

P.E.R.C. NO. 95-7

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF RIVERSIDE,

Respondent,

-and-

Docket No. CO-H-93-409

RIVERSIDE POLICE ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Township of Riverside violated the New Jersey Employer-Employee Relations Act when it unilaterally discontinued supplemental payments to police injured on duty. The Commission finds that supplemental payments to employees injured on the job are mandatorily negotiable and that the employer failed to prove that the Riverside Police Association waived its right to negotiate before the employer eliminated the supplemental payments.

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RIVERSIDE POLICE ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Jeffry A. Mintz, attorneys
(Jeffry A. Mintz, of counsel)

For the Charging Party, Costa & Vetra, attorneys
(Robert D. Vetra, of counsel)

DECISION AND ORDER

On May 18, 1994, the Riverside Police Association filed an unfair practice charge against the Township of Riverside. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),^{1/} when it unilaterally discontinued supplemental payments to police injured on duty.

On March 9, 1994, a Complaint and Notice of Hearing issued. On March 24, the Township filed its Answer claiming that:

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

it was not required to maintain the prior practice of paying injured employees in an amount frequently exceeding the net pay of working employees; it notified the charging party of its intent to change the applicable ordinance and the charging party did not claim that the change would be an unfair practice until after it had been implemented; it has since negotiated over supplemental pay to injured employees; and the charging party has refused to negotiate in good faith. The employer also relied on a previous statement of position.

On April 26, 1994, Hearing Examiner Susan W. Osborn conducted a hearing. The parties examined witnesses and introduced exhibits. The parties argued orally and the employer filed a post-hearing brief.

On July 8, 1994, the Hearing Examiner issued her report. H.E. No. 95-1, 20 NJPER ____ (____ 1994). She found that the Township violated subsections 5.4(a)(1) and (5) when it discontinued the practice of paying police injured on duty the difference between their workers' compensation benefits and their regular salaries. She rejected the Township's argument that the Association waived its right to negotiate because it did not file this charge when the Township announced it intended to eliminate the benefit.

The Hearing Examiner served her decision on the parties and informed them that exceptions were due July 21, 1994. Neither party filed exceptions or requested an extension of time.

We have reviewed the record. We adopt the Hearing Examiner's findings of fact (H.E. at 2-5).

N.J.S.A. 34:13A-5.3 requires a public employer to negotiate before changing a mandatorily negotiable term and condition of employment. Supplemental payments to employees injured on the job are mandatorily negotiable. Jackson Tp., P.E.R.C. No. 82-79, 8 NJPER 129 (¶13057 1982). Thus, absent proof that the Association waived its right to negotiate before the employer eliminated the supplemental payments, and absent exceptions, we find that the employer violated subsections 5.4(a)(5) and, derivatively, (a)(1). The Hearing Examiner correctly found that the Association was not required to seek negotiations or file an unfair practice charge when the change was announced. In any event, the charge was filed less than six months after the February 1993 announcement. N.J.S.A. 34:13A-5.4(c).

ORDER

The Township of Riverside is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate in good faith with the Riverside Police Association before discontinuing the practice of paying police injured on duty the difference between their workers' compensation benefits and their regular salaries.

2. Refusing to negotiate in good faith with the Association concerning terms and conditions of employment of unit employees, particularly by not negotiating with the Association before discontinuing the practice of paying police injured on duty the difference between their workers' compensation benefits and their regular salaries.

B. Take this action:

1. Restore the practice of paying employees injured on duty the difference between their workers' compensation benefits and their regular salaries.

2. Pay Officers Patrick Vacanti and Scott Wenner, and any other employee collecting workers' compensation benefits after the Township changed its policy on March 29, 1993, the difference between the amount they received in workers' compensation benefits and the amount of their regular salaries for the period they were on injury leave, plus interest pursuant to R.4:42-11.

3. Negotiate in good faith with the Association before changing the practice of paying employees injured on the job the difference between the amount they receive in workers' compensation benefits and the amount of their regular salaries for the period they are on injury leave.

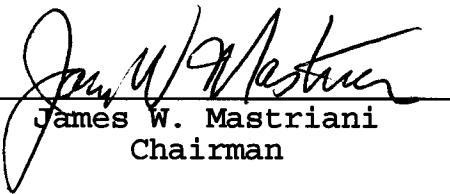
4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and

maintained by it for at least sixty (60) consecutive days.

Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Klagholz, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: August 19, 1994
Trenton, New Jersey
ISSUED: August 19, 1994



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 refusing to negotiate in good faith with the Riverside Police Association before discontinuing the practice of paying police injured on duty the difference between their workers' compensation benefits and their regular salaries.

WE WILL cease and desist from refusing to negotiate in good faith with the Association concerning terms and conditions of employment of unit employees, particularly by not negotiating with the Association before discontinuing the practice of paying police injured on duty the difference between their workers' compensation benefits and their regular salaries.

WE WILL restore the practice of paying employees injured on duty the difference between their workers' compensation benefits and their regular salaries.

WE WILL pay Officers Patrick Vacanti and Scott Wenner, and any other employee collecting workers' compensation benefits after the Township changed its policy on March 29, 1993, the difference between the amount they received in workers' compensation benefits and the amount of their regular salaries for the period they were on injury leave, plus interest pursuant to R. 4:42-11.

WE WILL negotiate in good faith with the Association before changing the practice of paying employees injured on the job the difference between the amount they receive in workers' compensation benefits and the amount of their regular salaries for the period they are on injury leave.

Docket No. CO-H-93-409

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

APPENDIX "A"

H.E. NO. 95-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF RIVERSIDE,

Respondent,

-and-

Docket No. CO-H-93-409

RIVERSIDE POLICE ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find the Township of Riverside violated 5.4(a)(1) and (5) of the Act when it discontinued the practice of paying police injured on duty the difference between the workers compensation benefit payments and their regular salary.

The Hearing Examiner rejects the Township's argument that the Police Association waived its right to negotiate because it did not file the charge when the Township first announced it intended to eliminate the benefit.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 95-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF RIVERSIDE,

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Docket No. CO-H-93-409

RIVERSIDE POLICE ASSOCIATION,

Charging Party.

Appearances:

For the Respondent
Jeffrey A. Mintz, attorney

For the Charging Party
Costa & Vetra, attorneys
(Robert D. Vetra, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On May 18, 1993, the Riverside Police Association filed an unfair practice charge with the Public Employment Relations Commission alleging that Riverside Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5)^{1/} when it unilaterally discontinued supplemental payments to police injured on duty.

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

On March 9, 1994, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Township filed an Answer on March 24, admitting that it discontinued the supplemental payments but asserting that it had no bargaining obligation since the payment was gratuitous; the police were not entitled to it by the terms of the contract; the Association waived its right to file this charge by filing after the change was implemented; and it did negotiate with the Association over the change.

A hearing was conducted on April 26, 1994, at which the parties examined witnesses and presented documents.^{2/} The Association argued orally at the conclusion of the hearing, and the Township filed a post-hearing brief on May 20, 1994. Based upon the entire record in this matter I make the following:

FINDINGS OF FACT

1. The Riverside Police Association represents the Township's police officers, detectives and sergeants (J-1). The parties' most recent collective agreement (J-1) expired December 31, 1993. The contract is silent on the issue of injury on duty payments.

2. The Township believed that employees temporarily disabled by injury on duty are statutorily entitled to workers'

^{2/} The hearing transcript is referred to as "T-"; jointly submitted exhibits are identified as "J-"; the Township's exhibits are referred as to "R-".

compensation payments of 2/3 of the employee's regular salary, up to a maximum dollar amount set by State regulation.^{3/}

3. In 1986, the Township passed an ordinance granting all employees supplemental payments to workers' compensation benefits. That ordinance (J-2) provides,

Section 2:19-1. In the event a Township employee is injured through Township employment and is eligible to collect workers' compensation insurance, the Township shall pay said employee one-third (1/3) of his salary or wages for a period of one (1) year from the date of the injury.

4. Notwithstanding the language of the ordinance, the Township's practice had been to pay an injured employee the difference between the workers' compensation payment and the employee's regular gross pay. Because of the State regulatory dollar cap, the Township's payment sometimes exceeded 1/3 of the employee's salary (T50-T51). The Township also paid injured employees four hours overtime pay bi-weekly.^{4/} Police officers on

^{3/} N.J.S.A. 34:15-12 provides that employees temporarily disabled by injury shall be paid workers compensation benefits of 70% of the employees' weekly wages received at the time of the injury, to a maximum of 75% of the average weekly wages earned by employees covered by unemployment compensation law, and capped at a maximum weekly amount (for 1993) of \$385. N.J.A.C. 12:235-1.6.

^{4/} Association Vice-President Vacanti testified that this was contractually required (T15-T16). However, contract article 5.1(a) provides, "Each individual in the bargaining unit who works the twelve-hour shift schedule shall receive four hours overtime every other week paid at the rate of time and one-half to compensate for the additional hours said persons will be required to work as a result of this schedule.

workers' compensation received the payments supplementing their workers compensation until 1993.

5. Because taxes are not deducted from workers' compensation payments or the supplemental payments, injured employees on workers' compensation between 1986 and 1993 actually received a greater take home pay than if they were working (T32-T34; T42).

6. In February 1993, the Township announced its intention to repeal the 1986 supplemental injury payments benefit. It sent a copy of the proposed ordinance to Association President Paul Tursi on March 1, 1993 (R-1).

At the Association's request, its attorney Robert Vetra sent a letter on March 25, 1993 (R-2), to Township Administrator Gary LaVenja, expressing the Association's objections to the proposed discontinuance of the workers' compensation supplemental payments. Vetra advised the Township that the Association considered the proposed ordinance "unlawful" and that it "...would take the necessary steps to have it overturned if it passes" (R-2). Vetra also expressed the Association's objections at the Township's March 29 council meeting (T13).

7. On March 29, 1993, by ordinance 1993-03, the Township rescinded the 1986 ordinance. The Township stated in the 1993 ordinance that it discontinued the supplemental payments because it needed the funds for other purposes, the payments tended to extend disability leave, delayed employees' return to work, and were

unnecessary because employees already receive reasonable income during periods of disability.

8. Two Township police officers were injured on duty since the March 1993 repeal of the supplemental injury pay. Officer Patrick Vacanti was injured April 17, 1993, and was placed on injury leave through March 9, 1994. Officer Scott Wenner was also on injury leave after the 1993 repeal (T14-T15).

ANALYSIS

N.J.S.A. 34:13A-5.3 requires an employer to negotiate with the majority representative before changing a mandatorily negotiable term and condition of employment.

A past practice is a term and condition of employment which is not articulated in the parties' agreement, but arises from their conduct. Caldwell-West Caldwell Board of Education, P.E.R.C. No. 80-65, 5 NJPER 536 (¶10276 1979), aff'd in pt., rev'd in pt., 180 N.J. Super. 440 (App. Div. 1981). A past practice is unequivocal, clearly enunciated and acted upon; readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. It is as enforceable as any written contract term. Elkouri & Elkouri, How Arbitration Works at 439 (Fourth Ed. 1985), cited with approval, Passaic County Regional High School District No. 1, P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990).

Any change in employees' terms and conditions of employment imposed without negotiations violates 5.4(a)(5) of the Act. The union bears the burden of proving: (1) a change; (2) in a term and condition of employment; (3) without negotiations. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322 (1989); Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed Ass'n, 78 N.J. 25 (1978); Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985).

Here, police enjoyed a well-established past practice of supplemental payments to their workers' compensation benefits. The Township admitted that its practice was to "make injured employees whole" by paying them the difference between the workers compensation benefit and their regular salary. When the Township rescinded that benefit, it unilaterally changed employees' terms and conditions of employment. This change imposed without negotiations violates subsection 5.4(a)(5) unless the Township can prove that the Association waived its right to negotiate.

A contract waiver of section 5.3 rights will not be found unless a contract or practice clearly, unequivocally and specifically authorizes a unilateral change. Red Bank; Elmwood Park Board of Education, P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985); Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983); State of New Jersey, P.E.R.C. No. 77-40, 3 NJPER 78 (1977). There is no contract provision that gives the Township the option to reduce or eliminate the supplemental injury payments.

The Township asserts that the Police Association waived its right to file this charge by its conduct: it neither demanded to negotiate over the supplemental payment benefit, nor did it announce its intention to file the charge before the Township ordinance was passed. First, the Association was not obligated to demand negotiations over the proposed change. It was the Township's responsibility to seek negotiations before it made the change. In the collective negotiations arena, the parties are considered equals; just as the Association may only seek changes through the negotiations process (not by acting unilaterally), so must the Township.

Second, the Township argues that the Association should have notified it of its intent to file a charge. Both the announcement, as well as the implementation, of a unilateral change in a term or condition of employment constitute unfair practices. Somerville Bd. of Ed., P.E.R.C. No. 87-128, 13 NJPER 323 (¶18134 1987); Warren Hills Reg. Bd. of Ed., P.E.R.C. No. 78-69, 4 NJPER 188 (¶4094 1978); Jamesburg Bd. of Ed., P.E.R.C. No. 80-56, 5 NJPER 496 (¶10253 1979). Had the Association chosen to it could have filed a charge over the announced change. Its decision not to do so does not preclude its filing a charge when the employer unilaterally implements the change. There is no 5.4(a)(5) violation until the employer acts unilaterally; that is, when it implements the change. The charge about the unilateral action was not ripe until the employer acted. Accordingly, I find no waiver.

Finally, the Township contends that no violation should be found because it offered to negotiate about the change. However, its offer to negotiate after it acted unilaterally and after the charge was filed is inconsequential to my finding that the Township violated the Act. In essence, the Township suggests that, after it took away the benefit, the Association could try to negotiate it back. The Commission and the Courts have recognized that normally,^{5/} 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 about the same subject. See State of New Jersey and CWA, I.R. No. 82-2, 7 NJPER 532 (¶12234 1981); County of Sussex, I.R. No. 91-15, 17 NJPER 234 (¶22101 1991).

CONCLUSIONS OF LAW

The Respondent Township violated N.J.S.A. 34:13A-5.4(a)(5), and derivately, (a)(1), by discontinuing supplemental payments for employees injured on duty and eligible for workers' compensation without first negotiating in good faith with the Police Association.

^{5/} There are certain circumstances after genuine good faith negotiations, and impasse resolution procedures are invoked, when an employer may impose its final offer. Those circumstances are not present here.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Township cease and desist from:

Interfering with police employees' rights by refusing to negotiate in good faith with the Association before discontinuing the practice of paying police injured on duty the difference between their workers' compensation benefit payment and their regular salary.

B. That the Respondent Board take the following affirmative action:

1. Restore the practice of paying employees injured on duty the difference between their workers' compensation benefit payment and their regular gross salary.

2. Pay Officer Patrick Vacanti and Officer Scott Wenner, and any other employee collecting workers compensation benefits after the Township changed its policy on March 29, 1993, the difference between the amount they received in workers compensation benefits and the amount of their regular salary for the period they were on injury leave, plus interest pursuant to R.4:42-11.


3. Negotiate in good faith with the Police Association over the issue of supplemental pay for injured employees eligible for workers compensation.

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

maintained by it for at least sixty (60) consecutive days.

Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

4. Notify the Chairman 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: July 8, 1994
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally eliminating the practice of supplemental payments for police injured on duty.

WE WILL NOT refuse to negotiate in good faith with the Police Association concerning terms and conditions of employment, particularly, by unilaterally eliminating the practice of supplemental payments for police injured on duty.

WE WILL immediately restore the practice of paying employees injured on duty the difference between their workers compensation benefits and their regular salary.

WE WILL reimburse police officers Ptl. Vacanti and Pt. Wenner, and any other employee placed on workers compensation benefits after the Township changed its policy on March 29, 1993, the difference between the amount they received in workers compensation benefits and the amount of their regular salary for the period they were on injury leave plus interest pursuant to R.4:42-11.

WE WILL negotiate in good faith with the Police Association over any attempt to change the supplemental pay for injured employees eligible for workers compensation.

Docket No. CO-H-93-409

Township of Riverside

(Public Employer)

Dated _____

By _____

(Title)

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