

H.E. NO. 99-18

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

In the Matter of

TOWNSHIP OF NUTLEY,

Respondent,

-and-

Docket No. CO-H-97-427

PBA LOCAL 33,

Charging Party.

SYNOPSIS

In a decision on a Motion for Summary Judgment brought by Charging Party, PBA Local 33, a Hearing Examiner grants the motion and recommends that the Commission find that the Respondent, Township of Nutley, violated the New Jersey Employer-Employee Relations Act when it unilaterally reduced the payment for the clothing and maintenance allowance to employees in their last year of employment before retirement.

The Hearing Examiner found that the parties had a past practice which provided for the full payment of a clothing and maintenance allowance to retiring employees in their last year of employment and that Respondent unilaterally reduced the payment amount by pro-rating the payment based on the employee's projected date of retirement.

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.

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TOWNSHIP OF NUTLEY,

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PBA LOCAL 33,

Charging Party.

Appearances:

For the Respondent, Savage & Serio, attorneys
(Thomas J. Savage and Beverly M. Wurth, of counsel)

For the Charging Party, Abramson & Liebeskind, consultants
(Arlyne Liebeskind, consultant)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

Nutley PBA Local 33 filed an unfair practice charge against the Township of Nutley on June 24, 1997, alleging that the Township violated sections 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,^{1/} when it unilaterally changed an existing term and condition of employment and refused to negotiate concerning same.

^{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. (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."

A Complaint and Notice of Hearing was issued on December 19, 1997. After a prehearing conference, the hearing was rescheduled and the Charging Party filed a Motion for Summary Judgment on May 4, 1998. On May 5, 1998, the motion was referred to me for disposition. The Township has filed neither an answer to the complaint, pursuant to N.J.A.C. 19:16-3.1, nor a response to PBA Local 33's motion for summary judgment, pursuant to N.J.A.C. 19:14-4.4.

N.J.A.C. 19:14-3.1 requires a respondent to file its answer to a complaint within 10 days of the service of the complaint unless, upon proper cause shown, the hearing examiner has extended the time for filing the answer. The rule further states:

The answer shall specifically admit, deny or explain each of the allegations set forth in the complaint, unless the respondent is without knowledge,.... All allegations in the complaint, if no answer is filed, or any allegation not specifically denied or explained shall be deemed to be admitted to be true and shall be so found by the Commission, unless good cause to the contrary is shown. The answer shall include a detailed statement of any affirmative defenses. The answer shall be in writing and the party or representative filing the answer shall make this dated and signed certification: "I declare that I have read the above statements and that the statements are true to the best of my knowledge and belief."
N.J.A.C. 19:14-3.1 (emphasis added)

N.J.A.C. 19:14-3.2 requires that a respondent file an original and nine copies of its answer with the Hearing Examiner, together with proof of service of a copy of the answer on all other parties to the

case. Where a respondent has not filed an answer to the complaint in accordance with N.J.A.C. 19:14-3.1 and 3.2, the Commission has held that the allegations in the complaint are deemed admitted to be true. Passaic County, P.E.R.C. No. 88-64, 14 NJPER 124 (¶19047 1988); Fort Lee Boro., P.E.R.C. No. 98-118, 24 NJPER 208 (¶29096 1998).

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 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. Brill, 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).

N.J.A.C. 1:1-12.5 (Motion for summary decision) states:

...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 in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

R. 1:6-2 states:

...If the...response (to a motion) relies on facts not of record...it shall be supported by affidavit.... The motion shall be deemed uncontested...unless responsive papers are timely filed and served stating with particularity the basis of the opposition to the relief sought.^{2/}

In this matter, the Respondent has not filed any affidavits or documentation in opposition to or contradicting the affidavits submitted by Charging Party with its motion.

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 Township of Nutley 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/} Pressler, Current N.J. Court Rules, Comment R. 1:6-2, indicates that in order to constitute a contest, the answering documents must not only object generally to the motion, or to the relief sought by the motion, but must also state specifically the legal and/or factual basis for the opposition. See Heljan Management Corp. v. Di Leo, 55 N.J. Super. 306 (App. Div. 1959); See also, Celino v. General Acc. Ins., 211 N.J. Super. 538 (App. Div. 1986) (documents are required to be incorporated by reference in affidavits, not merely annexed to the brief).

^{3/} The documents in the hearing/motion record in this matter are: (C-1) Complaint and Notice of Hearing (including the unfair practice charge with attachments); (C-2a) Charging Party's Motion for Summary Judgment (with affidavits attached); and (C-2b) Charging Party's Brief in Support of Motion (with appendix).

(2) Nutley PBA, Local No. 33 is an employee organization within the meaning of the Act, is subject to its provisions and is the statutory majority representative of a collective negotiations unit of patrol officers and sergeants employed by the Township of Nutley Police Department.

(3) The Township and the PBA are parties to a collective negotiations agreement covering the above negotiations unit for the period from January 1, 1996 through December 31, 1997. When this charge was filed, the parties were in the interest arbitration process for a successor agreement.

(4) Article VIII of the parties' collective negotiations agreement^{4/} is titled, "Clothing and Maintenance Allowance"; it provides for a \$500.00 annual clothing allowance and a \$500.00 annual maintenance allowance for each officer.

Article VIII states:

1. Clothing Account. The Department shall establish, with a vendor to be selected by the Township, an annual clothing account in the amount of \$500.00, against which employees shall be permitted to make purchases. All unexpended funds shall, at the end of each calendar year, revert to the Township. The Chief of Police may, at his discretion, waive the establishment of a clothing account in favor of a direct payment to any employee assigned to administrative or investigative duties. Any such payment under this option shall be made in the first pay period following adoption of the annual budget.

^{4/} The parties' 1996-97 agreement is an exhibit attached to the unfair practice charge.

2. Maintenance Allowance. In addition to the annual clothing account as set forth above, each employee shall receive an annual clothing maintenance allowance in the amount of \$475.00 which shall be payable in the first pay period following adoption of the annual budget. Effective January 1, 1997, the clothing maintenance allowance shall be increased \$500.00.

(5) The parties had a past practice concerning the payment of the clothing and maintenance allowance to retiring employees which they followed from at least 1989 through May 1997, at which time the Director of Public Safety unilaterally changed it. The practice provided that after the filing of their retirement papers, all officers in their last calendar year of employment before retirement received a full cash payment for their clothing allowance and a full cash payment for their maintenance allowance. The Director changed the practice by reducing (pro-rating) the amount of the clothing and maintenance allowance payment to retiring officers, depending upon the employee's retirement date.^{5/}

^{5/} The PBA submitted three affidavits with its Motion for Summary Judgment. PBA President Ferrara, a 21 year employee of the department, has been a PBA official for sixteen years (the last eight as president). He stated that the past practice of paying retiring officers the full amount of the clothing and maintenance allowance was established for some twenty years prior to the change in May 1997.

Police Chief DeLitta, a thirty-five year department employee, has been chief since 1990. He stated that the Township has paid retiring officers the full amount of the clothing and maintenance allowance for as long as he could remember.

(6) On April 1, 1997, four officers who planned to retire in 1997 submitted their Clothing and Maintenance Allowance vouchers for the full amount of the 1997 Clothing and Maintenance Allowance -- a \$1,000.00 cash payment.

(7) On May 12, 1997 the vouchers were approved by Director of Public Safety Orechio, but for an amount less than the \$1,000.00 submitted; the amount approved was pro-rated down from \$1,000.00, in accord with the designated retirement date of the employee.

(8) In a memo to Chief DeLitta dated May 12, 1997, PBA President Ferrara objected to the pro-rated amounts of the clothing and maintenance allowance payments made to the officers retiring in 1997.

(9) In a responsive memo to Ferrara dated May 16, 1997, DeLitta agreed that the parties' past practice provided that retiring officers received payment for the full amount of the Clothing and Maintenance Allowance in their last year of employment. However, DeLitta noted that he could not overrule the decision of the Director of Public Safety.

5/ Footnote Continued From Previous Page

Deputy Chief Holland, a twenty-five year department employee, has been deputy chief since 1990. Holland served as the administrative aide to the Township Director of Public Safety from 1986-1996. In that position, he was directly involved in the formation and administration of the Township budget and states that during that period, he had direct knowledge of the payments that were made to all retiring officers for the full amount of the clothing and maintenance allowance. Holland also asserts that each of the payments was approved by the then-Director of Public Safety, a member of the elected governing body.

(10) The Township did not negotiate or seek to negotiate any change in the amount of the Clothing and Maintenance Allowance payments to be made to retiring officers in their last year of employment.

(11) As a remedy, the PBA seeks: (a) a finding that the Township violated 5.4a(5) and (1) of the Act; and an order (b) enjoining the Township from continuing to pro-rate the clothing and maintenance allowance payment to retiring employees; (c) directing the Township to immediately reinstate the past practice of compensating retiring officers for the full amount of the clothing and maintenance allowance; (d) directing the Township to make whole any retiring officers who suffered any adverse effects from the change in the payment of the clothing and maintenance allowance; (e) directing the Township to negotiate with the PBA regarding any desired changes to the method of compensating retiring officers for clothing and maintenance allowance; and (f) requiring the Township to post appropriate notices and provide other relief as appropriate.

ANALYSIS

Issues of uniform maintenance and uniform allowance concern employee compensation; compensation is a mandatorily negotiable term and condition of employment. Englewood Bd. of Ed. v. Englewood Teachers Assn., 64 N.J. 1 (1973); see also Boro of Maywood, P.E.R.C. No. 87-133, 13 NJPER 354 (¶18144 1987). Terms and conditions of employment may arise from a past practice not contained in parties'

collective negotiations agreement. New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1977) mot. for recon. den., 4 NJPER 56 (¶4073 1978). A past practice demonstrates "a pattern of conduct and some kind of mutual understanding, either express or implied." United Transportation Union v. St. Paul Union Depot Co., 434 F.2d 220, 75 LRRM 2595 (8th Cir. 1970). The Commission has defined past practice as a course of events "...which is repeated, unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Somerville Boro, P.E.R.C. No. 84-90, 10 NJPER 125, 126 (¶15064 1984), quoting from Elkouri and Elkouri, How Arbitration Works, p. 391 (BNA 1973).

Where a collective negotiations agreement is silent or unclear concerning a particular term, then the parties' past practice may control. Sussex Cty., P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982). An employer fulfills its 5.3 obligation to negotiate when it makes changes in terms and conditions of employment that are permitted under the contract's terms. Sussex-Wantage Reg. Bd. of Ed., P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985); Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Bound Brook Bd. of Ed., P.E.R.C. No. 83-11, 8 NJPER 439 (¶13207 1982); Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980). A past practice that is determined to be contrary to the clear, express terms of a collective negotiations agreement, must yield to the clear meaning of the contractual agreement.

Randolph Tp. Bd. of Ed.

However, when an employer is charged with a unilateral change in a past practice, the contract provides a defense only where it specifically and expressly authorizes the change.

Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983).

In Barneget Tp. Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990), the Commission, affirming the Hearing Examiner, found that the Board violated the Act when it unilaterally ended a two-year past practice of permitting cafeteria and custodial employees to convert unused personal days into accumulative sick days. Although the cafeteria/custodial employees' collective negotiations agreements provided that personal days could not be accumulated, the agreements were silent about whether personal days could be converted into sick days; the agreements did not restrict the accumulation of sick leave. Based upon these circumstances, the Hearing Examiner concluded that the contracts were not clear and unequivocal on the issue of conversion of personal days to sick days and therefore did not permit the Board to alter the conversion past practice. The employer argued that there could be no binding past practice here of converting personal days into sick days because the "practice" arose only when its payroll clerk made an error and acted outside the scope of her authority. The Commission observed that this argument did not focus on the issue. The Commission stated:

We...do not determine...whether the parties have breached contractual commitments or...past practices. We ask only whether an employment condition has been changed, thus triggering the

duty to negotiate under section 5.3. Under the conditions of this case, a condition existed and was changed without negotiations.

Barnegat Tp. Bd. of Ed., 16 NJPER at 485 (emphasis added)

Similarly, in Orange Bd. of Ed., P.E.R.C. No. 91-73, 17 NJPER 154 (¶22063 1991), the Board argued against the past practice of paying home instructors for an entire hour regardless of the length of the instruction session held -- one that might have been shortened by the student; the Board contended the minimum payment was not "legitimate." The Commission stated:

Our role, however, is not to evaluate the worth of an existing practice. We simply enforce the statutory requirement that: Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. [N.J.S.A. 34:13A-5.3]

Orange Tp. Bd. of Ed., 17 NJPER at 155.

In Tp. of Jackson, P.E.R.C. No. 81-76, 7 NJPER 31 (¶ 12013 1980), the Commission found the Township violated the Act when it unilaterally stopped the past practice of paying the tuition of police officers for courses in subjects other than police science, but which were required for a degree in police science. The contract provided "tuition...will be paid by the Township...[for] any course related to police science...." In January 1980, the Township began a policy of paying for only police science courses. Prior to that time, under the parties' past practice, the Township paid for all courses required to obtain a police science degree. The Commission concluded that the contract language was not clear

and unequivocal; therefore, it found the parties' past practice controlled and required the Township to pay for all courses required to earn a police science degree.

In Tp. of Irvington, P.E.R.C. No. 84-97, 10 NJPER 165 (¶15081 1984), the Commission, affirming the Hearing Examiner, found the Township violated the Act when it unilaterally discontinued the parties' past practice of paying housing inspectors for weekend standby time. Although the contract contained a provision for standby time for certain other unit employees (employees of the Division of Streets and Sewers), because housing inspectors were paid under the past practice at a different rate than was contractually provided for the Streets and Sewers employees, the Hearing Examiner concluded that the contract provision was never intended to apply to housing inspectors; therefore, the Hearing Examiner found the contract provision was not a waiver of negotiations rights on this issue and the past practice controlled. Accordingly, pursuant to the parties' past practice, the Commission found the housing inspectors were entitled to compensation for weekend standby time.

In the instant matter, prior to May 1997, there was (at least) a nine-year past practice of paying retiring officers the full amount of the clothing and maintenance allowance. In May 1997, the Township unilaterally reduced the amount of the clothing and maintenance allowance payment to four officers who had each submitted their retirement papers. The Township pro-rated the

amount of their clothing and maintenance allowance, based upon the specified retirement date of each employee. Thus, here, as in Barnegat, an employment condition existed and was changed without negotiations, thus violating 5.4a(1) and (5).

No provision in the contract specifically and expressly authorized the Township's action reducing the clothing and maintenance allowance payment to the retiring officers. The contract obligates the Township to pay all officers the full \$500.00 maintenance allowance in cash and the full \$500.00 clothing allowance, in cash to non-uniformed officers and on account to uniformed officers. The past practice addresses the payment of the clothing and maintenance allowance to retiring officers -- officers in their last year of employment before retirement; the practice provides that all retiring officers be paid the full \$500.00 maintenance allowance in cash and the full \$500.00 clothing allowance in cash. There was no basis -- either in the contract or past practice -- for unilaterally altering that practice.

Accordingly, based on the foregoing facts and applicable law, I reach the following:

CONCLUSIONS OF LAW

(1) The Township violated 5.4a(1) and (5) of the Act by unilaterally reducing the payment for the clothing and maintenance allowance to retiring officers by pro-rating the payment based upon each employee's designated retirement date.

(2) PBA Local 33's Motion for Summary Judgment is granted.

RECOMMENDED ORDER

I recommend that the Commission order:

A. That the Respondent Township of Nutley cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by refusing to negotiate in good faith with PBA Local 33 concerning the alteration of the clothing and maintenance allowance for retiring officers.

2. Refusing to negotiate in good faith with PBA Local 33 concerning terms and conditions of employment, including the alteration of the clothing and maintenance allowance for retiring officers.

B. That the Township take the following affirmative action:

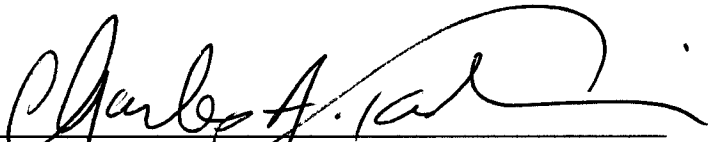
1. Resume paying retiring officers the full amount of the clothing allowance and the full amount of the maintenance allowance in the last calendar year of their employment.

2. Make whole any officers who retired since May 1997 for any losses sustained due to the alteration of the clothing and maintenance allowance for retiring officers, plus interest pursuant to R. 4:42-11(a)(ii)

3. Negotiate in good faith with PBA Local 33 before changing the amount of the clothing and maintenance allowance for retiring officers.

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. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.



Charles A. Fadduni
Hearing Examiner

Dated: March 1, 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 NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by refusing to negotiate in good faith with PBA Local 33 concerning the alteration of the clothing and maintenance allowance for retiring officers.

WE WILL NOT refuse to negotiate in good faith with PBA Local 33 concerning terms and conditions of employment, including the alteration of the clothing and maintenance allowance for retiring officers.

WE WILL resume paying retiring officers the full amount of the clothing allowance and the full amount of the maintenance allowance in the last calendar year of their employment.

WE WILL make whole any officers who retired since May 1997 for any losses sustained due to the alteration of the clothing and maintenance allowance for retiring officers, plus interest pursuant to R.4:42-11(a)(ii).

WE WILL negotiate in good faith with PBA Local 33 before changing the amount of the clothing and maintenance allowance for retiring officers.

Docket No. CO-H-97-427

Township of Nutley
(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"