P.E.R.C. NO. 2000-14

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF EAST ORANGE,

Respondent,

-and-

Docket Nos. CO-H-99-23, CO-H-99-30, CO-H-99-31, CO-H-99-32, CO-H-99-35

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; EAST ORANGE FIRE OFFICERS ASSOCIATION; PBA LOCAL NO. 16; EAST ORANGE SUPERIOR OFFICERS' ASSOCIATION; AND FMBA LOCAL NO. 23,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission finds that the City of East Orange violated the New Jersey Employer-Employee Relations Act when, without negotiations, it reduced the rate at which it paid workers' compensation benefits from 100% to 70% of the injured employee's average weekly wages. The Communications Workers of America, AFL-CIO, East Orange Fire Officers Association, PBA Local No. 16, East Orange Superior Officers' Association, and FMBA Local No. 23 filed unfair practice charges and moved for summary judgment. The Commission affirms a Hearing Examiner's decision granting summary judgment and orders the City to restore the previous level of the workers' compensation benefits and negotiate before reducing them again.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; EAST ORANGE FIRE OFFICERS ASSOCIATION; PBA LOCAL NO. 16; EAST ORANGE SUPERIOR OFFICERS' ASSOCIATION; AND FMBA LOCAL NO. 23,

Charging Parties.

Appearances:

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

For the Charging Party, Communications Workers of America, AFL-CIO (Elaine Waller, representative)

For the Charging Party, East Orange Fire Officers' Association, Balk, Oxfeld, Mandell & Cohen, attorneys (Gail Oxfeld Kanef, of counsel)

For the Charging Party, PBA Local No. 16 S.M. Bosco Associates (Dr. Simon M. Bosco, consultant)

For the Charging Party, East Orange Superior Officers' Association, S.M. Bosco Associates (Dr. Simon M. Bosco, consultant)

For the Charging Party, FMBA Local No. 23 Courter, Kobert, Laufer & Cohen, attorneys (Fredric M. Knapp, of counsel)

DECISION

The Communications Workers of America, AFL-CIO, the East Orange Fire Officers Association, PBA Local No. 16, the East

Orange Superior Officers' Association, and FMBA Local No. 23 represent various negotiations units of employees of the City of East Orange. Between July 24 and August 3, 1998, these representatives filed unfair practice charges alleging that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (5), and (7),[1/] when it unilaterally reduced the rate at which it paid workers' compensation benefits from 100% to 70% of the injured employee's average weekly wages.[2/]

The SOA and the FMBA sought interim relief restraining the City from reducing workers' compensation benefits without negotiations. The FMBA argued in particular that this employment condition could not be changed during interest arbitration proceedings. N.J.S.A. 34:13A-21. Interim relief was granted.

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, (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 [and] (7) Violating any of the rules and regulations established by the commission." The FMBA alleged violations of all four provisions; the police officers' representatives alleged violations of 5.4a (1), (2), and (5); the fire officers' representative alleged violations of 5.4a(1) and (5); and CWA alleged a violation of 5.4a(5).

2/ The FMBA also alleges that the City violated the Act when it unilaterally implemented an alternate duty policy. That allegation is not before us now.

I.R. No. 99-4, 24 NJPER 459 (¶29212 1998). In that proceeding, the City argued that fiscal constraints justified the reduction in benefits, but would not prevent it from making employees whole for lost benefits if a violation was ultimately found.

On November 25, 1998, the Director of Unfair Practices consolidated the charges and issued a Complaint and Notice of Hearing. The City filed an Answer admitting that it had unilaterally reduced workers' compensation benefits, but asserting that it had a managerial prerogative and statutory right to do so.

The charging parties moved for summary judgment and submitted certifications, exhibits, and briefs. The City did not respond.

Pursuant to N.J.S.A. 19:14-4.8, the motions for summary judgment were referred to the Hearing Examiner, Wendy L. Young. On June 21, 1999, she granted the motions. H.E. No. 99-23, 25 NJPER 354 (¶30150 1999). She concluded that reducing workers' compensation benefits without negotiations and during interest arbitration proceedings violated N.J.S.A. 34:13A-5.4a(1) and (5). She recommended that the City be ordered to restore the previous level of payments and make whole employees who had their benefits improperly reduced. She recommended dismissing the alleged violations of 5.4a(2) and 5.4a(7).

On July 8, 1999, the City filed exceptions. It asserts that workers' compensation benefits are not automatic and employees could not expect that level of benefits to be maintained

from year to year. It also argues that it should not be required to negotiate over reducing benefits given its fiscal constraints.

The FMBA filed a response urging us to accept the Hearing Examiner's recommendations.

The Hearing Examiner's decision resolves all issues in the consolidated charges except the FMBA's allegation concerning the alternate duty program. We grant special permission to appeal the summary judgment ruling with respect to the FMBA's charge and entertain the City's exceptions on the other charges pursuant to N.J.A.C. 19:14-4.8(e).

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 5-6) are accurate.3/ We adopt and incorporate them. These findings establish that the City had a longstanding practice of paying workers' compensation benefits at the rate of 100% of the injured employee's average weekly wages; the City adopted a resolution reducing the rate of payment to 70% of wages; and the City did not negotiate with any majority representative before doing so. We add that the City presented no factual allegations in response to the summary judgment motions and may not do so now in its exceptions.

The Hearing Examiner's legal analysis (H.E. at 7-11) is sound. We adopt and incorporate that analysis and specifically

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3/ We supplement finding no. 3 by taking administrative notice that on July 9, 1997 the East Orange Fire Officers Association petitioned for interest arbitration.

accept her determination that the previous level of workers' compensation benefits was an existing employment condition that could not be changed without satisfying the duty to negotiate under N.J.S.A. 34:13A-5.3. We add that the Appellate Division has recently affirmed the Middletown decision relied upon by the Hearing Examiner, Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd __ NJPER ___ (¶___ App. Div. 1999), and we repeat what we said in Middletown:

> [T]he [City] is not bound to maintain its practice. It is simply required to negotiate before changing it.... If conditions have changed and the [City] believes that the practice should be discontinued, it is free to take that position in negotiations. [Id. at 31]

We will modify the recommended order to clarify that the City's duty is not to maintain the previous benefits, but to engage in the negotiations process before reducing those benefits. The City may present its fiscal concerns in negotiations.

ORDER

The City of East Orange 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 not negotiating before reducing the workers' compensation benefits paid injured employees from 100% of their average weekly wages to 70% of their average weekly wages and by reducing those benefits during interest arbitration proceedings without the consent of the FMBA or the Fire Officers Association.

2. Refusing to negotiate with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, particularly by reducing workers' compensation benefits paid injured employees from 100% of their average weekly wages to 70% of their average weekly wages and by reducing those benefits during interest arbitration proceedings without the consent of the FMBA or the Fire Officers Association.

B. Take this action:

1. Rescind that portion of Resolution No. 1-236 reducing workers' compensation benefits.

2. Make whole employees who had their benefits reduced without negotiations.

3. Negotiate in good faith with the Communications Workers of America, PBA Local #16, and the East Orange Superior Officers' Association before reducing workers' compensation benefits.

4. Negotiate in good faith with FMBA Local No. 23 and the East Orange Fire Officers Association and complete interest arbitration proceedings before reducing workers' compensation benefits;

5. 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.

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

The 5.4a(2) and 5.4a(7) allegations are dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Muscato and Ricci voted in favor of this decision. None opposed. Commissioner McGlynn abstained from consideration. Commissioner Madonna abstained from consideration under protest.

DATED: August 26, 1999
Trenton, New Jersey
ISSUED: August 27, 1999

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 not negotiating before reducing the workers' compensation benefits paid injured employees from 100% of their average weekly wages to 70% of their average weekly wages and by reducing those benefits during interest arbitration proceedings without the consent of the FMBA or the Fire Officers Association.

WE WILL cease and desist from refusing to negotiate with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, particularly by reducing the workers' compensation benefits paid injured employees from 100% of their average weekly wages to 70% of their average weekly wages and by reducing those benefits during interest arbitration proceedings without the consent of the FMBA or the Fire Officers Association.

WE WILL rescind that portion of Resolution No. 1-236 reducing workers' compensation benefits.

WE WILL make whole employees who had their benefits reduced without negotiations.

WE WILL negotiate in good faith with the Communications Workers of America, PBA Local #16, and the East Orange Superior Officers' Association before reducing workers' compensation benefits.

WE WILL negotiate in good faith with FMBA Local No. 23 and the East Orange Fire Officers Association and complete interest arbitration proceedings before reducing workers' compensation benefits.

Docket Nos. CO-H-99-23, CO-H-99-30
CO-H-99-31, CO-H-99-32
CO-H-99-35

CITY OF EAST ORANGE
(Public Employer)

Date: _____ By: _____

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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H.E. NO. 99-23

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

In the Matter of

CITY OF EAST ORANGE,

Respondent,

-and-

Docket Nos. CO-H-99-23, CO-H-99-30
CO-H-99-31, CO-H-99-32, CO-H-99-35

C.W.A.; EAST ORANGE FIRE OFFICERS ASSOC.; PBA LOCAL #16; EAST ORANGE SUPERIOR OFFICERS ASSOC.; FMBA LOCAL NO. 23,

Charging Parties.

SYNOPSIS

In a decision on a Motion for Summary Judgment brought by Charging Parties, CWA, FOA, PBA, SOA and FMBA, a Hearing Examiner grants the motion and recommends that the Commission find that Respondent, City of East Orange violated the New Jersey Employer-Employee Relations Act when it unilaterally reduced the level of compensation paid to employees eligible to receive workers' compensation benefits and when it reduced those benefits during interest arbitration with the FMBA.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the 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.

H.E. NO. 99-23

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

In the Matter of

CITY OF EAST ORANGE,

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-and-

Docket Nos. CO-H-99-23, CO-H-99-30
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C.W.A.; EAST ORANGE FIRE OFFICERS ASSOC.; PBA LOCAL #16; EAST ORANGE SUPERIOR OFFICERS ASSOC.; FMBA LOCAL NO. 23,

Charging Parties.

Appearances:

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

For the Charging Party, C.W.A.
Elaine Waller, Representative

For the Charging Party, Fire Officers Assoc.
Balk, Oxfeld, Mandell & Cohen, attorneys
(Gail Oxfeld Kanef, of counsel)

For the Charging Party, PBA Local #16
S.M. Bosco Associates
(Dr. Simon M. Bosco, Consultant)

For the Charging Party, Superior Officers Assoc.
S.M. Bosco Associates
(Dr. Simon M. Bosco, Consultant)

For the Charging Party, FMBA Local No. 23
Courter, Kobert, Laufer & Cohen, attorneys
(Fredric M. Knapp, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION ON MOTION FOR SUMMARY JUDGMENT

Communications Workers of America (CWA), East Orange Fire Officers Association (FOA), PBA Local No. 16 (PBA), East Orange Superior Officers' Association (SOA), and FMBA Local No. 23 (FMBA) filed unfair practice charges against the City of East Orange (City) on July 24, 1998 (CO-99-23), August 3, 1998 (CO-99-30), August 3, 1998 (CO-99-31), August 3, 1998 (CO-99-32) and August 6, 1998 (CO-99-35),[1/] respectively. The charges allege some or all violations of 5.4a(1), (2), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[2/] The charging parties assert that the City unilaterally changed the longstanding practice of paying employees eligible to receive workers' compensation benefits at the rate of 100% of the employee's average weekly wages.

Additionally, the FMBA alleges that the City violated the Act when it unilaterally implemented an alternate duty policy to accommodate employees who are receiving workers' compensation

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1/ On August 12, 1998, the FMBA amended its unfair practice charge to make technical corrections in their charge.

2/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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. (7) Violating any of the rules and regulations established by the commission." Only the FMBA alleged violations of 5.4a(2) and (7) of the Act.

benefits and are medically able to perform some kind of work without prior notice or negotiations. However, the FMBA has not requested summary judgment on the unilateral implementation issue. Therefore, my decision does not address that issue.

Accompanying the charges filed by the FMBA and the FOA were applications for interim relief. On August 27, 1998, the Commission Designee restrained the City from implementing a portion of Resolution No. 1-236 which modified the level of payments made to employees eligible to receive workers' compensation benefits. He denied interim relief seeking to restrain the "alternate duty policy." City of East Orange, I.R. No. 99-4, 24 NJPER 459 (¶29212 1998).

A Consolidated Complaint and Notice of Hearing was issued on November 25, 1998. The City filed an Answer admitting the factual allegations of the charge. The City asserts the affirmative defenses of statutory preemption, managerial prerogative and failure to state a claim upon which relief can be granted.

Accompanying the charging parties' motions for summary judgment were briefs, exhibits and affidavits or certifications. On March 11, 1999, the City was given an extension of time to respond to the motions. The response was due on or about May 11, 1999. The City failed to file a response pursuant to N.J.A.C. 19:14-4.4.

N.J.A.C. 19:14-4.8 states:

> (c) Within 10 days of service on it of the motion for summary judgment...the responding party shall serve and file its answering brief and affidavits, if any....

> (d) 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...is entitled to its requested relief as a matter of law, the motion...for summary judgment may be granted and the requested relief may be ordered.

A party seeking a motion for summary judgment claims there is no genuine issue of material fact and that it is entitled to judgment on the undisputed facts and applicable law. See, generally, N.J.A.C. 1:1-12.5 and R. 4:46-2(c). In considering a motion for summary judgment, all inferences must be drawn against the moving party and in favor of the party opposing the motion. The motion must be denied if a genuine issue of material fact exists. Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). In determining whether a genuine issue of material fact exists, the factfinder must weigh whether the competent evidence presented, viewed in light most favorable to the party opposing the motion, is sufficient to permit a rational factfinder to resolve the disputed issue in favor of the party opposing the motion. Id., at 540. In order to defeat the motion, the party opposing the motion must demonstrate that a genuine issue of material fact exists -- i.e., has the opposing party made a sufficient showing, based on all the competent evidence submitted on the motion and giving that party all legitimate inferences permissible from that evidence, to require submission of the issue to the factfinder in a plenary hearing. R. 4:46-2. A motion for summary judgment should be granted with caution and may not be substituted for a plenary trial. Baer v.

Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988).

Where the party opposing the motion for summary judgment submits no affidavits or documentation contradicting the moving party's affidavits and documentation, then the moving party's facts may be considered as true, and there would be no genuine issue of material fact, unless it was raised in movant's pleadings. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954). In this matter, the Respondent has not filed a response or submitted any affidavits or documentation in opposition to or contradicting argument or affidavits submitted by charging parties.

Accordingly, based upon the foregoing and in reliance upon the record documents submitted to date in this matter, I make the following:3/

FINDINGS OF FACT

(1) The City of East Orange is a public employer within the meaning of the Act, is subject to its provisions and is the employer of the employees involved in this matter.

(2) The CWA, FOA, PBA, SOA and FMBA are employee organizations within the meaning of the Act, are subject to its

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3/ The documents in the hearing/motion record in this matter are: (C-1) Consolidated Complaint and Notice of Hearing (including the unfair practice charges with attachments); (C-2a) Charging Parties' Motions for Summary Judgment (with affidavits and exhibits attached); and (C-2b) Charging Parties' Briefs in Support of Motion.

provisions and are the statutory majority representatives of collective negotiations units of various non-uniformed employees, police officers, police superiors, firefighters and fire superiors employed by the City of East Orange.

(3) The City and CWA are parties to a collective negotiations agreement effective from January 1, 1997 to December 31, 1999. The City and the FOA are parties to a collective negotiations agreement which expired on June 30, 1996 and are currently in negotiations for a successor agreement. The City and the PBA and the SOA are parties to collective negotiations agreements which expire on June 30, 1999. The City and the FMBA are parties to a collective negotiations agreement which expired on December 31, 1995. The City and FMBA are in interest arbitration. The change in payments for employees eligible to receive workers' compensation benefits has not been raised by either party in the interest arbitration.

(4) On June 24, 1998, without prior negotiation or notice to the charging parties, the City adopted Resolution No. 1-236 which provides in pertinent part that:

> ...in conformity with the State of New Jersey's personal administrative model, our worker's compensation payout for eligible employees shall be seventy (70%) percent of average weekly wages, effective July 1, 1998...

(5) The City's long standing practice was to compensate employees eligible to receive workers' compensation benefits at the rate of 100% of the employee's average weekly wages.

ANALYSIS

There are no material facts in dispute. The City unilaterally changed the level of workers' compensation benefits from 100% to 70% of average weekly wages and, in one instance, changed the level of benefits during interest arbitration.4/ Summary judgment will be granted it movants are entitled to relief as a matter of law. Brill, supra.

There are several legal issues for consideration. The Commission has held that changes in employment conditions must be addressed through the collective negotiations process. N.J.S.A. 34:13A-5.3. Unilateral action is destabilizing and contrary to the express requirements of the Act. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978), Tp. of Middletown, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997). Any change in employees' terms and conditions of employment imposed without negotiations violates 5.4a(5) and derivatively a(1) of the Act.

The issue of paying in excess of workers' compensation payments for employment related injuries and disabilities is mandatorily negotiable. Morris Cty., P.E.R.C. No. 79-2, 4 NJPER 304 (¶4153 1978), aff'd NJPER Supp.2d 67 (¶49 App. Div. 1979); Riverside Tp., H.E. No. 95-1, 20 NJPER 303 (¶25152 1994) adopted P.E.R.C. No. 95-7, 20 NJPER 325 (¶25167 1994). Thus, the City's affirmative

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4/ The FMBA and City were in interest arbitration for a successor agreement at the time that Resolution No. 1-236 was adopted.

defense of managerial prerogative raised in its Answer to the Complaint must fail.

Here, charging parties enjoyed a well-established past practice of receiving 100% of average weekly salary for employees eligible to receive workers' compensation. Where an existing working condition is changed, such a change triggers the duty to negotiate under section 5.3 of the Act. To prove a violation, absent an applicable defense, the majority representative need show only that the employer changed an existing employment condition without first negotiating. Middletown at 30.

When the City adopted Resolution No. 1-236 reducing payment to 70% of average weekly salary for employees eligible to receive workers' compensation benefits, it unilaterally changed employees terms and conditions of employment. This change imposed without negotiations violates sections 5.4a(5) and derivatively 5.4a(1) of the Act.

In its Answer the City asserted that N.J.S.A. 34:15-12(a) preempts negotiations. That statute 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. N.J.S.A. 34:15-12(a). A statute or regulation will not preempt negotiations unless it sets a term and condition of employment specifically, expressly, and comprehensively and thereby eliminates

an employer's discretion to vary it. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). In the instant matter, N.J.S.A. 34:15-12(a) only sets mandatory payments for temporary disability benefits under workers compensation. That statute does not address payments in excess of workers' compensation benefits. Since the Commission held in Morris that payments in excess of the statute are negotiable, the City's preemption argument is defeated.

Next, I consider whether the change in the level of benefits occurring during the pendency of interest arbitration constitutes any additional violations of the Act.

N.J.S.A. 34:13A-21 provides:

> During the pendency of proceedings before the arbitrator, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other, any change in or of the public employer or employee representative notwithstanding; but a party may so consent without prejudice to his rights or position under this supplementary act.

It is undisputed that the change in level of benefits effectuated by the adoption of Resolution No. 1-236 occurred during interest arbitration proceedings between the City and the FMBA and without the consent of the FMBA. 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 and undermines labor stability. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 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. Consequently, this unilateral change in a term and condition of employment without the consent of the FMBA constitutes a violation of 5.4a(5) and derivatively 5.4a(1) of the Act.

The FMBA also alleges a violation of 5.4a(7) which prohibits violating the rules and regulations established by the Commission. Nothing in the FMBA charge refers to any rule or regulation which has been violated. The only reference is to N.J.S.A. 34:13A-21. That reference is to a statute, not to a rule. Thus, I do not find a violation of 5.4a(7).

Finally, the FMBA alleges a violation of 5.4a(2) of the Act. Commission cases dealing with 5.4a(2) claims generally involve organizational rights or the actions of an employee with a conflict of interest caused by his membership in a union and his position as an agent of an employer. Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976); Middlesex Cty (Roosevelt Hospital), P.E.R.C. No. 81-129, 7 NJPER 266 (¶12118 1981); Camden Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983). While motive is not an element of a 5.4a(2) offense, there must be a showing of pervasive employer control or manipulation of the employee organization itself. New Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980). I do not find that the unilateral change in the level of benefits for employees eligible for workers' compensation as a whole without a showing that

the acts complained of actually interfered with or dominated the FMBA, constitutes a 5.4a(2) violation.

CONCLUSIONS OF LAW

1. The City violated N.J.S.A. 34:13A-5.4a(1) and a(5) by unilaterally reducing the level of payment made to employees eligible to receive workers' compensation benefits and by reducing the level of payment during interest arbitration proceedings without the consent of the FMBA.

2. The City did not violate 5.4a(2) and 5.4a(7) of the Act.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the City of East Orange 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 reducing the level of payment made to employees eligible to receive workers' compensation benefits from 100% of average weekly salary to 70% of average weekly salary and by reducing the level of payment during interest arbitration proceedings without the consent of the FMBA.

2. Refusing to negotiate in good faith with the Communications Workers of America, the East Orange Fire Officers Assoc., P.B.A. Local #16, the East Orange Superior Officers Assoc., and FMBA Local No. 23 particularly by reducing the level of payment made to employees eligible to receive workers' compensation benefits

from 100% of average weekly salary to 70% of average weekly salary and by reducing the level of payment during interest arbitration proceedings without the consent of the FMBA.

B. That the City take the following action:

1. Rescind that portion of Resolution No. 1-236 which modifies the level of payment made to employees eligible to receive workers' compensation benefits.

2. Make whole employees who sustained losses as a result of the reduction in level of benefits.

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.

C. That the 5.4a(2) and 5.4a(7) allegations be dismissed.

Wendy L. Young
Hearing Examiner

DATED: June 21, 1999
Trenton, New Jersey

RECOMMENDED

NOTICE TO EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally reducing the level of payment made to employees eligible to receive workers' compensation benefits from 100% of average weekly salary to 70% of average weekly salary and by reducing the level of payment during interest arbitration proceedings without the consent of the FMBA.

WE WILL cease and desist from 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, particularly by unilaterally reducing the level of payment made to employees eligible to receive workers' compensation benefits from 100% of average weekly salary to 70% of average weekly salary and by reducing the level of payments during interest arbitration proceedings without the consent of the FMBA.

WE WILL rescind that portion of Resolution No. 1-236 which modifies the level of payment made to employees eligible to receive workers' compensation benefits.

WE WILL make whole employees who sustained losses as a result of the reduction in level of benefits.

Docket No. CO-H-99-23, CO-H-99-30, CO-H-99-31, CO-H-99-32, CO-H-99-35

CITY OF EAST ORANGE
(Public Employer)

Date: _____ By: _____

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"