.

On March 20, 2015, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing on the 5.4a(1) and (5) allegations dismissing the 5.4a(2) alleged violation as not meeting the Commission's complaint issuance standard.

On April 8, 2015, Respondent filed its Answer generally admitting that the calculation for military leave is based on a five-on two-off schedule and asserting that this calculation conforms to the parties' negotiated Memorandum of Agreement. Respondent generally denies that it refused to negotiate.

On September 28, 2015, Charging Party filed a motion for summary judgment together with a brief and certification of PBA Vice-President Danny Gonzalez with attached exhibits. The Charging Party also requested a stay of the hearing scheduled for February 2016. On October 16, 2015, Respondent filed a cross motion for summary judgment together with a brief in response to Charging Party's motion and in support of its cross motion. Certifications and exhibits of Business Administrator Gregory C. Fehrenbach and Attorney Timothy D. Cedrone were attached to Respondent's cross motion. On November 20, 2015, pursuant to N.J.A.C. 19:14-4.8, the Chair referred the motion and cross motion for summary judgment to me for disposition.

The following material facts are not disputed by the parties. Based upon the record, I make the following:

FINDINGS OF FACT

1. The City and PBA are, respectively, public employer and public employee representative within the meaning of the Act.

2. Prior to May 2011, the City's Police Department had no formal written policy regarding military leave. [Fehrenbach Certification]. Effective May 12, 2011, the Police Department issued General Order No. 11-029. [Fehrenbach Certification; Exhibit C of Charging Party's brief].

3. General Order No. 11-029 under the heading of "Leave Entitlement", Section 261.3.1 entitled "New Jersey National Guard" provides in pertinent part:

> 1. Members of the New Jersey National Guard [are] entitled to a leave of absence from their respective duties without loss of pay or time on all day(s) during which they will be engaged in Federal or State active duty including **Annual Training (AT)** or **Active Duty for Training (ADT)** or other duty ordered by the governor; provided, however, that the leaves of absence without loss of pay for Federal Annual Training or Active Duty for Training shall not exceed **90 days** in the aggregate in any one year.
>
> **NOTE**: For clarification of Military Leave Time, [a]ll members will be converted to an 8 hour day. For example, if working a 10 hour day the member will account for the military leave days as a 5-day 8-hour day work schedule.

261.3.2, entitled "Other National Guard Units" provides in pertinent part:

> 1. Members serving in National Guard units in other states are entitled to **30 days** of paid military leave for Federal active duty training including **Annual Training (AT)** or **Active Duty for Training (ADT)**.
>
> **NOTE**: For clarification of Military Leave Time, all members will be converted to an 8 hour day for example, if working a 10 hour day the member will account for the military leave days as a 5-day 8-hour a day work schedule.

261.3.3 entitled "Federal Reserve Units" states in pertinent part:

> 1. Members serving in Federal Reserve units are entitled up to **30 days** of paid Military Leave for Federal active duty including **Annual Training (AT)** or **Active Duty for Training (ADT)**.
>
> **NOTE**: For clarification of Military Leave Time, [a]ll members will be converted to an 8 hour day. For example, if working a 10 hour day the member will account for the military leave days as a 5-day 8-hour a day work schedule.

Finally, under Section 261.4.1 entitled "Military Leave of Absence Not Authorized For Pay", there is a list of nine inactive-duty-training days not authorized for pay or time reimbursement. Travel days associated with military leave are also delineated as not authorized paid military leave. This section permits employees, however, at their discretion to utilize accrued personal, vacation and/or compensatory time for

such Inactive Duty Service or for travel time associated with military leave.

4. On July 5, 2011, the PBA filed an unfair practice charge under Docket No. CO-2012-002, alleging that the City's unilateral adoption of General Order No.11-029 pertaining to military leave without negotiations violated the Act. The PBA alleged specifically that the unilateral change resulted in the parties no longer being permitted time off with pay for all military training, thus, forcing its members to use vacation or compensatory leave time or lose pay. [Certification of Fehrenbach].

5. In settlement of the above unfair practice charge as well as an unrelated grievance, the parties entered into a Memorandum of Agreement (MOA) on August 8, 2012.[2/] [Fehrenbach

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2/ Gonzalez characterizes the terms of the MOA as only involving "weekend drills". To the extent that Gonzalez' Certification is contrary to the terms of the written MOA, I do not consider such assertions as fact. The clear and concise terms of the written agreement supercede and bar any parole evidence to vary or contradict the terms of that agreement. See generally, Atl. Ne. Airlines v. Schwimmer, 12 N.J. 293 at 301-02 (1953); Restatement (Second) of Contracts §213 (1981); County of Morris, P.E.R.C. No. 94-103, 20 NJPER 227 (¶25111 1994). As to Gonzalez' contention that the settlement discussions leading up to the MOA never pertained to calculations of the work day or work schedule on military leave other than weekend drills, the discussion leading to the agreement are only relevant to explain ambiguous language. However, to the extent that these assertions are contrary to the unambiguous written agreement, they are also barred by the parole evidence rule. Moreover, Charging Party asserts in its brief that the (continued...)

Certification, Exhibit B]. The MOA states in pertinent part at paragraph 2:

> The PBA hereby agrees to abide by and not to challenge the Police Department's written policy on Military Leave as set forth in General Order No. 11-029, with an effective date of May 12, 2011 and agrees to waive any claim for unpaid leave and/or use of accrued leave time in connection with any prior military leave that occurred up to the execution of this agreement.

In paragraph 4 of the MOA, the City agreed to grandfather five named officers, including PBA Vice-President Danny Gonzalez, regarding their entitlement to military leave for "weekend drills" but stated that, in the future, these officers would only be entitled to paid leave for five weekend drills per year when the drills conflicted with the officer's scheduled work shift.

At paragraph 6, the MOA provides that either party may raise the issue of military leave as a proposal during the next round of negotiations.

Under paragraph 7 of the MOA, it states:

> It is agreed and understood that all other Perth Amboy Police Officers shall be entitled to leave in accordance with the specific

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2/ (...continued)
parties never discussed calculation of military leave other than weekend drills in the MOA. Such factual assertions in the brief absent other competent evidence in the record cannot support a motion for summary judgment. Respondent accurately cites Petersen v. Twp. of Raritan, 418 N.J. Super. 384, 399-400 (App. Div. 1961) in support of this proposition.

> terms of the Military Leave Policy contained in General Order No. 11-029. It is further understood that the five officers listed in paragraph 4 shall be entitled to military leave other than “weekend drills” in accordance with the specific terms of the Military Leave Policy contained in General Order No. 11-029.

6. According to PBA Vice-President Danny Gonzalez, he had been on several military leaves of absence both before and after the effective date of the MOA. On those occasions, he was paid based on his regular four-day, ten-hour work schedule, not on the five-day on, two-day off, eight-hour day work schedule mandated by General Order No. 11-029 for calculating military leave. However, on June 13, 2014, he was informed by Jacqueline Guzman who works in the City’s Office of the Comptroller that his duty days for military leave would be based on the five-two work schedule of eight-hour days and not on the four-four work schedule of ten-hour days, thus causing him to deplete his allotted 90-day military leave time sooner. [Certification of Gonzalez]

7. According to Fehrenbach who represented the City during negotiations for a successor agreement to the 2009-2013 CNA, the PBA did not negotiate a change in the military leave provisions set out in the MOA nor did it make any proposals regarding the issue of military leave during those negotiations. [Fehrenbach Certification].

8. Negotiations were completed in late 2014, and the parties entered into a successor CNA effective from January 1, 2014 to December 31, 2018. [Exhibit D of Fehrenbach Certification].

Article VII of the 2014-2018 CNA, entitled “Hours of Work and Work Schedule”, states in pertinent part:

> Section A
>
> The work day shall consist of not more than ten (10) consecutive hours in a twenty-four (24) hour period, except as mutually agreed to between the parties and otherwise set forth in Section D of this Article. The starting and ending time shall be determined by the Employer.
>
> Section B
>
> The work week shall consist of four (4) ten (10) hour work days out of every eight (8) days, totaling forty (40) hours per week for employees assigned to the Operations Division and four (4) ten (10) hour work days out of every seven (7) days, totaling forty (40) hours per week for employees **assigned to specialized units** as determined by the Employer. The exact days worked shall be determined by the Employer. [emphasis added]

The parties’ previous CNA (2009-2013) contained identical wording for Article VII with the exception of the words bolded in Section B above. Instead of the words “ assigned to specialized units” Section B in the previous CNA delineated “assigned to Detective, Traffic and Juvenile Divisions”. [Exhibit B of Charging Party’s brief]

9. I take administrative notice of the following statutes cited by Charging Party in its brief:

N.J.S.A. 38A:4.4 provides in pertinent part:

> a. A permanent or full-time temporary officer or employee of the State . . . or other instrumentality of the State or of a county, school district or municipality who is a member of the organized militia **shall be entitled**, in addition to pay received, if any, as a member of the organized militia, **to leave of absence from his or her respective duties without loss of pay or time on all days during which he or she shall be engaged in any period of State or Federal active duty; provided, however, that the leaves of absence for Federal active duty or active duty for training shall not exceed 90 work days in the aggregate in any calendar year**. Any leave of absence for such duty in excess of 90 workdays shall be without pay but without loss of time. [emphasis added]
>
> b. Leaves of absence for such military duty shall be in addition to the regular vacation or other accrued leave allowed such officers and employees by the State, county or municipal law, ordinance, resolution or regulation.

N.J.S.A. 38:23-1 provides in pertinent part:

> a. A permanent or full time temporary officer or employee of the State . . . or of a county, school district or municipality, who is a member of the organized reserve of the Army of the United States, United States Naval Reserve, United States Air Force or United States Marine Corps Reserve, or other organization affiliated therewith, including the National Guard of other states, **shall be entitled**, in addition to pay received, if any as a member of a reserve component of the Armed Forces of the United States, **to leave**

> **of absence from his or her respective duty without loss of pay or time on all work days on which he or she shall be engaged in any period of Federal active duty, provided, however, that such leaves of absence shall not exceed 30 work days in any calendar year. Such leaves shall be in addition to the regular vacation or other accrued leave allowed such officer or employee. Any leave of absence for such duty in excess of 30 days shall be without pay but without loss of time.** [emphasis added]

10. Federal and State statutes prohibit adverse employment actions and other forms of unlawful discrimination based on an employee's military service or affiliation. Uniformed Services Employment and Re-employment Rights Act (USERRA), 38 U.S.C. § 4301 et seq. and the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 et seq.

11. In addition to the above-cited statutes, I take administrative notice of New Jersey State Department of Community Affairs, Division of Local Government Services Bulletin, LFN No. 2004-14 issued July 15, 2004 which interprets and provides guidance for State mandated reimbursement for an employee's military leave. That bulletin states at page 4:

> The routine work schedule of the individual is the basis for calculating the mandate obligation for State reimbursement. For example, law enforcement officers or firefighters that do not work 5 days on/2 days off schedules would be calculated on a case-by-case basis, using the individual's normal schedule.

The bulletin also explains that there is no statutory obligation or employee entitlement to receive employer pay for inactive duty training. Local units may have separate personnel policies or labor agreements that may provide for compensation for this time.

ANALYSIS

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. 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).

N.J.A.C. 19:14-4.8(d) provides:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross motion for summary judgment may be granted and the requested relief may be ordered.

Charging Party asserts that N.J.S.A. 38A:4-4 and N.J.S.A.38:23-1 preempt the City's GO-11-029 which sets the method of calculating time off for military leave based on a work schedule of five eight-hour days on and two days off. It asserts that the calculation under these statutes as well as a NJ State Department of Community Affairs (DCA) local finance bulletin (LFN 2004-14) mandates that paid military leave be calculated based on the employees' actual work schedule, namely four ten-hour days on

with four days off. In the alternative, Charging Party contends that the parties' past practice both before and after the parties' August 8, 2012 memorandum of agreement settling an unfair practice charge regarding calculation of military leave time has consistently calculated military leave entitlement based on the employees' actual work schedule. That past practice, it contends, prohibits unilateral change without negotiations.

Respondent asserts that the above-noted statutes do not preempt negotiations over the issue of work schedule and military leave and that it fulfilled its negotiations obligation when it entered into the Memorandum of Agreement resolving a charge regarding the same issue that the PBA seeks to litigate before me. Furthermore, the City argues that by entering into the MOA, the PBA waived the right to further negotiations and/or is equitably estopped from doing so.

The Preemption Argument

A statute or regulation will not preempt negotiations unless it speaks in the imperative and specifically sets an employment condition by eliminating any discretion to vary it. State v. State Supervisory Employees' Ass'n, 78 N.J. 54, 80-82 (1978). See also Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982) (negotiation is preempted only if the statute or regulation fixes a term or condition of employment "expressly, specifically, and comprehensively").

In this regard, Charging Party argues that N.J.S.A. 38A:4-4 and N.J.S.A. 38:23-1 preempt the City's calculation of entitlement to paid military leave based on a work schedule at variance with the employee's actual work schedule. Specifically, it contends that calculating military leave on a 5/2 8-hour day schedule when the employee's actual work schedule is a 4/4 10-hour day schedule is prohibited because these statutes do not permit the City to change the work schedule for this purpose. I disagree.

These statutes mandate entitlement to time off for Federal or other reservists (30 work days in the aggregate in any calendar year) or for State National Guard active duty (90 work days in the aggregate in any calendar year) without loss of pay. The statutes, however, do not remove all discretion from employers especially with regard to calculating days off for military leave based on other than the employee's regular work schedule. In other words, the statutes do not mandate a specific calculation method for what constitutes a work day.[3/] See Tp. of West Orange, P.E.R.C. No. 84-141, 10 NJPER 358 (¶15166 1984)

3/ Charging Party argues that New Jersey State Department of Community Affairs, Division of Local Government Services Bulletin, LFN No. 2004-14 issued July 15, 2004 which interprets and provides guidance for State mandated reimbursement for an employee's military leave provides that the calculation is based on the actual work schedule. However, this bulletin only provides guidance and does not supercede or preclude an agreement by the parties to the contrary.

(N.J.S.A. 38A:4-4 does not specifically divest public employers of all discretion to grant paid leaves of absence for attending National Guard drills without rescheduling the work time missed.); State of New Jersey (Dept. of Corr.), P.E.R.C. No. 2005-27, 30 NJPER 442 (¶146 2004)(N.J.S.A. 38A:4-4a does not preempt arbitration of employee's claim for paid contractual leave time because statute guarantees contractual benefit in certain instances but does not prohibit providing paid leave in other instances.)

The change in work schedule from 4/4 to 5/2 for purposes of calculating entitlement to either the 30-day or 90-day paid military leave allowed by the statutes apparently results in using up more quickly the number of paid military leave days requiring the officer to use other available leave time to remain in paid status.[4/] However, the statutes at issue do not speak in the imperative regarding the officer's work schedule and/or how many hours constitute a work day for purposes of calculating leave entitlement. Thus, the statutes permit the City some discretion and have only a limited effect on the parties' ability to collectively negotiate on this issue and reach agreement.[5/]

4/ Whether an officer works a 4-4 schedule or a 5-2 schedule, he/she works the same number of hours in a 30-day period.

5/ Charging Party also asserts that the USERRA and NJLAD preempt the calculation enforced by GO 11-029, basically arguing that these statutes prohibit discrimination based on (continued...)

The Charging Party's preemption argument is, thus, not persuasive.

The Past Practice and MOA Argument

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their terms and conditions of employment and requires an employer to negotiate before changing working conditions. In Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000), the Commission explained that unilateral action undermines the employment relationship and violates the terms and goals of the Act.

Here, the parties agree that the employer issued a General Order No. 11-029 unilaterally and without negotiations. The order states that "[f]or clarification of Military Leave Time, [a]ll members will be converted to an 8 hour day. For example, if working a 10 hour day the member will account for the military leave days as a 5-day 8-hour day work schedule". However, Respondent asserts that it fulfilled its negotiations obligation

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5/ (...continued)
military affiliation. Presumably, Charging Party contends that the potential loss of paid leave time caused by the new calculation is an adverse personnel action related to military service. However, as Respondent asserts, neither statute contains any express language regarding the calculation at issue here. Accordingly, I do not find that either statute preempts the change in calculation based on a different work schedule.

when the parties entered into a memorandum of agreement settling an unfair practice charge pertaining to the issuance of GO 11-029 which the PBA alleged was a unilateral change without negotiations regarding military leave time and weekend drills. The issues raised in the previous charge are identical to the allegations in the current charge. Moreover, it contends that by entering into the MOA, the PBA waived its right to further negotiate and is equitably estopped from doing so.

In Middletown, the Commission defined three types of cases involving allegations that an employment condition has changed. The first type of case is where there is an express contractual commitment which permits the change. In the third type, the employer asserts that the representative has clearly waived any right to negotiate.[6/] The City contends that both types of cases apply to the facts in the charge.

Specifically, in the MOA resolving a prior unfair practice charge asserting unilateral change in the City's military leave policy, the PBA agreed "to abide by and not to challenge the Police Department's written policy on Military Leave as set forth in General Order No. 11-029" and furthermore agreed that "Perth

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6/ The second type of case asserts that the majority representative does not claim an express or contractual right to prevent the change and the employer does not claim, or cannot prove, an express or implied right to impose the change without negotiations. This type is not implicated here, since the City claims the MOA gives it the express right to enforce GO 11-029.

Amboy Police Officers shall be entitled to leave in accordance with the specific terms of the Military Leave Policy contained in General Order No. 11-029". The parties subsequently negotiated and entered into a successor CNA which did not change GO 11-029. Accordingly, the clear and unambiguous language of the MOA accepting the method of calculating military leave time by a 5-2 work schedule supercedes any contrary past practice. See generally, Kittatinny Reg. Bd. of Ed., P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991)(Board could end past practice granting more generous benefits and return to benefit level set by contract where contract language clearly and unambiguously sets benefit level.)

Charging Party asserts that since the issuance of General Order No. 11-029, the City has calculated military leave consistent with the past practice based on the officer's actual work schedule which was 4/4, not 5/2. However, the fact that after the agreement, Officer Gonzalez was paid based on a calculation other than the 5/2 work schedule set out in General Order No.11-029 as well as the parties' MOA is irrelevant. Even if the City mistakenly calculated what Gonzalez was entitled to while on military leave, thus giving him more than he was entitled to under the General Order and MOA, that mistake does not foreclose the City from enforcing a valid written agreement giving less benefits. Kittatinny. See also, Township of

Bridgewater, P.E.R.C. No. 2006-62, 32 NJPER 46 (¶24 2006), rev'd 33 NJPER 155 (¶55 App. Div. 2006) (Court reversed the Commission determining that the Township Mayor acted ultra vires in unilaterally granting terminal leave benefits contrary to the parties' collective agreement and Township code. The Court found no violation of the duty to negotiate, since the parties' contract language authorized discontinuance of the Mayor's practice in providing terminal leave prior to retirement.)

Next, the City asserts that the PBA waived its right to further negotiations regarding the terms of GO 11-029. Waiver can be found where a mandatory subject of negotiations has been fully discussed and explored in negotiations, and where the union has consciously yielded its position. Higgins, The Developing Labor Law at 1019 (5th ed. 2006); Verona Tp., P.E.R.C. No. 84-41, 9 NJPER 655 (¶14283 1983). Specifically, the City contends that the PBA, by entering into the MOA which acknowledged its acceptance of GO 11-029 regarding the City's treatment of military leave and, subsequently, by entering into a successor CNA which does not change the terms of GO 11-029, has waived its right to negotiate any change.[7/] I agree.

7/ The PBA makes several arguments regarding the meaning of the MOA. These contentions are not considered by me as being either irrelevant, not competent evidence and/or barred by the parole evidence rule. See footnote 2.

In Union County Vocational and Technical Bd. of Ed., D.U.P No. 2002-8, 28 NJPER 91 (¶33034 2001), like here, the employer alleged that the Association was attempting to reopen an agreement which previously settled an unfair practice charge resolving the issues raised in the charge and for which releases were signed. In refusing to issue a complaint, the Director determined that the Association waived its right to pursue its claims by entering into the settlement agreement. The Director explained that consistent with the Commission's responsibility to prevent or promptly settle labor disputes, it strongly advocated the voluntary resolution of labor disputes and presumed a finality in the process. Thus, the Director wrote:

> When the parties reach a settlement and withdraw an unfair practice charge based upon such settlement, the Commission will only reopen such a matter in the most compelling circumstances, such as where the agreement is fraudulent or otherwise conflicts with State law or regulations. Id. at 92.

The language of the parties' MOA settling the previous unfair practice charge alleging the same claims in the instant charge is clear. It authorized the employer's departure from past practice in how it calculated time off for military leave. See, e.g., South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp. 2d 170 (¶149 App. Div. 1987) (where majority representative has acquiesced to an employer's

unilaterally setting or changing a term and condition of employment, no violation of the obligation to negotiate found.)

Therefore, by executing the MOA, the PBA agreed not to challenge GO 11-029 and to accept its terms. Thereafter, the parties entered into a successor CNA making only a slight change to the work schedule clause and no changes to GO 11-029 despite acknowledging in the MOA that either party could raise the issue of military leave in negotiations for that CNA. Contrast UMDNJ, P.E.R.C. No. 2010-12, 35 NJPER 330 (¶113 2009)(UMDNJ did not secure a contractual right to set supplemental salaries unilaterally. Therefore, there was no express waiver in contract nor waiver by acquiescence.)[8/]

CONCLUSIONS OF LAW

Based on the foregoing, I find that the City had no duty to negotiate over its calculation of military leave based on a 5-2, 8-hour day work schedule. The parties' MOA expressly permits the City's actions and acts as a waiver of the PBA's right to reopen the issue in this charge.[9/]

8/ Nevertheless, the PBA is not foreclosed from seeking to negotiate a change in that policy during future contract negotiations. In UMDNJ, supra, Commission determined that parties could clarify their respective rights in next round of negotiations.

9/ In light of the foregoing, I need not address the Respondent's arguments regarding equitable estoppel.

RECOMMENDED ORDER

Based on the foregoing the Charging Party's motion for summary judgment is denied, and the Respondent's cross motion is granted.

/s/ Wendy L. Young
Wendy L. Young
Hearing Examiner

DATED: February 26, 2016
Trenton, New Jersey

For Summary Judgement

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 March 11, 2016.