

I.R. NO. 2009-9

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF ROSELLE,

Respondent,

-and-

Docket No. CO-2009-075

PBA LOCAL 99,

Charging Party.

SYNOPSIS

Three police officers employed by the Borough of Roselle applied for and were granted family leave under the FMLA/NJFLA. Two officers were granted leave for the birth of a child and one was granted leave for the care of a seriously ill spouse. The Borough denied the employees' requests to use their sick leave to remain in pay status. In the past, the Borough had allowed officers to use paid sick time during approved family leave. The Commission Designee granted interim relief for the officer who sought to substitute sick time during his leave to care for his spouse and denied relief for the two other officers who were on family leave for the birth of a child. As to the latter two officers, the Commission Designee found that the PBA had not established a likelihood of success, one of the requisite elements for the grant of interim relief, since there existed a provision in the parties' collective agreement which may control the conditions of employment related to the type of paid leave available to employees on leave for the birth of a child.

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Appearances:

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

For the Charging Party, Mets Schiro & McGovern,
attorneys (Kevin P. McGovern, of counsel)

INTERLOCUTORY DECISION

On September 8, 2008, the Policemen's Benevolent Association, Local 99 (PBA) filed an unfair practice charge, accompanied by an application for interim relief, seeking temporary restraints, with the Public Employment Relations Commission (Commission) alleging that the Borough of Roselle (Borough) violated 5.4a(1), (3) and (5)^{1/} of the New Jersey

^{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; (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

(continued...)

Employer-Employee Relations Act, N.J.A.C. 34:13A-1 et seq. (Act), when on or about July 2008, the Borough denied the respective requests of certain police officers to use paid sick leave for a Family Medical Leave Act (FMLA)/New Jersey Family Leave Act (FLA) covered event. The PBA alleges that the Borough's denial of the officers' use of paid sick time to cover their leave period constitutes a unilateral change in terms and conditions of employment in the form of a change in the established practice and, since the alleged change occurred after the expiration of the collective agreement, such change has a chilling effect on negotiations for a successor agreement.

On September 10, 2008, I executed an order to show cause, denied temporary restraints, and set a return date for October 15, 2008, for oral argument. The parties submitted briefs, affidavits and exhibits and argued orally on the scheduled return date. The following facts appear.

The PBA is the majority representative of a collective negotiations unit comprised of patrol officers and sergeants employed by the Borough. The Borough is a public employer within the meaning of the Act. The Borough and the PBA are parties to a

1/ (...continued)
concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

collective negotiations agreement covering the period from January 1, 2004 through June 30, 2008. The parties began negotiations for a successor agreement on September 11, 2008.

Article V, E., Child Birth, of the collective agreement states:

Upon written notice to the Chief, an Officer shall be allowed to save four (4) vacation days to be used, as needed, due to the birth, placement or adoption of a child.

Article V, F., Sick Leave, states:

Officers shall be entitled to unlimited sick time of up to one (1) year.

Three officers applied for leave under the FMLA/FLA.^{2/} On or about June 9, 2008, Officer Timothy Baylock requested leave beginning on July 14, 2008, and returning on September 29, 2008. The reason for his request was to care for a newborn child. Baylock submitted no certification; consequently, it is unknown whether he sought to remain in pay status during his leave or, if he did, the type of paid leave he sought to substitute for unpaid family leave. Therefore, I make no finding regarding Officer Baylock's circumstance and grant no relief as to him.

^{2/} With regard to the FLA, N.J.A.C. 4A:6-1.21B(h) provides: "...that nothing in the FMLA supercedes any provision of the State law that provides greater rights than those provided under the FMLA, and further provided that rights under the FMLA shall not be diminished by State law." Thus, rights granted under the FMLA would be allowed under the FLA. Consequently, the parties stated their arguments in terms of the FMLA.

In July 2008, Officer William Byrnes sought the use of family leave for the birth of his child. Byrnes, having been granted the use of sick leave in 2004 for the birth of his first child, expected to be permitted to again use sick time to remain in pay status for the birth of this child. Byrnes began his family leave on August 5, 2008. Subsequently, the Borough notified him that it would not authorize the use of sick time during his family leave and that in order to remain in pay status, Byrnes would be allowed to use vacation or personal time. Alternatively, Byrnes could opt to take his leave without pay. Byrnes elected to use vacation, personal days and compensatory time to remain in pay status during his leave. Consequently, upon Byrnes' return to work on September 14, 2008, he had exhausted all paid leave time and would be unable to take any paid time off at any other point during calendar year 2008.

In or about July 7, 2008, Sergeant Michael Cyktor requested the use of family leave in order to care for his wife who underwent reconstructive knee surgery. Cyktor requested and was granted family leave between July 12, 2008 and August 20, 2008; a total of twenty work days. Cyktor expected to be able to charge his family leave time against paid sick leave. However, he was advised by the Borough that he would not be allowed to use paid sick time and could either take unpaid family leave or use accumulated personal or vacation time in order to remain in pay

status. Cyktor opted to use accumulated personal and vacation time during his family leave.

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).

The PBA alleges that the Borough unilaterally modified a mandatorily negotiable term and condition of employment, thus the Borough violated 5.4a(5) of the Act when it denied employees the right to use paid sick time during an FMLA leave unrelated to the employees' own medical condition. Paterson PBA Local 1 v. Paterson, 87 N.J. 78 (1981) governs negotiability for police and fire employees. Here, it must be determined whether a particular issue in dispute is controlled by a specific statute or regulation. If it is, then the matter must be deemed to be preempted and, therefore, not negotiable. See State Supervisory Employees Association, 78 N.J. 54, 81 (1978). Negotiations are

only preempted if the contract language conflicts with a statute or regulation that expressly, specifically, and comprehensively sets the terms and condition of employment. Bethlehem Tp. Ed. Assn. v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982). To be preemptive, such a statute or regulation must eliminate the employer's discretion to agree to grant the benefit sought; where the employer's discretion is preserved, the statute or regulation is not deemed preemptive. Id.

The FMLA, 29 U.S.C. §2612(d), Relationship to Paid Leave, states, in relevant part, as follows:

(2) Substitution of paid leave

A. In General. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A) [the birth of a child], (B), (C), or (E) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection.

B. Serious Health Condition. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection, except that nothing in this title [29 U.S.C.A. §§2611 et seq.] shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

The dispute in this case is not whether the employees were granted FMLA leave, since they all were, but whether they could use their contractually derived unlimited sick leave to remain in pay status during the leave. In Cyktor's case I find that the FMLA does not prohibit his ability to substitute the use of paid sick time for unpaid leave. 29 U.S.C. §2612(d)(2)(B) expressly contemplates the use of sick leave where an employee uses FMLA leave in order to care for a spouse suffering a serious health condition, as has occurred in Cyktor's case. The statute goes on to indicate that the employer is not required to provide paid sick leave where the employer would not normally provide such paid leave. However, here the employer's normal practice appears to allow employees to substitute paid sick leave when granted leave under the FMLA.

The Borough argues that Cyktor is not entitled to paid sick time because the FMLA refers to "accrued" paid leave and that since police officers are granted a one year period of unlimited sick leave, officers do not "accrue" sick time. The Borough's argument is not convincing. The definition of "accrue" in Webster's Ninth New Collegiate Dictionary, (1985) states: "to come into existence as a legally enforceable claim." I find that the sick leave granted pursuant to the terms of the collective agreement comes into existence as a legally enforceable claim and thus is "accrued".

Byrnes' circumstance differs from Cyktor's. Byrnes sought to use sick leave while on family leave due to the birth of his child. The Borough argues that the FMLA does not provide for the substitution of paid sick leave in the case of FMLA leave granted for the birth of one's child. Under the facts in this case, I need not determine whether employees have the right under the FMLA to substitute paid sick leave for the birth of a child. The parties have negotiated Article V, Section E, in the collective agreement which the Borough argues is controlling with regard to time off due to the birth of a child. The law is well settled that an employer has met its negotiations obligation when it acts pursuant to its collective agreement. Sussex-Wantage Reg. Bd. of Ed., P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985); Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554 (¶11281 1980). Thus, even where an employer deviates from a practice that has existed for many years, it does not waive its contractual rights and does not violate the Act by subsequently acting pursuant to the collective agreement. New Jersey Sports & Exposition Authority, P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987). Consequently, assuming arguendo that the substitution of paid sick leave is not preempted by the FMLA, it is not for me to interpret the parties' collective agreement, but to leave that task to the negotiated grievance procedure, including arbitration, to determine whether Article V, Section E., is

controlling with regard to the kind of paid time that may be charged on the occasion of the birth of a child.

Accordingly, I find that the PBA has established a likelihood of success in the circumstance of Michael Cyktor but has not established a likelihood of success in the circumstance of William Byrnes.

In the case of Cyktor, I find that the PBA has established irreparable harm. Leave time which may be wrongfully denied represents leave opportunities which are lost forever and may not be remedied later by way of a Commission order. See City of Trenton, I.R. No. 2003-4, 28 NJPER 368 (¶33134 2002); North Bergen Tp., I.R. No. 97-16, 23 NJPER 249 (¶28119 1997); Essex Cty., I.R. No. 90-2, 15 NJPER 459 (¶20188 1989). Because Cyktor has been required to charge some twenty vacation and personal days to remain in pay status during his family leave, he will be unable to take additional time off at a later date, to the degree that he had expected, as the result of the Borough's denial of his request to use sick leave. That time cannot be recovered.

In weighing the relative hardships to the parties resulting from the grant or denial of interim relief, I find that the scale tips in favor of the PBA in Cyktor's case. This interim order merely returns the Borough and Cyktor to the status quo ante. The issue here is not whether Cyktor is granted leave, since Cyktor was allowed leave time to care for his wife. The issue is

whether the time is charged against sick leave or other paid leave time. Thus, the City stands to suffer little harm with respect to its ability to maintain the public safety, whereas Cyktor will suffer irreparable harm as the result of not being able to enjoy time off to which he is entitled.

The public interest is not injured by granting Cyktor and the PBA relief in this case. Allowing Cyktor to take additional earned leave as he would otherwise be entitled to enjoy under the Borough's established leave program, does not interfere with the public interest of maintaining an acceptable level of public safety. Moreover, the public interest is also fostered by requiring the Borough to adhere to the tenets of the Act.

ORDER

The PBA's application for interim relief for Byrnes and Baylock is denied.

The City is restrained from denying Cyktor the ability to substitute sick leave for unpaid family leave or other paid leave time during the family leave period of July 12 through August 20, 2008. This interim order will remain in effect pending a final Commission order in this matter.

The unfair practice charge will proceed through the normal unfair practice processing mechanism.

A handwritten signature in black ink, appearing to read "Stuart Reichman", written over a horizontal line.

Stuart Reichman
Commission Designee

DATED: October 22, 2008
Trenton, New Jersey