

P.E.R.C. NO. 91-111

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF NEPTUNE,

Respondent,

-and-

Docket No. CO-H-90-300

F.O.P. LODGE #19, SUPERIOR OFFICERS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Township of Neptune. The Complaint, based on an unfair practice charge filed by FOP Lodge #19, Superior Officers, alleged that the Township violated the New Jersey Employer-Employee Relations Act by unilaterally denying unit employees the right to use accumulated sick leave without proof of sickness as part of a terminal leave before retirement. The Commission concludes that even though the Township may have allowed the use of accumulated sick time in the past, the Township retained the right to approve the use of sick time and to require verification of sickness.

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Charging Party.

Appearances:

For the Respondent, Ruderman & Glickman, attorneys
(Steven S. Glickman, of counsel)

For the Charging Party, Klausner & Hunter, attorneys
(Stephen B. Hunter, of counsel)

DECISION AND ORDER

On April 9, 1990, F.O.P. Lodge #19, Superior Officers filed an unfair practice charge against the Township of Neptune. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),^{1/} by unilaterally denying unit employees the right to use accumulated sick leave,

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

without proof of sickness, as part of a terminal leave before retirement.

On June 22, 1990, a Complaint and Notice of Hearing issued. On July 3, 1990, the Township filed an Answer generally denying that it had violated the Act.

On August 30, 1990, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by December 3, 1990.

On February 7, 1991, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 91-20, 17 NJPER 104 (¶22047 1991). He found that the FOP did not prove a past practice of permitting employees to use accumulated sick leave, whether they were sick or not, prior to retirement. He further found that even if such a practice existed, it was inconsistent with the parties' collective negotiations agreement.

On March 19, 1991, after an extension of time, the FOP filed exceptions. It also relies on its post-hearing brief. On April 10, 1991, after an extension of time, the Township filed a reply.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-19) are accurate. We incorporate them here. We will now address each exception and reply.

1. The FOP asserts that the Hearing Examiner erred by finding that it contended that Lieutenant Jobs' leave was terminal

rather than medical. The Township asserts that the FOP had relied on Jobes' medical leave in support of its arguments. The FOP's reliance is not the issue. More important is our finding that Jobes was on an approved extended sick leave until his retirement.

2. The FOP asserts that the Hearing Examiner erred by not finding that Smidt was on terminal leave despite his and former Chief Ward's testimony. The Township asserts that Smidt used verified sick leave prior to retirement. We cannot, on this record, determine whether Smidt was actually disabled during his terminal leave. We note, however, that doctors' notes were submitted during the disputed period and that those notes undercut the FOP's argument that Smidt used accumulated sick leave without being sick. The FOP has not presented any satisfactory explanation why Smidt would have submitted doctors' notes if he was not required to do so.

3. The FOP asserts that the Hearing Examiner erred by not finding that Sergeant Hulse was on terminal leave despite Chief Ward's testimony that Hulse was able to perform the duties of his position during that time and the fact that Hulse did not have sufficient accumulated personal, compensatory or vacation leave to cover the leave period. The Township asserts that the FOP failed to provide any evidence supporting its contention that Hulse used unverified sick leave. We accept the inference that Hulse used accumulated sick leave prior to his retirement without medical documentation. The Chief so testified and the Township failed to produce any contrary evidence. In the absence of any supporting

evidence, we reject any inference that Hulse was sick because of the "traumatic" incident prior to his retirement.

4. The FOP asserts that the Hearing Examiner erred by not finding that Chief Ward was granted terminal leave. The Township asserts that it "flies in the face of logic" to believe that Ward would have used only a small amount of accumulated sick time if he could have retired earlier and received an additional \$30,000 for his accumulated time. The Hearing Examiner found that Ward used a relatively small amount of accumulated sick days during his terminal leave period (H.E. at 16). We accept that finding.

5. The FOP asserts that the Hearing Examiner erred by finding that there was no evidence that Lieutenant Hulse used accumulated sick leave despite evidence that he was capable of working and did not have sufficient accumulated personal, compensatory or vacation leave to cover the leave period. The Township asserts that the FOP failed to prove that Hulse used unverified sick leave since it can be inferred that he had a medical disability. We accept the inference that Hulse used accumulated sick leave prior to his retirement without medical documentation. There is insufficient evidence in the record to support an inference that Hulse had a medical disability prior to his fatal heart attack.

6. The FOP asserts that the Hearing Examiner erred by finding that Chief Gilbert was not granted terminal leave. The Township asserts that Gilbert did not use unverified sick leave as part of his terminal leave. The Hearing Examiner accurately found

that Gilbert took terminal leave but did not use accumulated sick leave.

7. The FOP asserts that the Hearing Examiner erred by finding that Captain Martin was not granted terminal leave despite the Township's failure to show that it sought to verify his use of sick leave. The Township asserts that Martin was on verified sick leave between December 1985 and April 1986 and that such a finding is supported by a doctor's note and department records. We are not in a position to judge whether Martin was really sick during his terminal leave period. We must simply evaluate the department records giving medical reasons for his use of sick leave and a doctor's note which, although covering a period extending into Martin's vacation time, we infer was submitted to justify his sick leave.

8. The FOP asserts that the Hearing Examiner erred by failing to consider the terminal leave benefits granted to Officer Stedman. The Township asserts that the charging party failed to establish that Stedman converted sick leave into terminal leave. The Hearing Examiner correctly found that Stedman used accumulated sick leave during his terminal leave. There is no evidence in the record to support an inference that Stedman was either ill or required to submit verification of illness.

9. The FOP asserts that the Hearing Examiner erred by finding that Lieutenant Scott was on an approved medical leave and not terminal leave despite medical documentation indicating that he

was able to perform light duty during his leave. The Township asserts that Scott was on an approved, verified medical leave. We find that the Township determined that, in light of a doctor's note limiting Scott to light duty and the fact that he had moved to Florida, it would continue to allow him to use accumulated sick leave.

10. The FOP asserts that the Hearing Examiner erred by not finding that Lieutenant Crane was on terminal leave despite the absence of medical documentation for his use of accumulated sick leave during the last 10 months of his terminal leave.^{2/} The Township asserts that Crane was on a verified medical leave from November 14, 1989 through September 1, 1990. We accept the Hearing Examiner's finding that the Township approved Crane's use of accumulated sick leave during his terminal leave. The Township's business administrator told the chief that, based on doctors' reports, Crane could remain on medical leave but that the chief should continue to receive medical reports. The fact that no further medical verification may have been submitted does not prove that Crane had the right to use accumulated sick leave without Township approval.

11. The FOP asserts that the Hearing Examiner erred by insisting that there be some evidence of a formal conversion of

^{2/} The FOP contends that Crane's leave was from November 14, 1989 through September 1, 1990, not from June 1989 as found by the Hearing Examiner.

leave entitlements into terminal leave. The Township asserts that no practice existed of converting sick leave into terminal leave. The Hearing Examiner did not require that the FOP show a formal conversion. He simply found, in evaluating the terminal leave practice, that no formal conversion had taken place.

12. The FOP asserts that the Hearing Examiner erred by concluding that Smidt, Ward, Gilbert and Stedman were not within the FOP's unit and then discounting the other instances where terminal leave was granted. The Township asserts that the circumstances involving Smidt, Ward, Gilbert and Stedman could not be relied on to prove the FOP's allegations. The Hearing Examiner correctly found that at the time of their retirement, Smidt, Ward, Gilbert and Stedman were not in titles now in the FOP's unit. He nevertheless found no evidence that accumulated sick leave was converted into terminal leave. Those limited findings are accurate.

13. The FOP asserts that the Hearing Examiner erred by concluding that the Township consistently sought to verify sickness when terminal leave applications were made. The Township asserts that the FOP failed to establish any alleged past practice. It argues that 7 out of 10 police officers referred to by the charging party used sick time in accordance with the contract. It further argues that there is no concrete testimony and no documentation that the Township ever accepted the use of sick leave as alleged. The Hearing Examiner accurately found that the Township determined who was authorized to use sick leave prior to retirement and what level of sickness verification was required.

14. The FOP asserts that the Hearing Examiner erred by failing to find a practice of allowing police employees to use all of their accumulated vacation, compensatory, personal and sick time just prior to retirement. The Township asserts that there was no past practice of permitting employees to use sick leave when they were not sick.

Some unit employees, and some who may not have been in the FOP's unit, were allowed to use accumulated sick leave without having to meet strict verification requirements. Some went months without a doctor's note. Others were permitted to use their accumulated time despite evidence that they were able to work in some capacity.

Nevertheless, the record does not support a finding that the Township was obligated to permit the use of accumulated sick leave prior to retirement. A reading of the evidence most favorable to the FOP shows that Township officials were often inclined to permit use of accumulated sick leave with only a minimal showing of sickness or disability. But even under such a favorable reading, employees still needed Township approval to use that leave time.

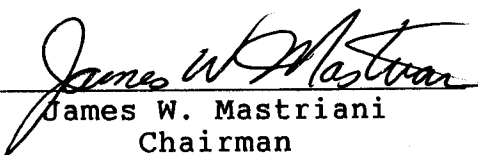
Thus, under all the circumstances of this case, we find that the Township did not violate its negotiations obligation when its business administrator announced that employees would not be permitted to use sick leave before retirement without proof of sickness. Although Township representatives may have allowed, and even encouraged the use of accumulated time in the past, the

Township always retained the right to approve the use of sick time and to require verification. Accordingly, we dismiss the Complaint.^{3/}

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Goetting, Regan and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith voted against this decision.

DATED: June 20, 1991
Trenton, New Jersey
ISSUED: June 21, 1991

^{3/} In light of this holding, we need not decide the effect of the contract's sick leave provision.

H.E. NO. 91-20

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

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-and-

Docket No. CO-H-90-300

F.O.P. LODGE #19, SUPERIOR OFFICERS,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Township of Neptune did not violate the New Jersey Employer-Employee Relations Act by denying an employee the opportunity to use accumulated sick leave, whether sick or not, just prior to retirement. The Hearing Examiner found that FOP Lodge 19, Superior Officers did not prove that a past practice existed permitting employees to use accumulated sick leave whether sick or not just prior to retirement. The Hearing Examiner also found that even if such a practice existed, it was inconsistent with the parties' collective agreement.

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

H.E. NO. 91-20

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For the Respondent, Ruderman & Glickman, Attorneys
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For the Charging Party, Klausner & Hunter, Esqs.
(Stephen B. Hunter, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (Commission) on April 9, 1990 by F.O.P. Lodge #19, Superior Officers, Neptune Township (FOP) alleging that the Township of Neptune (Township) violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} The FOP alleged the Township

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

unilaterally rescinded a past practice by denying Sgt. Eugene Blecki's request to "convert" accumulated sick time into a "terminal leave benefit" prior to retirement. The FOP seeks an order reinstating the alleged past practice and granting Sgt. Blecki his requested leave benefit.

A Complaint and Notice of Hearing (C-1) was issued on June 22, 1990. The Township filed an Answer (C-2) on July 3, 1990 denying that it violated the Act.

A hearing was conducted on August 30, 1990.^{2/} Both parties filed post-hearing briefs by December 3, 1990.

Based upon the entire record I make the following:

Findings of Fact

1. The Township and FOP are parties to a collective negotiations agreement (J-1) effective from January 1, 1988 - December 31, 1990. The FOP represents a unit of superior officers including sergeants through captain.

J-1 contains the following pertinent clauses: a grievance procedure ending in binding arbitration (Art. 3); vacation time (Art. 9); fourteen holidays and two personal days per year which cannot be accumulated year to year (Art. 10); compensatory time and court time (Art. 8 and Art. 20); and sick leave (Art. 11) and retirement (Art. 19) clauses.

^{2/} The transcript will be referred to as "T."

Employees may use sick leave when they are unable to perform their work due to personal or family illness and non-work related causes.

Art. 11, Section A provides as follows:

Service Credit for Sick Leave

1. All permanent employees or full-time provisional employees shall be entitled to sick leave with pay based on their aggregate years of service for non-work related causes.

2. Sick leave may be utilized by employees when they are unable to perform their work by reason of personal illness, non-work related accident, or exposure to contagious disease which is non-work related. Sick leave benefits may also be utilized in order to attend a member of the employee's immediate family who is seriously ill, or when the employee's attendance is required by a member of the immediate family. Immediate family shall be defined as the employee's husband, wife, child, stepchild, mother, father, brother, sister, or spouse's mother, father, brother or sister.

An employee absent more than three days due to illness or disability must produce a written doctor's statement.

3. Any absence on account of illness or disability of an employee or a member of the employee's immediate family in excess of three (3) days must be certified by a written statement from the attending physician.

During protracted illness or disability the Township may require interim physician reports which the employee must follow.

4. During protracted periods of illness or disability of an employee or a member of the employee's immediate family, the Township Committee may require interim reports on the condition of the patient at weekly or bi-weekly periods, from the attending physician and/or a Township medical physician. When under medical care, employees are expected to conform to the instructions of the

attending physician if they wish to qualify for salary payment during such period of illness or disability.

Employees must report sick leave absences to their supervisor (Art. 10, Sec. C(1)(a) and (b)). The Township may verify the use of sick leave, and can require proof of illness of an employee on sick leave, and can require an examination to determine whether an employee can or should return to work. Art. 11, Sec. D provides:

D. Verification of Sick Leave

1. An employee who shall be absent on sick leave in excess of three (3) consecutive working days shall be required to submit acceptable medical evidence substantiating the illness. The Township may require proof of illness of an employee on sick leave. Abuse of sick leave shall be cause for disciplinary action.

3. The Township may require an employee who has been absent because of personal illness, as a condition of his return to duty, to be examined, at the expense of the Township, by a physician designated by the Township. Such examination shall establish whether the employee is capable of performing his normal duties and that his return will not jeopardize the health of other employees.

The Township may also require physical examinations based on Job Incurred Injuries (Art. 12) and pursuant to the Health and Welfare clause, Art. 13, Sec. D.

Under Art. 19, the Retirement clause, retiring employees are eligible to receive payment for accumulated sick leave benefits.

C. Any employee who retires under the Police and Firemen's Retirement System shall be eligible to receive payment for accumulated sick leave benefits on the following basis:

1. Employees with a minimum of ten (10) years of service to the Township of Neptune as of January 1,

1979 and who shall have accumulated sick leave upon retirement shall be entitled to one-half (1/2) day's pay at the rate of pay in effect at the time of retirement for each full day of unused accumulated sick leave up to a maximum of three hundred sixty five (365) days which is the equivalent of a maximum of one hundred eighty two and one-half days pay.

D. Said accumulated sick leave benefits will be paid in full to the employee upon his retirement provided that there are sufficient funds remaining from that individual employee's budgeted salary. In the event there are not sufficient funds from the individual employee's budgeted salary, then the Township, at its option, may pay the entire sum due or only so much of the sum due as remains from the employee's budgeted salary and the Township may pay the balance in the next fiscal year.

E. In the event of the employee's death prior to his retirement, such accumulated sick leave benefit will be paid on the basis noted in C. above to the employee's designated beneficiary or estate.

J-1 also contains a fully bargained clause, Art. 24.

There was no language in J-1 about a different use or treatment of sick leave just prior to retirement.

No evidence was presented showing how long the sergeants through captains have been represented by the FOP or some predecessor employee representative, or whether some or all of the above-cited contract language was included in any prior agreement.^{3/}

^{3/} Exhibits R-69 and R-70 do refer to a verification of sick leave clause, which is similar to Art. 11, Sec. D of J-1, but that agreement was not introduced and there was no showing who was covered by it, but it appears that the PBA not the FOP was the majority representative.

2. "Terminal leave" was the phrase used by employees of the Township's police department to define that period of time when a police employee was using all of his accumulated vacation time, compensatory time, personal days, and some or all approved sick leave just prior to the effective date of his retirement. (T49, T60, T100).^{4/} There was no "terminal leave benefit" in J-1, and no language in J-1 that employees could use sick leave if they were not sick. (T133).

I find that the terminal leave past practice that was in effect was to allow police employees to use all of their accumulated vacation, compensatory, personal, and approved sick time just prior to retirement.

3. From at least 1978, several police employees holding a rank sergeant through captain were in terminal leave periods prior to retirement. The terminal leave period could be arranged by an

^{4/} FOP President Lt. Robert Adams testified that accumulated vacation, personal and compensatory time are components of or part of "terminal leave" (T131), and that another part was the use of accumulated sick time prior to retirement whether or not an employee was sick (T132). Chief Anthony Paduano testified, however, that an employee could use his sick leave as part of his terminal leave whether he is sick or not, "...if it's granted by the administration." (T61). Although the evidence does not support their testimony that sick leave could be used during the terminal leave period whether an employee was sick or not (T80-T83, T101, R-50, R-51, R-69 -- R-81), I credit that part of Paduano's testimony where he said sick leave can be used prior to retirement "if granted by the administration," and infer therefrom that the use of sick leave, even during the terminal leave period, was subject to Township approval. (See also R-49, R-69, R-70, R-72, R-81 and further documents and discussion, infra.)

employee eligible for retirement notifying the Chief of Police of his intent to retire and his desire to use his accumulated time prior to retirement. The Chief would calculate the time and normally discuss it with, or submit a recommendation to, a Township official, often the business administrator. (T22, T24, T25, T48, CP-6, R-41, R-58, R-68).

In 1978 Sgt. Willard Hulse sought retirement and requested terminal leave. Then Chief A. Leroy Ward obtained administrative approval and Hulse was placed in a terminal leave period for three months from April to June 1978 (T24, T35). Although Ward was certain that Hulse did not submit medical documentation during the terminal leave period (T24), he had no knowledge as to how leave was recorded on a day-to-day basis (T42). There was no evidence that sick leave -- as opposed to vacation, compensatory or personal time -- was used as part of Sgt. Hulse's terminal leave period. (T42).

4. In May 1978, Lt. George Jobs injured his back at work and was out of work many days. (R-63 -- R-66). On December 11, 1978 Jobs sent a memo to Chief Ward (R-67) requesting he "be allowed to start an extended use of [his] accumulated sick leave" on January 1, 1979. On December 13, 1978 (R-68), Chief Ward sent a copy of R-67 to then Township Business Administrator Joseph Bennett, asking how to handle Jobs' request.

By memorandum to Ward on December 19, 1978 (R-69) Bennett cited a verification of sick leave clause from a collective

agreement presumably covering Jobes, which required employees to submit acceptable medical evidence substantiating an illness. Bennett required Jobes to submit medical evidence supporting his request for sick leave. By memo to Ward on December 22, 1978 (R-70), Bennett denied Jobes' request for sick leave because no medical evidence had been produced. Bennett indicated that Jobes' request would be reevaluated if evidence was submitted.

On December 26, 1978 a physician examined Jobes, found he had back problems, and recommended to Bennett that Jobes be granted sick leave (R-71). On December 29, 1978 Bennett sent a letter to Ward (R-72) apparently approving the sick leave based upon R-71, but reserving the right to request interim medical reports. Jobes was reexamined, and on March 7, 1979 the physician informed Bennett (R-73) that Jobes was not ready to return to work. On March 16, 1979 (R-74), Bennett sent Ward a copy of R-73 and asked for an update of Jobes' sick time.

Jobes was on leave from either January 1 or April 1, 1979 until November 1980 when he retired.^{5/} On August 15, 1979 Bennett notified Jobes that he was to be examined by another physician (R-75), who was to notify Bennett of the results. (R-76). On September 14, 1979 a physician sent Bennett a report explaining the

^{5/} It is not clear from the evidence whether Jobes went on extended sick leave on January 1 or April 1, 1979. Exhibit R-72 suggests the leave was approved as of January 1, but Paduano testified Jobes was on leave from April 1979 until his retirement in November 1980. (T91).

nature of Jobes' back problems and concluding he might have a herniated disc (R-77). Bennett sent R-77 to the Township Committee and recommended that Jobes be instructed to retire effective December 1, 1979, rather than be allowed to continue on sick leave with no hope of returning to work (R-78). On February 15, 1980 (R81), Bennett explained to Jobes that since the evidence showed that his condition was not improving to the point where he could return to work, he (Bennett) requested Jobes file for a disability retirement. There was no evidence showing what type of leave Jobes was on after R-81 until his retirement.

Ward was Chief when Jobes began his extended sick leave but had retired on November 1, 1979 (T25), before Jobes was sent R-81. After testifying that during his tenure as Chief terminal leaves were granted for Sgt. Hulse and a Detective Smidt, Ward was asked:

During the course of your tenure as chief of police, were there any other instances in which a terminal leave benefit was sought and granted. (T24).

He responded:

No, except for my own. (T24).

I credit Ward's testimony and infer therefrom, and from the language of R-67, that while Ward was Chief, Jobes had not requested he be placed on terminal leave. I find that Jobes was on extended sick leave from 1978, through Ward's retirement on November 1, 1979, and at least through the receipt of R-81. Since there was no evidence that Jobes requested he be placed in his terminal leave period before or after receiving R-81, and since R-77 showed it was

medically unlikely that Jobes could return to work, I find that Jobes was on approved extended sick leave until his retirement.

5. Lt. Howard Hulse was in his terminal leave period from January 1981 until his death in April 1981. He died before his official retirement date and before he used all of his accumulated vacation, personal, compensatory and sick leave (T46, T50-T51, T102). There was no showing that Lt. Hulse had actually used sick leave during his terminal leave period (T50-T51, T103).

6. Capt. Vincent Martin was in his terminal leave period from December 1985 until his retirement on April 1, 1986, but he actually worked a few days during that time period (T46, T76, T109, R-50, R-51). Exhibits R-50 and R-51 were Martin's absentee calendars on which his work absences and the specific reason for each absence were listed for 1985 and 1986, respectively. Paduano's secretary kept those records and recorded the information (T71). The procedure is for a police employee to either telephone or turn in an absence slip or sick form to his shift commander listing the reason for absence, i.e. vacation, compensatory, sick etc., and the information is passed along to Paduano's secretary (T72, T79). There are separate markings on R-50 and R-51 to record the kind of leave used: sick leave, vacation, compensatory time, and personal days. There is no marking for a leave called "terminal leave." The second page of each document lists the reason for the use of each sick day.

Exhibit R-50 shows that in 1985 Martin: worked December 2-4, 9 and 10, 16 and 17, and 30 and 31; used sick leave December 5 and 6 (inner ear infection), 11-13 (back problem), and 18 (high fever); used personal days December 19 and 20; and, used vacation December 23-27. R-51 shows that in 1986 Martin: worked January 6 and 7, 13 and 14, and March 3; used sick leave January 1-3 and 8-10 (virus), January 15-17 and March 4-31 (ear infection); used personal days January 20 and 21; and, used vacation January 22-31 and all of February. A sick report and doctor's note (R-52) was provided to verify Martin's sick leave for March 1986.

There was no indication on R-50 and R-51 that Martin's sick leave, vacation or personal days were "converted" to a leave status called "terminal leave." In fact, there was no mention of terminal leave on those exhibits. Thus, I find there was no conversion of sick leave, vacation, personal or compensatory time to another form of leave.

Similarly, I do not credit Paduano's testimony that Martin was not ill during his terminal leave period (T52, T82). Under cross-examination Paduano testified he had no reason to doubt the veracity of the information contained in R-51 or presumably the doctor's note attached to R-52 (T80), and that he did not know for a fact whether Martin was sick (T83). He further testified that neither the shift commander, his secretary or the business administrator would have known whether Martin was sick when he called in sick (T82-T83). I credit his testimony on

cross-examination, thus conclude there was no basis to challenge the accuracy of the information contained within R-50 through R-52.

7. Lt. Charles Scott was in his terminal leave period from sometime in November 1988 until his retirement in January 1990 (T47). Just prior to his terminal leave period Scott had injured his hand and had other injuries (T46, T53). He asked Paduano if he could go on terminal leave and he decided to move to Florida (T46-T47). The leave was approved, but then administrator Helen Riggs requested a doctor's note be submitted to the Township (T47). Scott produced medical documentation of his ailments but did not demonstrate a permanent or total inability to perform his job (T53-T54).

Alayne Shepler became Township Administrator in November 1988, but sometime after Scott's leave had been initially approved (T138, T149). In early 1989 Shepler was attending a workshop meeting with the Township Committee and learned that Scott was working in Florida while on sick leave. She was told to investigate the matter (T145-T146). She spoke to Paduano who informed her that Scott had a hand injury and was on "terminal leave" but was living and working in Florida (T146). That was the first time Shepler heard the term "terminal leave." (T146-T147, T149). Shepler asked Paduano what he meant by "terminal leave" and he said officers could use their sick time even though they were not sick. He did not mention the use of vacation, compensatory or personal leave time (T150-T151).

Shepler reported to the Committee which decided it wanted additional medical information on Scott. Shepler asked the Chief to contact Scott and produce a medical report of his condition. The Chief received a report regarding Scott's condition on or about March 17, 1989 (R-82). The report indicated Scott still had some disability, but might be capable of light duty (T54, T147). Shepler reported the results to the Committee which decided to continue Scott's sick leave since he had a partial disability (T147).

8. Lt. Ronald Crane was in a terminal leave period from June 1989 through his retirement on September 1, 1990 (T47, T64). Crane had a knee operation, presumably in the spring of 1989, and was on sick leave and apparently sought to stay in Maine while in a terminal leave period. But the Township denied his request and required him to produce medical information regarding his sick leave and to be reexamined periodically on whether he could return to work (T54).

On September 14, 1989 Crane produced a note from a Dr. Struble which was transmitted to Shepler on September 27, 1989 (R-41). The note indicated that Crane was unable to work and would be reevaluated on October 16, 1989. On October 16, Shepler was given an October 14 note (R-43) from Struble indicating that Crane should remain out of work another six to eight weeks. On October 30, 1989 (R-44), Shepler notified Paduano that the Committee determined that R-43 was unacceptable, and pursuant to Art. 11, Section D(3) of J-1 a doctor's appointment was scheduled for Lt.

Crane. On November 2, 1989 Paduano notified Crane of the appointment (R-45). On November 14, 1989 (R-46), Shepler was notified of the results of Crane's examination. R-46 indicated that Crane could return to work at least on an in-house basis, but that reports should be obtained from the doctor treating his knee and the doctor treating him for depression and stress. Shepler forwarded R-46 to Paduano on December 1, 1989 (R-47), and noted she was awaiting another report (T143).

On November 28, 1989 Shepler received another report regarding Crane (R-48) which indicated that his anxiety/stress and insomnia were not work related. Shepler spoke to the doctor who prepared R-48 who explained that although Crane appeared physically well, he expressed concern over Crane's treatment with antidepressants and about his stress and related illnesses (T144). Shepler subsequently told Paduano that although Crane might be physically able to work, she still considered him ill because of his "mental condition." (T144). Shepler allowed Crane to remain on leave but told Paduano she wanted to continue receiving medical reports about him (T104, T145). No medical documentation regarding Crane, however, was submitted to Shepler after R-48 (T160).

On January 11, 1990 (R-49) Paduano informed Shepler that Crane's vacation, compensatory and sick time had been calculated to finalize his retirement. Paduano concluded R-49 with the following sentence:

If he is allowed to use his unused sick time, Lt. Crane's retirement date will be August 31, 1990.

I find the evidence regarding Crane's terminal leave period shows that his vacation, compensatory and sick time was not converted to some other form of leave; he could not use sick leave at his own option whether he was sick or not; he was required to verify illness, and he complied with that requirement. Similarly, I do not credit Paduano's testimony that employees could use sick leave whether sick or not. His own language in the last sentence of R-49 "If he is allowed to use his unused sick time..." presupposes that Crane could not use sick leave during his terminal leave period without the Township's approval.

9. Several other former Township police employees, Detective Smidt, Chief Ward, Chief Gilbert, and Deputy Chief Stedman, were in terminal leave periods prior to their respective retirements. At the time of their retirements, however, none of these employees held positions that are now included in the FOP's negotiations unit. The evidence regarding these employees does not show that vacation, compensatory or sick time was converted to a leave status called terminal leave. Smidt was in a terminal leave period from February 1976 through May 1977 (T22). A doctor's note of March 19, 1976 (R-40) listed him as disabled for an undetermined time, and Township records showed he was in a sick, vacation or court time leave with a broken ankle during the terminal leave period (R-1 -- R-38).

Ward was in a terminal leave period from August through October 1979 (T37-T38). He had accumulated hundreds of sick days,

but used only a relatively small amount during his terminal leave period and received cash for the remainder based upon the same formula contained in Art. 19 of J-1.

Gilbert was in a terminal leave period from October through December 1982 (T51). He used only vacation and personal leave during that period (T88, R-58). He received cash for his sick time based upon the same formula contained in Art. 19 of J-1 (R-59 -- R-62).

Stedman was in his terminal leave period from June through August 1986 (CP-8). His official absentee calendar (R-56) showed: he was on sick leave the month of June and first week of July; on vacation, compensatory or personal leave the remainder of July; and was on vacation leave in August. His official leave status was not listed as "terminal leave." He received cash for his remaining sick leave based upon the same formula contained in Art. 19 (R-55).

10. As a result of the problems that arose over the use of sick leave by Lt. Scott, and after first hearing the phrase "terminal leave," Shepler had several discussions with the Township Committee and the present and former police commissioners. Neither commissioner knew what terminal leave meant, and the Committee maintained that sick leave should be used only for non-work related sickness or injury (T148).

After those discussions the Committee instructed Shepler to inform Paduano that the contract language regarding sick leave would be enforced (T149). Pursuant to the Committee's directive, Shepler sent Paduano a letter dated June 2, 1989 (CP-1) telling him that,

hereafter, all employees will be required to abide by J-1 regarding the use of sick leave. CP-1 provides:

It has come to my attention that some members of the Police Department are of the opinion that a practice for the use of sick leave has developed whereby an employee, whether sick or not, could utilize accumulated sick time to remain on the Township payroll until retirement. It is the position of the Township that such use of sick leave is contrary to the clear and unambiguous language of the collective bargaining agreements between the Township and its Police Officers, and that no practice has developed contrary to the clear and unambiguous language of the collective bargaining agreements.

Even if it were to be determined that a practice has developed as outlined above concerning the use of sick time, the Township is hereby putting all employees on notice that from this date forward, it will require employees to abide by the clear and unambiguous language of the collective bargaining agreements, utilizing sick leave only when an employee is "unable to perform their work by reason of personal illness, non-work related accident, or exposure to contagious disease which is non-work related," or "to attend a member of the employee's immediate family who is seriously ill, or when the employee's attendance is required by a member of the immediate family."

A copy of CP-1 was sent to FOP President Adams.

On June 13, 1989 (CP-2), the FOP's attorney in response to CP-1, notified Shepler that the FOP would initiate legal action if the Township "changed existing terminal leave/severance practices." He suggested the Township meet with the FOP and sent a copy of CP-2 to the Township's attorney.

Apparently, as a result of that suggestion the parties' attorneys met to discuss this matter on July 24, 1989. On August 23, 1989 (CP-3) the Township's attorney informed the FOP's attorney

that Shepler had not found evidence of a "past practice" supporting the FOP's contention, but she was still investigating the matter, and any settlement had to await the completion of her investigation.

On November 6, 1989 (CP-4) the Township's attorney informed the FOP's attorney that after reviewing all relevant information he did not agree that the FOP had established the "past practice" it had alleged existed. He suggested one more meeting to review the matter. The parties subsequently exchanged settlement proposals, but by letter of February 1, 1990 (CP-5), the Township's attorney rejected the FOP's proposal.

11. On January 24, 1990 (CP-6), Paduano notified Shepler that Sgt. Eugene Blecki wanted to retire in February 1991 by using his sick time, vacation and compensatory time which would have made his last work day April 2, 1990. Paduano indicated that Blecki would have approximately 170 sick days, eight compensatory days, 56 vacation days and four personal days to use. He concluded CP-6 by informing Shepler that Blecki had emphysema and a back problem. On February 21, 1990 (CP-7) Shepler denied Blecki's request, referred Paduano to CP-1, and rejected the contention that employees, whether or not sick, could remain on sick leave until retirement. She invited Blecki to submit a modified retirement request.

CP-7 provides:

In response to your letter dated January 24, 1990 regarding Sergeant Eugene Blecki, I am denying his

request to retire in February of 1991 while utilizing his sick time, vacation time and compensatory time from April 2, 1990.

If you recall my letter to you dated June 2, 1989, I outlined that it was the position of the Township that employees could utilize their sick time only if they were "sick" as defined in the collective bargaining agreement. I rejected the contention that employees, whether sick or not, could utilize accumulated sick time to remain on the Township payroll until retirement.

Therefore, Sergeant Blecki or any other police officer could utilize their sick time only if they are sick and unable [to] perform any duties as a police officer. I must inform you that if Sergeant Blecki "decided" that he was too sick to work because of the emphysema or "serious back problem" you alluded to in your letter, I would have serious problems as to the legitimacy of this claim. If Sergeant Blecki has been able to work with these "ailments" up to this date and will be able to continue to work with these "ailments" until April 2, 1990, I do not see why he will be unable to work with these "ailments" after that date.

If Sergeant Blecki wishes to submit a "modified" retirement request based on this letter, I would be more than willing to consider it at that time.

Blecki apparently did not submit another retirement request and was working at the time of the hearing in this matter (T56).

ANALYSIS

The Township did not violate the Act by denying Blecki's retirement request, nor did it change any existing leave benefits. The evidence does not support the FOP's contention that there was an official leave status known as terminal leave; that vacation, compensatory, personal and sick time was converted to some other leave time; or that employees in this negotiations unit were allowed to use accumulated sick leave, whether sick or not, just prior to

retirement. Rather, the evidence showed that terminal leave merely referred to that period of time prior to retirement wherein the employee was using accumulated leave time; and that the use of sick leave during that time period required Township approval.

The FOP's case is based upon its argument that a past practice existed permitting employees to convert primarily accumulated sick time, but also vacation, personal and compensatory time, into another form of leave called terminal leave. The employee allegedly had the right to use accumulated sick leave, whether sick or not, for terminal leave purposes. The FOP relied on the evidence produced regarding the ten employees discussed herein to support its argument.

A past practice (or established practice) is a term and condition of employment not appearing in the parties' collective agreement, but arising as implied from their mutual conduct. Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536 (¶10276 1979), aff'd in pt., rev'd in pt., 180 N.J. Super. 440 (App. Div. 1981). A past practice establishing a term and condition of employment is entitled to the same status as a term and condition of employment defined by statute or the parties' collective agreement. County of Sussex, P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982)(Sussex); Watchung Borough, P.E.R.C. No. 81-88, 7 NJPER 94 (¶12038 1981). Normally, where a collective agreement is silent or ambiguous on an issue, past practice controls. Sussex. But mere silence on an issue does not give a past practice binding effect

where the particular past practice is contrary to - or gives an effect different from - the express provisions of a collective agreement. N.J. Sports & Exposition Auth., P.E.R.C. No. 88-14, 13 NJPER 710, 711 (¶18264 1987); Randolph Tp. School Bd., P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980). Where the mutual intent of the parties can be determined from a simple reading of the parties' agreement, a contrary past practice cannot be relied upon. New Brunswick Bd. of Ed., 4 NJPER 84 (¶4040 1978), mo. for recon. den., 4 NJPER 156 (¶4073 1978).

In considering whether a public employer must negotiate before acting inconsistent with a past practice rather than relying on its collective agreement, 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); Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980). Thus, even where an employer deviates from a practice that has existed for ten years, it does not waive its contractual rights, and it does not violate the Act by subsequently acting pursuant to the collective agreement. See N.J. Sports & Exposition Auth.

The evidence the FOP relied upon did not prove its case. The FOP cannot rely upon the evidence regarding Smidt, Ward, Gilbert and Stedman since those employees did not hold positions represented in the FOP's unit at the time of their retirement. That evidence

provides background, but does not prove how the Township handled the matter for unit members. To the extent that evidence is relevant, however, it does not prove the existence of an official leave status called terminal leave, nor does it prove that sick, vacation, compensatory or personal leave was converted to some other form of leave. What it does show is that official Township records (R-1 -- R-38, R-56) recorded leave in six categories: vacation, compensatory, personal, sick, bereavement and court time. There was no designation for terminal leave and no evidence the other leaves were converted. Ward was not the keeper of the records and was not aware what leave the employees were claiming when they called to report their time off. Thus, Ward's testimony regarding terminal leave is not sufficient to overcome the information contained on the face of those documents.

Similarly, the evidence regarding the Hulses, Jobes, Martin, Scott and Crane does not support the FOP's argument. In addition to showing that there was no official leave status known as terminal leave, that evidence showed that the Township, in accordance with the language in J-1, consistently sought to verify sickness or injury, and that the employees did not have the option to use sick leave whether sick or not. Rather, the Township had the right to approve or deny the use of sick leave consistent with the language in J-1.

The evidence regarding the Hulses was insignificant since it did not show how their leaves were recorded or that they used any

sick leave during their terminal leave periods. As I found supra, the evidence regarding Jobes shows he was approved for an extended sick leave (not his terminal leave) prior to retirement. If, however, he was in his terminal leave period rather than extended sick leave, the Township's requirement for verification, and Jobes' compliance therewith, demonstrated that use of sick leave at any time was not at the employee's option whether sick or not. If Jobes really had the option to use sick leave during his terminal leave period, he would not have had to submit to verification. Rather, the Township had the right to verify and then approve or deny the leave. In fact, the Township in R-70 denied Jobes' use of sick leave until verification was obtained.

The FOP argued in its post-hearing brief that no information submitted by the Township concerning Jobes' sick leave contradicted the alleged terminal leave policy. That argument lacks merit. The burden here is on the FOP to prove the existence of such a policy, not for the Township to disprove it, and the FOP failed to meet its burden. In addition, the lack of verification evidence for Jobes between February and November 1980 does not help the FOP prove its case. If the Township was satisfied from R-77 that Jobes could not return to work it had the right to continue his sick leave until retirement. Continuing the leave on that basis does not prove the alleged past practice.

The evidence regarding Martin, primarily R-50 -- R-52, shows that leave was recorded as either sick, vacation, compensatory

or personal. There was no category called terminal leave, and no evidence that the former leaves were converted to some other leave. More important, however, was that R-50 - R-52 listed specific reasons for each sick day Martin used prior to retirement. Although Paduano originally testified that Martin was not really ill, he subsequently contradicted that testimony and admitted he had no reason to challenge the accuracy of the information on those documents. Thus, I find those documents reliable and conclude that they do not support the FOP's contention that employees used sick leave whether sick or not.

The FOP argued in its post-hearing brief that since Martin used his accumulated leave benefits prior to retirement it was consistent with what it alleged to be was the terminal leave policy. That logic is not persuasive. The evidence did not prove that a conversion of leave took place or that employees could use sick leave whether sick or not. As I indicated in Finding of Fact No. 2, the terminal leave past practice that was in place was to allow employees to use all accumulated vacation, compensatory, personal and approved sick leave just prior to retirement. R-50 -- R-52 merely support that finding.

The evidence regarding both Scott and Crane shows that the Township was consistent about requiring extensive medical verification for the use of sick leave during the terminal leave period. Both Scott and Crane complied with Township required examinations which became the basis for the Township's decision to

allow them to remain on sick leave. The Township found that Scott had a partial disability and, since he had already moved to Florida, was willing to allow him to remain on sick leave. Similarly, the Township concluded, based upon required examinations, that Crane had a "mental condition," thus it allowed him to remain on sick leave.

Whether the employee was sick enough to be on sick leave, or was sick at all, was not the issue. The issue was who authorized the use of sick leave prior to retirement, the Township or the employee at his option? The Township. It made little difference whether Scott or Crane could return to work. The point is that after undertaking a verification of their respective illnesses, the Township decided to allow them to remain on sick leave. The employees did not make that choice, and the Township did not waive its rights by approving those sick leaves.

The Contractual Defense

Even if the evidence showed that a practice existed allowing employees to use sick leave whether sick or not, the Township was not in violation of the Act by unilaterally discontinuing that practice since such sick leaves did not conform to Article 11 of J-1. An employer who acts in accordance with the collective agreement does not violate the Act. Sussex-Wantage; Pascack; N.J. Sports & Expo. Auth.

Here Article 11, Section A lists the reasons for the use of sick leave, and gives the Township the right to require examinations

and verify sickness. An unwritten practice permitting an employee to use sick leave whether sick or not just before retirement is inconsistent with the clear language in Article 11, Section A(2) the sick leave definition, and would give no meaning to Article 11, Section D(1) the verification clause, thus it is not entitled to receive past practice protection within the meaning of the Act. The mere fact that J-1 is silent about the use of sick time just prior to retirement does not create an exception to the rule that a past practice contrary to the terms of a written agreement cannot survive. The Township has the right to verify that sick leave is based upon some illness, and has the right to deny the use of sick leave if it does not comport with Article 11, Section A(2).

Once Shepler became aware of the alleged terminal leave practice she notified the Township Committee, then instructed Paduano in CP-1 that sick leave should only be used consistent with J-1. Blecki sought to retire by using "his sick time, vacation time and compensatory time" (CP-6). The Township denied his request to retire while using "his sick time, vacation time and compensatory time" (CP-7), because it determined he was not sick as defined in J-1. The Township did not deny Blecki the opportunity to use his vacation and compensatory time prior to retirement, that was not Blecki's request. The Township in CP-7 specifically invited Blecki to modify his request but there was no evidence he did, thus no basis to conclude that the Township would deny him the opportunity to use his other accumulated time prior to retirement.

Accordingly, based upon the above facts and analysis I issue the following:

RECOMMENDATION

I recommend the Complaint be dismissed.


Arnold H. Zudick
Hearing Examiner

Dated: February 7, 1991
Trenton, New Jersey