D.U.P. NO. 99-6

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

BOROUGH OF FRANKLIN,

Respondent,

-and-

Docket No. CO-98-414

FRANKLIN BOROUGH FOP LODGE NO. 57,

Charging Party.

**SYNOPSIS**

The Director of Unfair Practices refuses to issue a complaint on a charge alleging that the Borough of Franklin violated the Act when it announced its intention to end a practice of paying 100% of wages as disability benefits and to revert to an express contractual provision to pay 66 2/3%. The Director further finds that the Borough was not required to consent to the FOP's demand to submit this additional issue to the interest arbitrator. The charge is dismissed.

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Appearances:

For the Respondent,
Laddey, Clark & Ryan, attorneys
(Thomas N. Ryan, of counsel)

For the Charging Party,
Loccke & Correia, attorneys
(Charles J. Sciarra, Esq., of counsel)

**REFUSAL TO ISSUE COMPLAINT**

On May 18, 1998, Franklin FOP Lodge 57 ("Lodge 57") filed an unfair practice charge against the Borough of Franklin ("Borough"). The charge alleges that the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), provisions 5.4a(1), (3) and (5)[1/] by announcing on February 10,

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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

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1998, that it was ending an alleged past practice of paying 100% of employee wages when the employee is out of work on disability and reverting to the express contractual provision to pay 66 2/3% of salary without first negotiating with Lodge 57. Lodge 57 further alleges that the Borough refused its request to amend its submission in the interest arbitration proceeding which would place the issue of level of payment to employees on disability before the arbitrator.

The Borough denies it engaged in unfair practices. It relies on an express provision of the recently expired collective negotiations agreement which it asserts gave it the right to make the disputed change. It further asserts that the contractual provision was not raised in negotiations by either party, nor made a subject of interest arbitration by Lodge 57 in its initial Petition to Initiate Compulsory Interest Arbitration.

The Commission has authority to issue a Complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the Complaint issuance standard has not been met, I may decline to issue a Complaint. N.J.A.C. 19:14-2.3. On

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1/ Footnote Continued From Previous Page

in the exercise of the rights guaranteed to them by the 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."

October 23, 1998, I sent a letter to the parties setting forth the facts as they appeared and advising that I was inclined to find that the Borough did not violate the Act. I gave the parties an opportunity to file responses to legal conclusions stated in the letter. Neither party responded. Based upon the following, I find that the Complaint issuance standard has not been met.

The January 1, 1996 - December 31, 1997 agreement between the Borough and Lodge 57, which covers sergeants and patrolmen, provides:

> Article X, Insurance:
>
> The Borough shall provide disability insurance for the benefit of the Employees under the present plan providing the equivalent to sixty-six and two-thirds (66 2/3%) percent of the weekly earnings of each employee for a six (6) month maximum period.

The Borough contends that this contract language gives it the right to restore the benefit level set by the contract, regardless of whether some employees may have received a more generous benefit level in the past. Lodge 57 argues that the employer changed a long-standing past practice concerning a term and condition of employment during the negotiations process.

The issue of payments in excess of workers compensation payments for employment related injuries and disabilities is mandatorily negotiable. Morris Cty., P.E.R.C. No. 79-2, 4 NJPER 304 (¶4153 1978), aff'd NJPER Supp.2d 67 (¶49 App. Div. 1979); Riverside Tp., H.E. No. 95-1, 20 NJPER 303 (¶25152 1994) adopted P.E.R.C. No. 95-7, 20 NJPER 325 (¶25167 1994). Here, the contract provides for a specific level of disability benefit (66 2/3% of weekly earnings).

Where a contract clearly sets a term and condition of employment, it is not an unfair practice for the employer to unilaterally end a practice of granting more generous benefits than the contract provides and to return to the benefit level set by the agreement. See Burlington Cty Bridge Comm., P.E.R.C. No. 92-47, 17 NJPER 496 (¶22242 1992) (employer's decision not to consider sick or vacation time in computing overtime was authorized by the contract and did not violate the Act). See also Kittatinny Bd. of Ed., P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991) and Kittatinny Bd. of Ed., P.E.R.C. No. 93-34, 18 NJPER 501 (¶23231 1992) (where the parties' contract fixed the length of the workday, employer was not obligated to negotiate before discontinuing a practice of shortened hours during the summer and holiday recess periods). See also, New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd App. Div. Dkt. No. A-2450-77 (4/2/79); Passaic Cty. Reg. Bd. of Ed., P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990); New Jersey Sports and Exposition Authority, P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987); Ramapo State College, P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985).

Moreover, the Borough did not violate the Act by refusing to consent to Lodge 57's request that the disability payment issue be submitted to the interest arbitrator. Since this issue was not included in Lodge 57's Petition to Initiate Compulsory Interest Arbitration, the admission or exclusion of the issue is now within

the arbitrator's discretion. See N.J.A.C. 19:16-5.5 (a) and (b); Middlesex Cty., P.E.R.C. No. 98-46, 23 NJPER 595 (¶28293 1997). The Commission will defer to the arbitrator's decision the admission or exclusion of additional issues, unless it finds an abuse of discretion. See N.J.A.C. 19:16-5.7(f); N.J.A.C. 19:10-3.1(a) and (b); Middlesex Cty.; Middlesex Cty., P.E.R.C. No. 9-63, 23 NJPER 17 (¶28016 1996) (establishing this standard and affirming arbitral decision not to admit additional issues); See also, Bogota Bor., P.E.R.C. No. 98-104, 24 NJPER 130 (¶29066 1998), Allendale Bor., P.E.R.C. No. 98-27, 23 NJPER 508 (¶28248 1997) (affirming arbitrator decisions not to admit additional issues).

I find that the Borough did not violate the Act when it issued a memorandum indicating its intention to enforce the disability provisions of the parties' contract. I further find that the Borough did not violate the Act by refusing to consent to Lodge 57's demand to allow the amendment of its submission to the interest arbitrator. Therefore, I find that the Commission's complaint issuance standard has not been met and decline to issue a complaint on the allegations of this charge.[2/]

**ORDER**

The charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Stuart Reichman, Director

DATED: December 22, 1998
Trenton, New Jersey

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2/ N.J.A.C. 19:14-2.3.