

I.R. NO. 2003-13

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SUSSEX COUNTY BOARD OF FREEHOLDERS &  
SUSSEX COUNTY SHERIFF,

Respondent,

-and-

Docket No. CO-2003-285

P.B.A. LOCAL NO. 378,

Charging Party.

**SYNOPSIS**

A Commission Designee restrains the County from restricting corrections officers' use of contractual sick, vacation and other leave time. The PBA demonstrated that it would likely succeed on the merits of its claim that the employer repudiated the contractual leave provisions by requiring employees to earn time before they could use it. The Designee also found irreparable harm because the leave of opportunities, once denied, cannot be remedied at the conclusion of the case.

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Appearances:

For the Respondent,  
Laufer, Knapp, Tozewski & Delena, attorneys  
(Stephen E. Trimboli, of counsel)  
(James T. Prusinowski, of counsel, on the brief)

For the Charging Party,  
Oxford Cohen, attorneys  
(Gail Oxford Kanef, of counsel)  
(Sanford R. Oxford, of counsel, on the brief)

**INTERLOCUTORY DECISION**

On May 9, 2003, P.B.A. Local 378 filed an unfair practice charge with the Public Employment Relations Commission alleging that the employers, Sussex County Board of Freeholders and Sussex County Sheriff, violated 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.<sup>1/</sup> when

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<sup>1/</sup> 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; and(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and  
(continued...)

it restricted corrections officers Diane Vitale and Alicia Schular from taking any leave time - sick leave, vacation time, personal time, or holiday time - until the leave was "earned" on a monthly basis. The officers were warned that any request for leave time would only be approved if the leave benefit had been earned, and that leave without pay would not be granted without medical documentation.

The PBA alleges that, by this action, the employer repudiated the terms of its current collective negotiations agreement covering corrections officers. It asks that the employer be restrained from preventing employees from using leave time pursuant to the contract, and argues that, in the absence of such restraint, there will be no meaningful remedy available by the time the case is decided, causing irreparable harm.

The employer maintains that the action it took against Schular and Vitale to withhold a contractual benefit was disciplinary in nature. It asserts that the contractual language does not clearly give employees the leave time the PBA claims, and that an arbitrator may decide whether the County had just cause to punish the two employees by taking away their credited leave days.

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

The unfair practice charge was accompanied by an application for interim relief pursuant to N.J.A.C. 19:14-9. On May 15, 2003, I signed an Order to Show Cause scheduling the return date on the interim relief application for June 4, 2003. The parties submitted briefs and certifications in accordance with Commission rules and argued orally on the scheduled return date. The following facts are undisputed:

The PBA Local 378 represents corrections officers assigned to the County Jail. These employees are jointly employed by the Sussex County Board of Freeholders and the Sussex County Sheriff. The PBA has a collective agreement with the County and the Sheriff covering corrections officers for the period January 1, 2000 through December 31, 2003. That agreement, in relevant part, provides,

All full time employees shall be granted sick leave based upon the following from date of last hire: 1.25 days per month in the first year of service, then 15 days per calendar year. (Article XV)

Article XV of the collective agreement incorporates State Department of Personnel regulation, N.J.A.C. 4A:6-1.1 et seq., into the agreement. N.J.A.C. 4A:6-1.3 provides, with regard to annual sick leave for local government service employees,

...at the beginning of each calendar year in anticipation of continued employment, employees shall be credited with 15 working days.

The PBA's collective agreement includes a schedule of vacation leave for full-time employees based upon the length of employee service. The contract further states,

Employee must complete the above years of service before the vacation days will be credited January 1 of the following year. Example: Officer completes eight years of service July 1, 2000, he/she will be credited with fifteen vacation days as of January 1, 2001. Employees in the payroll as of January 1 of any calendar year shall on that January 1 be credited in advance with vacation entitlement in accordance with the foregoing schedule, provided however, that if the employee works less than twelve months in the calendar year, he/she is entitled to a pro-rata share of such vacation entitlement. (Article XIV)

Article XVI also provides for three days of personal leave time a year, and 3 bereavement leave days per year.

The County maintains an employee handbook, adopted in 1999, which provides,

An employee is required to work at least 30 days to earn either one vacation day or one and one quarter sick days or both. Advancement of unearned sick, vacation or personal leave is NOT allowed in the first calendar year of service. Thereafter, at the beginning of each calendar year, in anticipation of continued employment, employees will be credited with the full yearly allotment. If the Department/Division Head is aware there is a possibility the employee may not be working the entire calendar year due to termination, retirement, and/or leave of absence, advancement is restricted.

PBA President John Kernusz states in his certification that it has always been the practice to advance employees their annual allotment of leave time on January 1 each year.

On February 18, 2003, Undersheriff David DeMarco sent Correction Officers Vitale and Schular a memorandum advising them that they had used excessive sick leave, and that all future sick leave could only be approved if it was earned and supported by medical documentation. Further, the officers were advised that they would be permitted to take no benefit leave time - sick, vacation, personal time, holiday or comp time - unless the time had been "earned."

#### **ANALYSIS**

The PBA asks that I restrain the employer from implementing the restrictions on the officers' use of leave time. 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).

PBA alleges that the County repudiated the clear provisions of the collective agreement by taking away the employees' contractually granted allotment of sick and other leave time for 2003 and restricting the employees to only leave time as it is earned. PBA contends that this contractual repudiation violated 5.4a(1) and (5) of the Act.

The County denies that it violated the Act. It argues that the contract provisions are not clear, and that any claimed contractual violation should be presented to a grievance arbitrator. Citing New Jersey State Dept. Of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), the County argues that a violation of the contract does not give rise to the Commission's unfair practice jurisdiction.

N.J.S.A. 34:13A-5.3 requires the employer and the majority representative to negotiate in good faith over terms and conditions of employment. N.J.S.A. 34:13A-5.4a(5) prohibits an employer from refusing to negotiate in good faith. Employees are generally prohibited from changing employees' working conditions without negotiations. Where the parties expressly agree in the contract to provide employees a benefit, the employer is bound to maintain the benefit during the life of the contract - there is nothing to negotiate. Middletown Tp., P.E.R.C. No. 98-77, 24

NJPER 28 (¶29016 1997), aff'd 25 NJPER 357 (¶30151 App. Div. 1999), aff'd 166 N.J. 112 (2000), 26 NJPER 453 (¶31177 Sup. Ct. 2000). The Commission usually will not exercise unfair practice jurisdiction over contract disputes, but leave such disputes for arbitrators to decide. Human Services. However, one exception to that policy is where the employer has acted in bad faith by repudiating a clearcut contractual obligation. Human Services; State of New Jersey, P.E.R.C. No. 2000-36, 26 NJPER 12 (¶31001 1999). As the Commission observed in Human Services:

A claim of repudiation may also be supported, depending upon the circumstances of a particular case, by a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it or by factual allegations indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause. (Citations omitted). Human Services, p. 423.

The above-referenced contract language appears to be clear in granting employees, after the first year, with an annual allotment of leave time on January 1. In addition, the certification of the PBA president confirms that the parties have a long-standing practice that employees receive their full allotment of leave time at the beginning of each year.

The County further asserts that the employee handbook, established in 1999, gives it the right to prorate leave time where it believes the employee will not be continuously employed for the year. Even if explicit contractual terms could be modified by the employer's language in the handbook, the County



has offered no support for its claim that Vitale or Schular would not continue to be employed for 2003.

Thus, I find that the PBA has established a likelihood of success on the merits of its claim that the County repudiated the contract in violation of the Act.

To satisfy the irreparable harm standard, a charging party must show that the harm that will be suffered is incapable of an adequate remedy at the conclusion of the case. Interim relief is typically not granted where the harm is limited to a monetary remedy. Brick Tp., I.R. No. 2003-2, 28 NJPER 357 (¶33129 2002); State of New Jersey (DOC) (Shoudt), I.R. No. 99-16, 25 NJPER 193 (¶30089 1999); City of Jersey City, P.E.R.C. No. 77-13, 2 NJPER 293 (1976). Here, the PBA asserts that, absent interim relief, the employees' will be denied the use of their contractual leave time as those benefits were provided by the parties' negotiated agreement. It argues that forcing the employees to wait until this issue is adjudicated, either before the Commission or before an arbitrator, will result in the outcome the employer unilaterally imposed: that the employees will not have the benefit of their leave time until the time is earned. The employer argues that there is no irreparable harm, since an arbitrator may find a creative way to make the employees whole if it is found that the County violated the contract. In addition, the employer asserts that it has a right to discipline employees

by withholding contractual benefits, and the PBA has the right to challenge the appropriateness of the employees' punishment before an arbitrator.

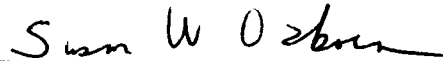
I find that there is irreparable harm. Leave time which may be wrongfully denied represents leave opportunities which are lost forever. City of Trenton, I.R. No. 2003-4, 28 NJPER 368 (¶33134 2002); N. Bergen Tp., I.R. No. 97-16, 23 NJPER 249 (¶28119 1997). Here, employees' choice of when in 2003 to take vacation and other leave time cannot be restored later, once the choice is denied. Weighing the possible relative hardship to the employer, I recognize that the employer has an exclusive right to decide what is excessive absenteeism and whether to bring disciplinary charges against an employee. City of Jersey City, P.E.R.C. No. 2003-57, 29 NJPER \_\_\_ (¶\_\_\_\_\_ 2003). However, the employer has the right to verify the legitimate use of sick leave time. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER (¶13029 1982). In addition, there are a range of disciplinary panalties that an employer can impose upon employees for excessive absenteeism, including counseling, letters of reprimand, docking of pay, suspension or termination. Morris Cty. and Morris Sheriff, P.E.R.C. No. 2002-33, 28 NJPER 58 (¶33020 2001).

In addition, the public interest will not be harmed in this matter by the employer being required to maintain the status quo

while the matter is being litigated. Such an order is consistent with the tenets of the Act.

**ORDER**

The County and the Sheriff are restrained from denying County correction officers their full sick, vacation, personal, holiday and other contractual leave time credited January 1, pursuant to PBA's 2000-2003 collective agreement. The employers shall not require corrections officers to "earn" their time prior to submitting a request to use such leave time as the contract permits. This interim order will remain in effect pending a final order in this matter.



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Susan Wood Osborn  
Commission Designee

DATED: June 9, 2003  
Trenton, New Jersey

