I.R. NO. 2000-16

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ORANGE TOWNSHIP,

Respondent,

-and-

Docket No. CO-2000-311

ORANGE POLICE DEPARTMENT SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

The City appears to have eliminated an alleged long-term practice of allowing unit employees to accrue a negative sick leave balance which was recaptured by the end of the officer's career, or sooner, at the officer's option. The City claimed that such practice was preempted by regulation and it could institute the change without incurring a negotiation obligation. The Commission Designee found that the issue of accruing a negative sick leave balance was not preempted and the City could not unilaterally change the practice. The Designee also noted that the change took place during the course of interest arbitration. The Designee ordered the City to return to the status quo.

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Appearances:

For the Respondent,
McCormack & Matthews, attorneys
(Thomas M. McCormack, of counsel)

For the Charging Party,
Loccke & Correia, attorneys
(Joseph Licata, of counsel)

INTERLOCUTORY DECISION

On April 7, 2000, the Orange Police Department Superior Officers Association (SOA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the City of Orange Township (City) committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) by violating N.J.S.A. 34:13A-5.4a(3)

and (5).[1/] The unfair practice charge was accompanied by an application for interim relief. On April 7, 2000, an order to show cause was executed and a return date was set for May 9, 2000. No oral argument was presented on the return date. Instead, the parties agreed to submit additional briefs in response to the opposing party's positions. All briefs were received by May 26, 2000. The following facts appear.

This matter concerns the elimination of unit members' ability to carry a negative sick leave balance conditioned on future recapture by the end of the officers' career, or sooner, at the officers' option. The City and the SOA are parties to a collective negotiations agreement having an expiration date of December 31, 1999. The SOA represents all superior officers holding the rank of sergeant, lieutenant and captain, but excluding the police director and all patrol officers. The unit contains approximately 40 employees.

During the later part of 1999, the parties met on several occasions to engage in successor collective negotiations. Impasse was reached and on or about February 23, 2000, the SOA filed a

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1/ These provisions prohibit public employers, their representatives or agents from: "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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."

petition to initiate compulsory interest arbitration (Docket No. IA-2000-71). The parties are currently proceeding through the interest arbitration process.

It appears that since 1981, the City has permitted unit members to carry a negative sick leave balance until such time as the member subsequently earns and accumulates sick time to the extent that the negative balance can be offset. On or about February 25, 2000, the police director issued a memorandum to a unit member informing him that he was carrying a negative balance and gave him until March 13, 2000 to inform the City as to the manner in which he wished to compensate the City to clear the negative balance. At about the same time, the City advised the SOA of its intention to change its policy and practice regarding negative sick leave balance approvals so as to generally eliminate members' ability to accrue a negative sick leave balance.

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

Sick leave is a term and condition of employment unless a statute or regulation preempts negotiations over a particular aspect. See Hoboken Bd. of Ed., P.E.R.C. No. 81-97, 7 NJPER 135 (¶12058 1981). Preemption will not be found unless a statute or regulation expressly, specifically and comprehensively fixes an employment condition, which eliminates the employers discretion to vary the condition. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Assn., 91 N.J. 38 (1982); State v. State Supervisory Employees Assn., 78 N.J. 54 (1978).

The City contends that the issue of whether unit employees may carry negative sick leave balances is preempted by statute and regulation. The City urges a finding that under the statutory and regulatory scheme, employees are prohibited from accruing negative sick leave balances. Thus, the City asserts that it may unilaterally discontinue any program allowing for such accumulations without incurring a negotiation obligation.

N.J.S.A. 11A:6-5 speaks to sick leave for employees in local government service. N.J.A.C. 4A:6-1.3 similarly speaks to sick leave for employees in local government service. The City contends that N.J.S.A. 11A:6-5 and N.J.A.C. 4A:6-1.3 are controlling. However, the PBA points out that N.J.S.A. 11A:6-9 and N.J.A.C. 4A:6-1.1(a)(4) also speak to leaves of absence, but specifically for police employees. N.J.A.C. 4A:6-1.1(a)(4) states:

> Vacation and sick leaves for police officers and firefighters are established by local ordinance. See N.J.S.A. 40A:14-7 and 40A:14-118.

It appears that sick leave provisions codified in N.J.S.A. 11A:6-5 and N.J.A.C. 4A:6-1.3 which relate generally to employees in local government service do not pertain to police. Police officers are governed by the more specific provisions of N.J.S.A. 11A:6-9 and N.J.A.C. 4A:6-1.1(a)(4). Thus, the City's argument that N.J.A.C. 4A:6-1.3(e)[2/] preempts the negotiability of negative sick leave balances for police is not persuasive. I find that SOA unit members' right to continue to accrue negative sick leave balances subject to future recapture by the employer at the end of the officer's career, or sooner, at the officer's option, does not appear to be preempted by statute or regulation.

The City argues that Article 8, section 3, paragraph 2 of the New Jersey Constitution preempts unit employees' right to carry a negative sick leave balance. That Constitutional program provides as follows:

> No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become security for, or be directly or indirectly the owner of, any stock or bond of any association or corporation.

The City asserts that to allow unit members to carry negative sick leave balances, which essentially means that those sick days are on loan from the City to be paid back at a later date,

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2/ N.J.A.C. 4A:6-1.3(e) states:
An employee who exhausts all paid sick days in any one year shall not be credited with additional paid sick leave until the beginning of the next calendar year.

is in contravention of the above-cited Constitutional provision. The SOA contends that the Constitutional provision does not serve to preempt unit members' rights to temporarily accrue negative sick leave balances.

In Maywood Ed. Assn. Inc., v. Maywood Bd. of Ed., 131 N.J. Super 551 (Ch. Div. 1974), the court stated:

> It is fair to say that our Courts generally have adopted the view that compensation paid to public employees, whatever the label, is not a gift so long as it is included within the conditions of employment either by statutory direction or contract negotiation [Id. at 557.]

It does not appear that allowing unit members to carry negative sick leave balances constitutes a gift from the municipality nor a loan in contravention of the Constitutional provision. Since sick leave use is generally a mandatory subject of negotiations, allowing employees to accrue a negative sick leave balance appears to be more in the nature of paid compensation rather than a gift, nor is it a loan of the City's money or credit.

Neither party disputes that the collective agreement is devoid of a specific provision in the sick leave article authorizing the accrual of negative sick leave balances. But the fact that specific language concerning the accrual of negative sick leave balances is not contained in the collective agreement, makes it no less a term and condition of employment. The SOA contends that the accrual of negative sick leave balances by unit members constitutes an established practice. While the City does not dispute that the prior police department administration allowed the accrual of

negative sick leave balances, it contends that the current City administration only recently became aware of the negative sick leave balance accruals and never specifically authorized it. The City asserts that since no police department administration had ever issued a written policy adopting a negative sick leave balance program, the SOA should not have relied upon the continuation of such benefit. The City asserts there was no mutual understanding that would establish negative sick leave balance accruals as an established practice. Therefore, the City claims that since there is no language contained in the collective agreement and no legitimate understanding between the parties that such program would continue, no established practice can exist.

In Tp. of Middletown, P.E.R.C. No. 98-77, 24 NJPER 28, 29 (¶29016 1997) the Commission stated that:

> [It] has generally seen three types of cases involving allegations that an employment condition has been changed: (1) cases where the majority representative claims an express or implied contractual right to prevent a change; (2) cases where an existing working condition is changed and neither party claims an express or implied right to prevent or impose that change; and (3) cases where the employer alleges that the representative has waived any right to negotiate, usually by expressly or impliedly giving the employer a right to impose a change.

This case appears to fall into the second category. The Commission in Middletown went on to state:

> In the second type of case, an existing working condition is changed and the majority representative does not claim an express or implied contractual right to prevent that change while the employer does not claim, or cannot

> prove, an express or implied right to impose that change without negotiations. Such a change triggers the duty to negotiate under section 5.3. As stated in Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138, 140 (¶14066 1983):
>
> > [A]n employer violates its duty to negotiate when it unilaterally alters an existing practice or rule governing a term and condition of employment ... even though that practice or rule is not specifically set forth in a contract.... Thus, even if the contract did not bar the instant changes, it does not provide a defense for the Board since it does not expressly and specifically authorize such changes. [Id. at 30.]

Consequently, here it appears that the City has effected a unilateral change in a term and condition of employment, i.e., the elimination of negative sick leave accruals, in violation of the Act. Accordingly, I find that the SOA has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

A unilateral change in terms and conditions of employment during any stage of the negotiations process has a chilling effect on employee rights guaranteed under the Act, undermines labor stability and constitutes irreparable harm. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978). Further, a unilateral change of a term and condition of employment during the pendency of interest arbitration constitutes a violation of N.J.S.A. 34:13a-21. Therefore, I find that the City's apparent unilateral change in terms and conditions of employment during the course of collective negotiations and interest arbitration undermines the SOA's ability to represent its members and results in irreparable harm.

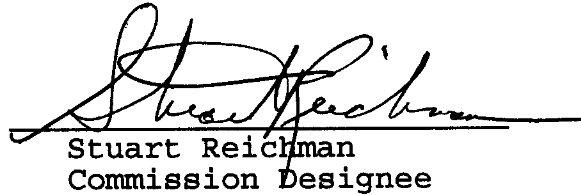
In consideration of the public interest and the relative hardship to the parties, I find that the public interest is furthered by adhering to the tenants expressed in the Act which require the parties to negotiate prior to implementing changes in terms and conditions of employment. Maintaining the collective negotiations process results in labor stability and, thus, promotes the public interest. In assessing the relative hardship to the parties, I find that the scale tips in favor of the SOA. The City experiences a lesser degree of hardship by being required to adhere to the previously existing conditions of employment. However, the SOA will be irreparably harmed as the result of the unilateral change in the sick leave practice during the pendency of collective negotiations and interest arbitration.

This case will continue to proceed through the normal unfair practice processing mechanism.

ORDER

The City is restrained from unilaterally eliminating unit members' right to accrue negative sick leave balances. The City is restrained from recouping sick leave from unit employees' negative balances and must return to the status quo ante by returning any

recouped sick leave to effected employees. This interim order will remain in effect pending a final Commission order in this matter.3/



Stuart Reichman
Commission Designee

DATED: June 14, 2000
Trenton, New Jersey

3/ This decision is not intended to affect the City's ability to recoup negative sick leave balance before an employee separates from City employment.