

H.E. NO. 2019-1

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

In the Matter of

CITY OF ORANGE TOWNSHIP,

Respondent,

-and-

Docket No. CO-2018-162

PBA LOCAL 89,

Charging Party.

Appearances:

For the Respondent
Scarinci Hollenbeck,
(Ramon E. Rivera, of counsel)

For the Charging Party
Detzky, Hunter & DeFillippo, LLC
(David J. DeFillippo, of counsel)

SYNOPSIS

A Hearing Examiner grants a Motion for Summary Judgment filed by PBA Local No. 89 (PBA) based on an unfair practice charge filed against the City of Orange Township (City). The charge alleged the City violated section 5.4(a)(5) of the New Jersey Employer-Employee Relations Act by unilaterally adopting an ordinance that eliminated the payment of terminal leave to PBA members upon the expiration of the parties' collective negotiations agreement (Agreement), which expired on December 31, 2020. The City acknowledged it made this unilateral change without prior negotiations, but contended the language of the ordinance should be interpreted in a way that did not eliminate terminal leave provided under the Agreement. The Hearing Examiner disagreed and found the City was obligated to negotiate any changes to terminal leave provided under the Agreement upon the expiration of the Agreement and maintain the terms and conditions of the Agreement during negotiations for a successor agreement with the PBA.

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HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On January 22, 2018, the Policemen's Benevolent Association Local No. 89 (PBA or Charging Party) filed an unfair practice charge against the City of Orange Township (City or Respondent). The charge alleges the City violated section 5.4a(1), (2), (3), (5) and (7)^{1/} of the New Jersey Employer-Employee Relations Act,

^{1/} 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard
(continued...)

N.J.S.A. 34:13A-1 et seq. (Act), when, on November 8, 2017, it adopted an ordinance eliminating the payment of terminal leave to PBA unit members upon the expiration of the parties' current collective negotiations agreement (CNA), which expires on December 31, 2020. According to the PBA, the City adopted this ordinance in contravention of CNA provisions providing for the payment of terminal leave to unit officers and has done so without negotiating the change with the PBA. On March 13, 2018, the City filed a position statement with exhibits, admitting it adopted the ordinance but denying the ordinance violated the Act. The City argues the ordinance does not eliminate terminal leave for unit members and that it is willing to negotiate over the payment of terminal leave.

On July 19, 2018, the Acting Director of Unfair Practices issued a Complaint and Notice of Pre-hearing on the (a)(1) and (5) allegations. On September 10, 2018, the PBA filed a Motion for Summary Judgment, accompanied by a brief, exhibits and a certification from Joseph Lane ("Lane Cert."), the PBA President.

1/ (...continued)
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. (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. (7) Violating any of the rules and regulations established by the commissions."

On September 20, 2018, the City filed a Cross Motion for Summary Judgment and a letter brief in support of the cross motion and in opposition to the PBA's motion for summary judgment. The City also advised, by letter dated September 20, 2018, that it was electing to treat its March 13, 2018 position statement as its Answer to the complaint. The City did not file a certification or affidavit in support of its cross motion or in opposition to the PBA's motion. The Chair referred the motion and cross motion to me for decision on October 4, 2018. N.J.A.C. 19:14-4.8(a).

STANDARD OF REVIEW

Summary judgment will be granted:

if it appears from the pleadings, together with the briefs, affidavits and other documents filed, there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law. [N.J.A.C. 19:14-4.8(d)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995) sets forth the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The fact-finder must ". . . consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the moving party." If that issue can be resolved in only one way, it is not a genuine issue of material fact. A motion for summary judgment should be granted cautiously -- the procedure may not be

used as a substitute for a plenary hearing. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

While a party is not required to file an affidavit or certification in support of summary judgment, where a ". . . party opposing the motion [for summary judgment] does not submit any affidavits or documentation contradicting the moving party's affidavits and documents, then the moving party's facts may be considered as true, and there would necessarily be no material factual issue to adjudicate unless, per chance, it was raised in the movant's pleadings." CWA Local 1037 (Schuster), H.E. No. 86-10, 11 NJPER 621, 622 (¶16217 1985), adopted P.E.R.C. No. 86-78, 12 NJPER 91 (¶17032 1985); City of Hoboken, H.E. No. 95-17, 21 NJPER 107 (¶26065 1995), adopted P.E.R.C. No. 95-91, 21 NJPER 184 (¶26117 1995); Nutley Tp., H.E. No. 99-18, 25 NJPER 199 (¶30092 1999) (final agency decision); N.J.A.C. 1:1-12.5(b) ("When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined by an evidentiary proceeding."). As the New Jersey Supreme Court explained in Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1974):

. . . if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature . . . he will not be

heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts and the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact. [17 N.J. at 75]

Given these standards and since the City has not filed affidavits or documents contradicting the facts set forth in Lane's certification, I must accept as true the statements in Lane's certification. CWA Local 1037 (Schuster), 11 NJPER at 622-623.^{2/}

Based on the parties' submissions and this standard of review, I make the following:

FINDINGS OF FACT

1. The PBA is the exclusive majority representative of all police officers employed by the City below the rank of sergeant. (Lane Cert., Paragraph 2^{3/}; City's Position Statement, Exhibit E, Article 1).

2. Joseph Lane is President of the PBA and has been employed by the City as a police officer since January 9, 1995. (Lane Cert., Paragraphs 1 and 5). As PBA President, Lane ". . . spearheaded the PBA's various negotiating committees in

^{2/} The City acknowledges, on page three (3) of its letter brief, that ". . . there is no dispute of fact, only a dispute as to the legal interpretation of the Ordinance."

^{3/} Lane's certification is attached as "Exhibit A" to the PBA's Brief in Support of its Motion for Summary Judgment.

successive negotiations with the City." (Lane Cert., Paragraph 5).

3. On or about September 14, 2016, Lane and the City's mayor, Dwayne D. Warren, Esq., signed a Memorandum of Agreement (MOA) setting forth terms and conditions of employment for the period January 1, 2010 through December 31, 2020. (Lane Cert., Paragraph 3; Exhibit B to PBA's Brief). The City Council ratified the MOA on October 18, 2016. (Exhibit B to PBA's Brief). The terms of the MOA have been fully implemented and are reflected in a collective negotiations agreement (CNA) extending from January 1, 2010 through December 31, 2020.^{4/} (Lane Cert., Paragraph 3; City's Position Statement, Exhibit E).

4/ The parties have exchanged drafts of CNAs memorializing the terms and conditions of employment agreed to in the 2010-2020 MOA. (Lane Cert., Paragraph 4). On July 26, 2018, Lane signed a draft CNA prepared by the City's legal counsel and forwarded the executed CNA to the City's counsel on August 3, 2018. (Lane Cert., Paragraph 4). As of the date of Lane's certification (September 6, 2018), the PBA had not received a fully executed copy of the CNA. (Lane Cert., Paragraph 4). There is no indication in the record whether or not the City has executed the CNA. However, I have learned, based on a position statement filed and served on the PBA in an unrelated charge involving the same parties (Dkt. No. CO-2019-074), that the City executed the 2010-2020 CNA on October 30, 2018 and provided a fully executed copy of the CNA to the PBA on November 12, 2018. The parties do not dispute that the 2010-2020 CNA provides for terminal leave payments and that the terminal leave provision in the CNA is consistent with the 2010-2020 MOA that was ratified by the parties and implemented by the City. (Lane Cert., Paragraph 3; Exhibit I to PBA Brief; City's Position Statement, Exhibits D and E).

4. Article V, Section 7 of the CNA provides for the payment of terminal leave based on an officer's accumulated, unused sick leave. (City's Position Statement, Exhibit E; Lane Cert., Paragraph 9 and Exhibit I to PBA Brief). For employees hired before January 1, 1988, Section 7 provides:

Upon ordinary retirement, or disability retirement, if an employee has accumulated sick leave to his credit, said employee shall opt for payment at the rate of 70% for all accumulated sick days or for compensation in time-off up to one (1) year or in cash, (which may be paid in a lump sum or in payments over time at the employee's option) at the rate of pay in effect at the date of retirement according to the following formula:

<u>Amount of Accumulated Sick Leave</u>	<u>Compensation</u>
1 through 126 days	1 day's pay or leave for each day of accumulated sick leave.
127 days or more	1 day's pay or leave for each day of accumulated sick leave to 126 days plus 20% of a day's pay or leave for each day of accumulated sick leave in excess of 126 days.

[Exhibit I to PBA Brief; Exhibit E to City's Position Statement]

Employees hired between January 1, 1988 and May 31, 1995 are entitled to the same terminal leave payment options as those hired prior to January 1, 1988, except the formula for

calculating compensation for unused sick leave is adjusted as follows:

<u>Amount of Accumulated Sick Leave</u>	<u>Compensation</u>
1 through 96 days inclusive	1 day's pay or leave for each day of accumulated sick leave not to exceed ninety-six (96) days in total.

Under the CNA, employees hired after May 1, 1995 are entitled to payment at the rate of 70% for all accumulated sick days upon ordinary or disability retirement. (City's Position Statement, Exhibit E; PBA Brief, Exhibit I). Under Article XVII of the CNA, a decedent officer's estate is entitled to receive the terminal leave benefits provided for in Article V of the CNA. (City's Position Statement, Exhibit E; Lane Cert., Exhibit I).

5. Article XXXVI, Section 2 of the CNA provides: "This Agreement shall remain in full force and effect beyond the date of expiration set forth herein during collective bargaining negotiations between the parties." (City's Position Statement, Exhibit E; PBA Brief, Exhibit I).

6. On November 8, 2017, the City adopted Ordinance No. 63-2017 (Ordinance). (PBA Brief, Exhibit F; Lane Cert., Paragraph 10). The Ordinance was adopted unilaterally and without prior negotiations or knowledge of Lane or the PBA's Executive Board. (Lane Cert., Paragraph 10). It provides:

AN ORDINANCE TO AMEND TITLE 23 CITY OF ORANGE TOWNSHIP EMPLOYEE HANDBOOK OF PERSONNEL POLICIES AND PROCEDURES, CHAPTER V-UNUSED SICK LEAVE AND TERMINAL LEAVE FOR THE CITY OF ORANGE TOWNSHIP POLICE, FIRE, AND NON-UNIFORMED WORKERS OF THE CODE OF THE CITY OF ORANGE TOWNSHIP PERTAINING TO UNUSED SICK LEAVE AND TERMINAL LEAVE.

WHEREAS, the Administration of the City of Orange Township from time to time reviews all employee personnel policies and procedures; and

WHEREAS, the City takes into consideration the needs of their employees and provides paid time off for sick leave; and

WHEREAS, sick leave is only allowed when an employee is sick, thus accrual is allowed and expected; and

WHEREAS, upon retirement any earned unused sick leave is paid out to the employee mindful of keeping excessive payments at a reasonable level.

NOW THEREFORE BE IT RESOLVED by the Municipal Council of the City of Orange Township, that Title 23 City of Orange Township Employee Handbook of Personnel Policies and Procedures, Chapter V-Unused Sick Leave and Terminal Leave, is hereby amended and supplemented as follows.

23:1-5.4 UNUSED SICK LEAVE AND TERMINAL LEAVE

All employees who have accumulated more than \$12,000 worth of sick leave as of December 31, 2020 cannot accumulate additional time and the dollar value (\$12,000) is frozen in place and cannot be increased. This does not affect the accrual of sick leave days that are earned; it only caps the amount of cash received at retirement.

There shall be no accumulated sick leave payment for employees who resign, die or are terminated beyond December 31, 2020.

**Terminal Leave for Members of OMEBA^{5/},
the Police and Fire Departments**

At the expiration of the current collective bargaining agreements, or December 31, 2020, whichever is later, unless already agreed to in an existing Collective Bargaining Agreement, the terms of this Ordinance must apply as follows: there will be no terminal leave payout for accumulated unused sick leave.

Terminal Leave for OMEBA Members - In accordance with their current collective bargaining agreement.

* * * *

EFFECTIVE DATE:

This Ordinance shall take effect twenty (20) days after the final reading and passage.

ADOPTED: November 8, 2017

(PBA Brief, Exhibit F; City's Position Statement, Exhibit F).

7. In a December 11, 2017 memorandum addressed to the City Council and Mayor Warren, Lane demanded that the Ordinance be rescinded and/or amended "...to reflect and otherwise incorporate the relevant terms of the CNA" governing terminal leave, namely

^{5/} While not described in the Ordinance, the "OMEBA" stands for the "Orange Municipal Employees Benevolent Association." See Orange Tp. and OMEBA(Williams), D.U.P. No. 94-49, 20 NJPER 271 (¶25136 1994).

Articles V and XVII. Lane noted that changes to terminal leave ". . . must be negotiated following the expiration of the 2010-2020 CNA and not unilaterally imposed by the City." (PBA Brief, Exhibit G; Lane Cert., Paragraph 11).

8. By memorandum dated February 8, 2018, Christopher M. Hartwyk, the City's Business Administrator, responded to Lane's December 11 memorandum. Hartwyk's memorandum provides, in pertinent part:

With regard to the ordinance you have identified, the ordinance has not and does not impact the current CBA, which expires in 2020. The ordinance constitutes a statement and codification of City policy. That policy will guide negotiations for a new CBA with yours and other unions when current CBAs expire. No corrective action is required at this time.

(PBA Brief, Exhibit H; Lane Cert., Paragraph 13).

ANALYSIS

The PBA argues the City unilaterally eliminated the payment of terminal leave, effective December 31, 2020, with the passage of Ordinance 63-2017 without prior negotiations with the PBA. Since the subject of terminal leave is mandatorily negotiable and provided for in the CNA, the PBA contends the City breached its duty to negotiate over terminal leave by unilaterally adopting the Ordinance.

The City acknowledges terminal leave is mandatorily negotiable (at page 3 of its letter brief), but maintains the

Ordinance does not eliminate terminal leave. According to the City, the Ordinance should be interpreted as not rescinding any terminal leave benefit provided for in the CNA. Further, the City asserts the Ordinance does not prevent negotiations over terminal leave and no unit employee has been denied terminal leave benefits. For the following reasons, I disagree with the City's arguments, deny its cross motion, and grant the PBA's motion for summary judgment.

Terminal leave is mandatorily negotiable. State of New Jersey, P.E.R.C. No. 92-3, 17 NJPER 374 (¶22175 1991), recon. den. P.E.R.C. No. 92-15, 17 NJPER 409 (¶22195 1991), aff'd NJPER Supp.2d 278 (¶225 App. Div. 1992), certif. denied 130 N.J. 596 (1992). Proposed new rules or modification of existing rules governing terminal leave and/or other mandatorily negotiable working conditions must be negotiated with a majority representative before they are established. N.J.S.A. 34:13A-5.3; Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000). "Thus, employers are barred from 'unilaterally altering mandatory bargaining topics, whether established by expired contract or by past practice, without first bargaining to impasse.'" County of Atlantic, 230 N.J. 237, 252 (2017), quoting Neptune Bd. of Ed. v. Neptune Education Ass'n, 144 N.J. 16, 22 (1996); see also Litton Fin. Printing Div. v. NLRB, 501 U.S. 190,

198 (1991) (Supreme Court, discussing NLRB v. Katz, 369 U.S. 736 (1962), writes that ". . . an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term and condition of employment" and that the "Katz [unilateral change] doctrine has been extended as well to cases where an existing agreement has expired and negotiations on a new one have yet to be completed).

These foundational labor relations principles apply to announced changes to negotiable terms that have not yet been implemented. Borough of Palisades Park, I.R. No. 98-24, 24 NJPER 239, 240 (¶29113 1998) ("The announcement of an action violative of the Act, as opposed to the actual implementation, can constitute an unfair practice."); City of Linwood, H.E. No. 98-16, 24 NJPER 133, 137 (¶29068 1997) ("The announcement of a change in a condition of employment serves as an operative event for purposes of identifying when an unfair practice occurred.") Moreover, an employer's offer to negotiate a change *after* a change has been announced or made is not a valid defense to an unfair practice charge. Riverside Tp., H.E. No. 95-1, 20 NJPER 303, 305 (¶25152 1994), adopted P.E.R.C. No. 95-7, 20 NJPER 325 (¶25167 1994). The ". . . very act of unilaterally modifying a term and condition of employment contradicts the meaning of collective negotiations; it is antithetical to the public policy of the Act to substitute unilateral action for good faith

collective negotiations." 20 NJPER at 305; citing State of New Jersey and CWA, I.R. No. 82-2, 7 NJPER 532 (¶12235 1981).

The City, by ordinance, unilaterally altered the status quo for negotiating a successor CNA by imposing modifications on the payment of terminal leave and eliminating payments altogether for terminal leave effective December 31, 2020 unless and until the parties reached a successor contract. I find that the Ordinance modified contractual terminal leave as follows:

(1) It sets forth a \$12,000.00 cap on cash payments for terminal leave for PBA unit members (and all other City employees); which cap does not exist in Article V of the CNA^{6/};

(2) Effective December 31, 2020, the Ordinance eliminates the right of a decedent officer's estate to the payment of accumulated sick leave, in contravention of Article XVII of the CNA^{7/}; and

(3) If the PBA and City do not reach a successor collective negotiations agreement by December 31, 2020, the City will not pay PBA unit members for accumulated sick leave unless and until it is agreed to in a

6/ This is set forth in Finding of Fact Number 6 of this decision, where the Ordinance reads: "All employees who have accumulated more than \$12,000 worth of sick leave as of December 31, 2020 cannot accumulate additional time and the dollar value (\$12,000) is frozen in place and cannot be increased. This does not affect the accrual of sick leave days that are earned; it only caps the amount of cash received at retirement."

7/ This is set forth in Finding of Fact Number 6 of this decision, where the Ordinance reads: "There shall be no accumulated sick leave payment for employees who resign, die or are terminated beyond December 31, 2020."

successor agreement, in contravention of Article V of the CNA^{8/}.

A public employer cannot, by ordinance, “. . . unilaterally preempt a negotiable term and condition of employment. . . .” Hopewell Tp., P.E.R.C. No. 2010-10, 35 NJPER 295, 297 (¶103 2009). Upon expiration of the 2010-2020 CNA, the City has an obligation to negotiate in good faith to impasse with the PBA before changing the terms and conditions of employment set forth in the CNA. N.J.S.A. 34:13A-5.3; Middletown PBA, Atlantic County, 230 N.J. at 252; Litton, 501 U.S. at 198.^{9/} The Ordinance is a breach of that duty and violates section 5.4(a)(5) of the Act.

The City contends the Ordinance should be interpreted in a way that does not rescind terminal leave benefits. It does not dispute terminal leave is mandatorily negotiable and that the Ordinance was adopted unilaterally without negotiations with the PBA. Instead, the City contends the plain language of the Ordinance makes clear that the Ordinance “. . . neither affects

^{8/} This is set forth in Finding of Fact Number 6 of this decision, where the Ordinance reads: “At the expiration of the current collective bargaining agreements, or December 31, 2020, whichever is later, unless already agreed to in an existing Collective Bargaining Agreement, the terms of this Ordinance must apply as follows: there will be no terminal leave payout for accumulated unused sick leave.”

^{9/} The parties are also under a statutory obligation to maintain terms and conditions of employment during interest arbitration proceedings. N.J.S.A. 34:13A-21.

the current CBA nor prevents the parties from negotiating a terminal leave benefit in a future CBA." (Page 7 of Letter Brief). I disagree with the City's argument or interpretation of the Ordinance and find the Ordinance does eliminate the payment of terminal leave to PBA officers, effective December 31, 2020 unless the parties reach a successor CNA providing for terminal leave.

When interpreting an ordinance, ". . . we apply the same rules of construction as are applied to statutes." Kim Real State Enterprises v. N. Bergen, 215 N.J. Super. 255, 257 (App. Div. 1987). "When the language of the ordinance is clear and unambiguous on its face, we need not look beyond the literal dictates of the words to divine the legislative intent." 215 N.J. Super. at 258. In interpreting an ordinance, one must also presume that every word in the ordinance has meaning and is ". . . not mere surplusage." Jersey Central Power v. Melcar Utility Company, 212 N.J. 576, 587 (2013) (Our Supreme Court noted that a "court should try to give effect to every word of a statute rather than construe a statute to render part of it superfluous.")

The City contends this language in the Ordinance should be interpreted as not eliminating the payment of terminal leave:

At the expiration of the current collective bargaining agreements, or December 31, 2020, whichever is later, unless already agreed to in an existing Collective Bargaining

Agreement, the terms of this Ordinance must apply as follows: there will be no terminal leave payout for accumulated unused sick days.

According to the City, the Ordinance does not rescind terminal leave under the current CNA, since the clause 'existing Collective Bargaining Agreement' refers to the 2010-2020 CNA, and the clause 'there will be no terminal leave payout for accumulated unused sick days' would not apply to employees subject to the 'existing agreement,' i.e., the 2010-2020 CNA. Since this interpretation renders much of the Ordinance's language superfluous, I decline to adopt it.

The Ordinance, in my view, eliminates terminal leave for PBA unit members if no CNA is in place by December 31, 2020. This interpretation gives effect and meaning to each word in the above-quoted portion of the Ordinance. The "current collective bargaining agreement" is the 2010-2020 CNA, which is set to expire on December 31, 2020 and provides for terminal leave. The Ordinance clearly eliminates the payment of terminal leave by providing "there will be no terminal leave payout for accumulated unused sick leave," unless "an existing Collective Bargaining Agreement" has been reached. The language, "existing Collective Bargaining Agreement" must refer to a successor CNA to the 2010-2020 CNA that would provide for terminal leave. The City's interpretation would conflate "existing Collective Bargaining Agreement" with the "current collective bargaining agreement" and

thus render the former clause superfluous. The City's interpretation would also not give effect to the language prohibiting the payment of terminal leave since, in its view, the expired CNA (which provides terminal leave) would continue to exist beyond December 31, 2020 regardless of whether the parties reached a successor agreement. If this were true, the City's interpretation defeats the Ordinance's plainly stated purpose: to discontinue terminal leave until a new agreement is in place. An interpretation of the Ordinance that renders it meaningless and without effect cannot be valid. 212 N.J. at 587.

By announcing in its ordinance the discontinuation of terminal leave for PBA officers, effective December 31, 2020, the City also commits an unfair practice by violating Article XXXVI, Section 2 of the CNA. Article XXXVI, Section 2 provides that the CNA ". . . shall remain in full force and effect beyond the date of expiration set forth herein during collective bargaining negotiations between the parties." Our Supreme Court has recently held that an employer who discontinues terms and conditions of employment that the parties agreed would continue beyond the expiration date of a collective negotiations agreement has committed an unfair labor practice. Atlantic County, 230 N.J. at 256.

In Atlantic County, the majority representatives and employers had agreed to contract language, similar to the

language of Article XXXVI here, that provided terms and conditions of employment would continue in full force and effect beyond the expiration dates of the agreements. 230 N.J. at 255. At the expiration of those agreements, the employers unilaterally discontinued salary guide increment payments -- a term and condition of employment set forth in the agreements -- without prior negotiations. The Supreme Court held the employer's conduct violated the Act and explained:

[T]he unilateral modification at issue here directly contradicted the parties' binding written agreement. Because the salary increment system was a term and condition of employment that governed beyond the CNAs' expiration date, Atlantic County and Bridgewater Township [the employers] committed an unfair labor practice when they altered that condition without first attempting to negotiate in good faith, in violation of N.J.S.A. 34:13A-5.3, -5.4(a)(1), and 5.4(a)(5).

[230 N.J. at 256]

The rationale in Atlantic County for finding an unfair labor practice applies with equal force here. The City violated the Act by unilaterally altering the payment of terminal leave - a term and condition of employment set forth in the CNA - without negotiating in good faith with the PBA. Under Article XXXVI of the CNA, the City is obligated to continue the payment of terminal leave pursuant to Articles V and XVII of the CNA during collective negotiations for a CNA.

CONCLUSIONS OF LAW

1. I grant the PBA's Motion for Summary Judgment and deny the City's Cross Motion for Summary Judgment.

2. The City violated N.J.S.A. 34:13A-5.4(a)(5) and, derivatively, (a)(1) of the Act by adopting Ordinance No. 63-2017 without negotiating in good faith with the PBA over changes to the provision of terminal leave.

REMEDY

As a remedy, the PBA seeks in its charge an order compelling the City to amend or rescind the Ordinance as applied to PBA membership. The Ordinance also references firefighters and non-uniformed City personnel in other negotiations units that are not parties to this case. In the absence of a factual record pertaining to those other units, I believe it would be improper to rescind or amend the Ordinance wholesale. However, as applied to PBA unit members, I find that the Ordinance is null and void and without legal effect. I order the City to maintain the status quo during collective negotiations for a successor CNA and continue to pay eligible unit members for terminal leave in accordance with the current CNA during negotiations for a successor agreement.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the City of Orange Township cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act, particularly by adopting an ordinance that unilaterally changes the status quo for negotiating a successor collective negotiations agreement concerning terminal leave for PBA Local 89 unit officers.

2. Refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by adopting an ordinance that modifies the payment of terminal leave, effective December 31, 2020.

B. That the City take the following action:

1. Refrain from applying Ordinance No. 63-2017 to PBA Local 89 unit officers and continue, upon expiration of the 2010-2020 CNA, to maintain the terms and condition of employment set forth in the CNA, including but not limited to the payment of terminal leave under Articles V and XVII of the CNA, upon expiration of the 2010-2020 CNA and during the period of collective negotiations with PBA Local 89 for a successor CNA.

2. Negotiate in good faith with PBA Local 89 over any proposed changes by the City to the payment of terminal leave.

3. 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.

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

/s/ Ryan M. Ottavio
Ryan M. Ottavio
Hearing Examiner

DATED: December 12, 2018
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by December 22, 2018.



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 this Act, particularly by adopting an ordinance that unilaterally changes the status quo for negotiating a successor collective negotiations agreement concerning terminal leave for PBA Local 89 unit officers.

WE WILL cease and desist from refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by adopting an ordinance that modifies the payment of terminal leave, effective December 31, 2020.

WE WILL refrain from applying Ordinance No. 63-2017 to PBA Local 89 unit officers and continue, upon expiration of the 2010-2020 CNA, to maintain the terms and condition of employment set forth in the CNA, including but not limited to the payment of terminal leave under Articles V and XVII of the CNA, upon expiration of the 2010-2020 CNA and during the period of collective negotiations with PBA Local 89 for a successor CNA.

WE WILL negotiate in good faith with PBA Local 89 over any proposed changes by the City to the payment of terminal leave.

Docket No. CO-2018-162

City of Orange Township
(Public Employer)

Date: _____

By: _____

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830