H.E. NO. 2011-4

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

In the Matter of

CITY OF EAST ORANGE,

Respondent,

-and- Docket No. CO-2007-234

FOP LODGE 111,

Charging Party.

SYNOPSIS

A Hearing Examiner grants in part Charging Party's motion for summary judgment to the extent that the City issued a sick leave policy and refused to negotiate two specific issues, namely (1) the use of chronic sick category B designation as a criteria in determining the eligibility for additional work and special assignments, and (2) a new designation review procedure. She determined that the category B designation as a criteria was negotiable. There was no nexus between assignment to that category and a determination that the officer was unqualified or physically incapable of performing the additional work. As to the designation review procedure, the Hearing Examiner determined that the City had an obligation to negotiate any procedure that circumvented the parties' grievance procedure and that, as written, the designation review procedure constituted direct dealing with the employees. Thus, the Hearing Examiner found that the City violated 5.4a(1) and (5) of the Act.

The Hearing Examiner grants in part the City's cross motion finding that the City had no negotiations obligation regarding the creation of chronic sick categories A and B to monitor and verify sick leave usage, even though assignment to the categories was triggered by less than the annual allotment of 20 sick leave days. Accordingly, she dismissed the portion of the charge asserting a negotiations obligation on this issue.

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CITY OF EAST ORANGE,

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Charging Party.

Appearances:

For the Respondent,
DeCotiis, Fitzpatrick & Cole, LLP, attorneys
(Avis Bishop-Thompson, of counsel)

For the Charging Party,
Markowitz and Richman, attorneys
(Matthew Areman, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION ON CHARGING PARTY'S MOTION FOR SUMMARY JUDGMENT AND RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

On February 7, 2007, the Fraternal Order of Police Lodge 111 (FOP) filed an unfair practice charge with the Public Employment Relations Commission (Commission) against the City of East Orange (City) alleging that the City violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-5.4a(1) and (5)[1/] when the City unilaterally issued a new sick leave

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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; (5) Refusing to
(continued...)

policy without negotiations. A Complaint was issued by the Director of Unfair Practices on October 14, 2009. On October 26, 2009, the City filed its Answer generally denying the allegations in the charge.

At the mutual request of the parties, no hearing was scheduled while the parties engaged in discussions seeking to resolve and narrow issues raised in the charge. In correspondence dated June 8, 2010, the parties notified me that there were only two issue still in dispute:

> (1) the criteria for, and penalties associated with, new sick leave categories A and B; and,
>
> (2) the non-grievance appeal procedure articulated in §6.1 of General Order 178A.

In particular, the FOP objects to the unilateral implementation of criteria for assigning an officer to chronic sick categories "A" or "B" when the officer has not yet exhausted his/her annual sick leave allotment under the parties' collective negotiations agreement. It also objects to the unilateral implementation of restrictions resulting from the assignment to chronic sick category B, namely that such a designation can be

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1/ (...continued)
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."

considered as a criteria in determining eligibility for additional work responsibilities or special assignments. As to the issue of the non-grievance appeal procedure, the FOP objects to the unilateral implementation of procedures outside of the normal grievance procedures for review of an officer's designation to either chronic sick category A or B.

On June 14, 2010, the FOP notified me of its intention to file a motion for summary judgment. On July 9, 2010, pursuant to N.J.A.C. 19:14-4.8, the FOP filed its motion, together with a brief, certification of FOP Vice-President Lawrence Flanagan and exhibits. On August 5, 2010, the City filed an opposition to the FOP's motion and a cross motion for summary judgment, together with a brief, certifications of its labor counsel and Medical Officer Lieutenant Raymond Brown as well as an exhibit.

The City maintains that it has a managerial prerogative to establish sick leave categories in order to monitor and verify sick leave usage. Also, it contends that establishing the chronic sick category B designation as one of several criteria to be considered in determining eligibility for additional work responsibilities or special work assignments is not a penalty or restriction that must be negotiated. Finally, the City asserts that it has a managerial prerogative to provide notice of absences to officers and that the designation review procedure is merely an invitation to discuss the designation and does not

supercede the parties' grievance procedure. The City describes the review as an election by the employee not a mandatory conference and, therefore, contends that the procedure does not constitute a negotiable disciplinary procedure.

On September 2, 2010, the Commission referred the motion and cross motion to me for disposition. On September 13, 2010, I accepted the FOP's reply brief in accordance with the parties' agreed-upon briefing schedule.

It is well-settled law that summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. In considering a motion for summary judgment, all inferences are drawn against the moving party and in favor of the party opposing the motion. No credibility determinations may be made, and the motion must be denied if material factual issues exist. N.J.A.C. 19:14-4.8(e); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). The summary judgment motion is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

Applying these standards and in reliance on the parties' submissions, I make the following:

FINDINGS OF FACT

1. The FOP is the majority representative of all rank-and-file police officers employed by the City.

2. The City and FOP were parties to a collective negotiations agreement effective July 1, 1999 through June 30, 2006. Negotiations for a successor agreement began in June 2006 and concluded in January 2008 with the execution of a successor agreement effective July 1, 2006 through June 30, 2010. The changes to the sick leave policy that gave rise to the instant unfair practice occurred during negotiations for the 2006-2010 collective agreement.

3. The following articles of the 1999-2006 collective agreement are pertinent to the parties' motions:

Article V, paragraph 1, entitled "Sick Leave," provides that officers are entitled to 20 days of sick leave per year that can be carried over in an accrual bank without limit.

Article VII is entitled "Grievance Procedure." A grievance is defined as "any difference or dispute between the City and any employee covered by this Agreement or the Association with respect to the interpretation, application, or alleged violation of any of the provisions of this Agreement." Under this provision, grievances must be initiated within ten working days from the time the employee and Association knew or should have known of its occurrence. The procedure provides for a five-step

process beginning with an appeal to the officer's immediate supervisor and ending with binding arbitration.

Article XVI, entitled "Rules and Regulations," at paragraph 1 sets out the rights and responsibilities pertaining to General Orders and states:

> The City may establish and enforce reasonable rules and regulations in connection with its operation of the Department and maintenance of discipline, provided such rules and regulations are not in conflict with the provisions of this Agreement. Copies of new rules and regulations shall be furnished to the Association and opportunity to discuss the new rules and regulations shall be afforded the Association before implementation of the same.

Article XVIII, entitled "Management Rights," provides that the City possesses, among other things, the sole right:

> . . . to establish or continue policies, practices or procedures for the conduct of the Police Department . . . to change or abolish such practices or procedures subject to the provisions of N.J.S.A. 34:13A-5.3 . . . to assign work to officers and to determine the overtime to be worked, if any, . . . to transfer and promote officers . . . to continue, alter, make and enforce reasonable rules for the maintenance of discipline, . . . and otherwise to take such measures as the City and/or Management may determine to be necessary for the orderly and efficient operation of the Police Department, provided, however, nothing herein shall prevent an officer from presenting his/her grievance for the alleged violation of any Article or specific term of this Agreement.

Article XIX, paragraph 13, provides for annual shift bidding by seniority as well as a procedure for schedule changes and shift swapping.

4. Prior to September 15, 2006, the City reviewed and revised General Orders 178 (Sick Leave Policy), 178A (Chronic Absence Control Program), and 179 (Sick Leave Procedures). General Orders 178 and 179 were contained within the Department's Rules and Regulations.

5. Sometime prior to September 15, 2006, Lt. Brown sent copies of the proposed revised draft general orders to the FOP and PBA. According to Brown, at some point thereafter but before the issuance of the general orders[2/], he and Chief Kevin Morgan met and discussed the revised orders with the FOP and PBA. In regard to the meeting, Brown's certification states that "[t]he FOP proposed changes to [sic] regarding application of leave to females, use of contractual [sic] various changes which were incorporated into the draft General Orders." His certification does not specify the changes that were allegedly incorporated into the revised orders.

6. On or about October 15, 2006, the City issued G.O. Nos. 178, 178A and 179. G.O. No. 178, the sick leave policy,

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2/ In its brief, the City asserts that the parties met with the FOP on September 21, 2006. This fact is not supported by any certification, so I do not know the exact date of any meeting, but the meeting occurred before the issuance of the orders. The exact date is not material.

restates, among other things, the provisions of the parties' collective agreement entitling officers to 20 paid sick leave days per year with the right to carry over unused sick leave from year to year without limit. It also recites that sick leave may be used by officers who are unable to work because of personal illness or injury, exposure to contagious disease or care of a seriously ill member of the officer's immediate family. The policy further recites that sick leave cannot be used for purposes other than those permitted by law and that managing absences is a legitimate business necessity. Finally, the policy states "[c]hronic use of sick leave may be symptomatic of an employee's non-fitness for duty. Management must take preventive or corrective action when necessary to protect the employee, other employees and the public good."

7. As to G.O. Nos. 178A and 179, the FOP challenges the following provisions which, it maintains, should have been negotiated before implementation. The pertinent parts of the orders are set forth below:

a. Chronic Sick Category A is defined as a sworn or civilian member of the police department who reports out sick for any reason for an aggregate of at least four (4) occurrences but less than six (6) occurrences totaling at least ten (10) but less than twelve (12) sick days within a twelve month period; provided, however that an initial line of duty absence or an

absence that includes hospitalization shall be specifically excluded from Category "A".

b. Chronic Sick Category B is defined as a sworn or civilian member of the police department who reports sick for any reason totaling twelve (12) or more sick days, regardless of the number of occurrences within a twelve (12) month period; provided, however that an initial line of duty absence or an absence that includes hospitalization shall be specifically excluded from Category "B".

c. Work Assignment Criteria - During the term of the member's designation as Chronic Sick, Category "B", such designation shall be included in the criteria utilized by commanding officers to determine the member's eligibility and ability to perform additional work responsibilities and or [sic] specialized assignments.

d. Designation Review Procedure - Any member may request a review procedure of their designation without filing a grievance. Members requesting a review of their designation without filing a grievance shall prepare a report in DUPLICATE on typed letterhead addressed to their Commanding Officer within ten (10) days upon being notified of a Chronic Sick designation indicating the reason(s) for the objection of the designation, and must present said report to their commanding officer for review and recommendation. The preparation and submission of the

report required from the member requesting review of the designation is not intended or to be interpreted as superseding the grievance procedure as defined and provided in the member labor agreements. The member should also review the grievance procedure contained in the labor agreements and take whatever steps afforded under the provision to file a grievance if the member so desires.

8. On December 1, 2006, the FOP sent a letter to the City listing its objections to the revised general orders and demanded a return to the status quo until the parties negotiated any substantive changes and the impact of those changes. The City did not respond to the request to negotiate.

9. Lt. Brown certifies that since the implementation of the revised general orders at issue here, the City has not imposed discipline based on a violation of its chronic absence control policy.

ANALYSIS

The motion and cross motions raise essentially two issues: (1) was the City obligated to negotiate the assignment to chronic sick categories A and B; the use of category B as a criteria in determining eligibility for additional work or special assignments; and the creation of a designation review procedure, and (2) if any of these items was negotiable, did the parties in fact negotiate.

The Negotiability Issue

I first consider the issue of whether any of the challenged provisions of the general orders was negotiable because if none are negotiable, I need not consider the second issue of whether the parties did or did not negotiate.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981). However, since the public employer is not required to negotiate permissive subjects, the only consideration for purposes of these motions is whether the subjects at issue are mandatorily negotiable. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

Paterson sets out the standard for determining whether an item is mandatorily negotiable:

> First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement

> would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. [87 N.J. at 92-93; citations omitted].

The parties do not assert that any item in dispute regarding the general orders is preempted by statute. Thus, the analysis turns on whether the three items are terms and conditions of employment.

The City asserts, and the FOP does not dispute, that the City has a managerial prerogative to establish a sick leave verification policy and to use reasonable means to verify the proper use of sick leave. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). The FOP objects, however, to the assignment of officers to chronic sick categories when the officers have not used up their annual 20-day sick leave allotment.

The premise of Piscataway and related cases is that employers have a non-negotiable right to monitor whether sick leave is being properly used, regardless of whether an employee has used his annual sick leave allotment. See, Township of Montclair, P.E.R.C. No. 2000-107, 26 NJPER 310 (¶31126 2000) (grievance not legally arbitrable if employer prevented from initiating discipline for sick leave abuse unless employee had exhausted annual sick leave allotment). There is a recognized governmental policy interest is verifying that employees who claim to be sick are, in fact, sick. A corollary to this

prerogative is the non-negotiable right of the employer to monitor absences after a set number of sick days. Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984) (Board had non-negotiable managerial prerogative to require employees on sick leave for a certain number of days to attend conferences with supervisors even though employees entitled to 10 sick leave days per year). See also, County of Morris, P.E.R.C. No. 2002-33, 28 NJPER 58 (¶33020 2001) (grievance restrained to extent it challenged Sheriff's right to monitor sick leave after six and one-half days per year even though employees entitled to 15 sick leave days annually); Freehold Reg. H.S. Dist., D.U.P. No. 86-11, 12 NJPER 276 (¶17113 1986) (decision to require mandatory conferences for all employees after certain number of absences is non-negotiable right to verify sick leave usage). Accordingly, merely assigning employees to chronic sick leave categories for the sole purpose of monitoring sick leave usage, even when the monitoring is triggered by less than the negotiated leave benefit, is not negotiable.

The FOP's reliance on County of Monmouth, P.E.R.C. No. 2010-58, 36 NJPER 42 (¶19 2010) is misplaced. There, the Commission determined that a provision proposed by the PBA to preclude discipline for pattern setting unless the employee used their annual allotted 15 days of sick leave was negotiable. But the Commission emphasized that an agreement prohibiting

discipline for pattern setting would not preclude an employer from disciplining an employee if he/she takes sick leave but is not verifiably sick or abuses sick leave in some other manner. In other words, Monmouth does not override the prerogative to verify and monitor sick leave usage established by the cases cited herein. To the extent, therefore, that categories A and B implicate monitoring of sick leave usage, Monmouth is not controlling.

However, the FOP also challenges the City's unilateral right to use the category "B" designation as one of its criteria in determining eligibility for additional work or special assignments. Generally, criteria used for making promotions or giving assignments are non-negotiable. Cherry Hill Township, P.E.R.C. No. 97-33, 22 NJPER 375 (¶27197 1996). The premise is that the employer has a managerial prerogative to match the best qualified employee to each assignment. However, the Commission has also determined that allocation of overtime is directly related to hours of work and compensation and is, therefore, negotiable. City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982).

Nevertheless, overtime allocation cannot interfere with the employer's right to ensure that a sufficient number of qualified employees are available to perform the necessary overtime tasks. For instance, an employer who requires an employee with special

skills or qualifications may order the employee to work overtime regardless of negotiated overtime procedures. In re Local 195 and State of New Jersey, 88 N.J. 393 (1982). An employer retains the right to reject an employee's request to work overtime, if the employee is determined to be unqualified or physically incapable of performing the work. Long Branch.[3/] Thus, there is a tension between the employer's prerogatives to determine that overtime must be worked and to ensure employees are qualified to perform the work and the right of employees to negotiate how to allocate the overtime work.

Here, the City unilaterally determined that one of the criteria for allocating special assignments or additional work is assignment to category B. An officer is assigned to that category solely based on using a set number of sick leave days (a number less than the annual allotment) regardless of whether the officer is legitimately using sick leave for its intended purpose and within negotiated guidelines.

In Borough of Park Ridge, P.E.R.C. No. 87-55, 12 NJPER 851 (¶17328 1986), the Commission determined that a grievance

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3/ The FOP argues that using category B as a criteria also violates the seniority provision of the parties' collective agreement as well as past practice in using seniority for work assignments. There are no facts in the record to support the past practice, thus I can not consider this argument. As to violations of the parties' collective agreement, absent an allegation of repudiation, the FOP should pursue this matter through the negotiated grievance procedure.

alleging an employee was unjustifiably denied an overtime assignment due to excessive absenteeism was arbitrable since it predominantly involved the mandatorily negotiable issue of overtime allocation among unit employees. The Commission rejected the Borough's contention that overtime work involves a transfer or reassignment and wrote in pertinent part:

> [W]e recognize that an employer may reject an employee's request to work overtime, despite a negotiated system distributing overtime to volunteers with the most seniority, if that employee is unqualified or physically incapable of doing the work. (Citation omitted). But, in this case, there is nothing in the record that would show that Conklin is not qualified to perform the assignment. Contrary to the Borough's claim, Conklin's past absentee rate, standing alone, simply does not mean that he is incapable of performing this assignment. While the Borough retains the right to insure that employees who are sick do not work until their fitness is verified, (citation omitted) disputes over overtime opportunities among equally qualified employees may be submitted to binding arbitration. Id. at 852.

The City argues that the category B designation is only one of several criteria considered by commanding officers when determining eligibility for additional work responsibilities or special work assignments. The City does not view this designation as a penalty or restriction. Rather, it contends that the designation and its consideration regarding additional work assignments are designed to provide quality services so as not to threaten the public safety. This argument is inapposite.

Like Park Ridge, the category B designation only establishes that the officer has used a set number of days in a specified time period; it does not address the issue of whether the officer is physically capable or qualified to perform a particular task. In essence, using the category B designation for this purpose may deprive an officer, who is legitimately using a negotiated benefit, of the right to use that benefit or the negotiated benefit related to overtime opportunities. On balance, therefore, the employee's right to use negotiated sick leave time when sick and/or obtain additional work or special assignments outweighs the City's interest in using the category B designation as a criteria in determining eligibility for additional work or special assignments.

Moreover, the City has not demonstrated how negotiating over this issue would interfere with its ability to govern, specifically to monitor sick leave abuse and to ensure that qualified employees are assigned additional work or special assignments. The City is not prevented from identifying and disciplining sick leave abusers or ensuring that those who are not physically able do not take on additional work or special assignments. Accordingly, using category B as a criteria in determining eligibility for additional work or special assignments is negotiable.

Next, the FOP asserts that the City's designation review procedure is negotiable and could not be unilaterally implemented. N.J.S.A. 34:13A-5.3 mandates that public employers negotiate written grievance and disciplinary review procedures. The parties have done so and embodied the procedure in their collective agreement. The FOP maintains that any dispute regarding categories A or B designation in the sick leave policy falls squarely within the parties' negotiated grievance procedure. Setting up an additional procedure without negotiations, it asserts, violates the Act. I agree. Although the designation review adopted by the City states that it does not supercede the parties' grievance procedure, it is an additional and alternative procedure that could not be unilaterally implemented.

Also, as the FOP argues, by permitting a request for review by the individual officer, the designation review procedure excludes the union and, thereby, violates the tenets of the exclusivity principal set out in Lullo v. IAFF, 55 N.J. 409 (1970). See also, Troy v. Rutgers, 168 N.J. 354 (2001). An employer violates 5.4a(1) and (5) if it negotiates directly with individual employees rather than with their majority representative over employment conditions and enters into agreements with them setting employment conditions. Hillsborough Bd. of Ed., P.E.R.C. No. 2005-54, 31 NJPER 99 (¶43 2005);

Matawan-Aberdeen Reg. School Dist. Bd. of Ed., P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989).

The City counters that the designation review is merely an invitation to discuss the designation.[4/] That description is not accurate. The procedure provides that an officer may request his/her commanding officer to review the designation "without filing a grievance." The commanding officer is to review the request and provide a recommendation. This procedure leaves it to the officer to review the parties' grievance procedure and decide for themselves whether to file a grievance. The designation review does not provide for notification to the FOP and, apparently, provides a means for the individual to pursue his/her objection without notice to or opportunity for the union to participate. It clearly impinges on the FOP's right to exclusively represent the interests of its membership.[5/]

The Duty to Negotiate Issue

Having determined that the City had a duty to negotiate both the use of category B as a criteria for determining eligibility

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4/ The City also argues that notice to employees of a sick leave designation is a managerial prerogative. This argument, however, is not raised in the FOP's motion nor asserted in the unfair practice charge. Therefore, I have not addressed this issue.

5/ The City argues that the review procedure is merely an opportunity for a conference. A reading of the clear language of the provision does not support this interpretation. Thus, the cases cited by the City are inapposite.

for additional work or special assignments and the designation review procedure, I now turn to the issue of whether the City fulfilled its duty to negotiate. The City maintains alternative theories, namely that the FOP waived its right to negotiate and/or the parties negotiated.

As to the waiver issue, the City asserts that the "Management Rights" and "Rules and Regulation" provisions of the parties' collective agreement act as a waiver of the right to negotiate these subjects. Majority representatives may waive their right to negotiate over mandatorily negotiable subjects, but any waiver of a statutory right to negotiate must be clear and unmistakable. Red Bank Reg. Bd. Ass'n v. Red Bank H.S. Bd. of Ed., 78 N.J. 122, 140 (1978). Broadly worded zipper clauses or fully bargained clauses alone do not constitute a clear and unmistakable waiver of the right to negotiate specific subjects. Camden Cty., P.E.R.C. No. 94-121, 20 NJPER 282 (¶25143 1994). See also, City of Newark, P.E.R.C. No. 88-38, 13 NJPER 817 (¶18313 1987); UMDNJ, P.E.R.C. No. 2010-12, 35 NJPER 330 (¶113 2009). Cf. State of New Jersey, P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985) (collective agreement specifically reserved employer's right to determine employees' regular work shift and supported unilateral action changing shift times); Borough of Franklin, D.U.P. No. 2002-5, 27 NJPER 382 (¶32141 2001) (no obligation to negotiate where collective agreement provided for

work schedule "as determined by management"). The FOP correctly argues that the provisions relied on by the City do not give the City the right to act unilaterally in regard to consideration of the category B designation as a criteria or the designation review procedure. Thus, the general provisions of the parties' "Management Rights" and "Rules and Regulations" do not act as a waiver or relieve the City of its duty to negotiate before making unilateral changes to these working conditions.

Alternatively, the City contends that negotiations took place before the general orders were issued. Lt. Brown certified that copies of the proposed revised orders were sent to the unions approximately a month before they were issued and that he and Chief Morgan then met and discussed the orders with the FOP and PBA. Brown also certifies that the FOP proposed changes to "application of leave to females" and "use of contractual various changes [sic]" which were incorporated into the general orders. The City contends that just because the parties did not agree on every demand presented by the FOP does not mean that good faith negotiations did not occur. Rather, citing New Jersey Sports and Exposition Auth., P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987), the City asserts it was willing to negotiate the issues with an open mind and a desire to reach an agreement. It further opines that taking a firm stance on an issue does not constitute a refusal to negotiate in good faith, especially where many

concessions have been made. Council of New Jersey State College Locals, 141 N.J. Super. 470 (App. Div. 1976).

The FOP counters that the meet and discuss session did not constitute negotiations and that the City provides no evidence, that it actually made any revisions during the meet and discuss session which were the result of suggestions made by the FOP. In essence, the FOP contends that the City's certification fails to meet the standards to either oppose the FOP's motion or support its cross motion. Specifically, the City's certification established only bare assertions not uncontroverted facts showing the existence of a genuine issue of material fact.

The obligation to negotiate does not require agreement. State of New Jersey v. Council of New Jersey State College Locals. If the parties cannot reach agreement and negotiate, in fact, to impasse, the public employer may then act unilaterally. City of New Brunswick, P.E.R.C. No. 87-68, 13 NJPER 11 (¶18008 1986). In Jersey City Medical Center, P.E.R.C. No. 90-99, 16 NJPER 302 (¶21124 1990), a case cited by the FOP, the Commission determined that the City's letter offering to meet and discuss the issue of free parking was not a sufficient response to the union's demand to negotiate. The letter was never received by the union. Nevertheless, the Commission found that, even if it had been received, the mere offer was consistent with the Medical Center's position that it had no duty to negotiate over free

parking and with the admission in its Answer that it had refused to negotiate. This case is distinguishable because here it appears that the parties did meet and some proposal(s) was exchanged. Also, there is no admission by the City that it refused to negotiate.

The City's certification, however, does not support that the parties negotiated over the specific subjects of the category B designation as a criteria in allocation of additional work and special assignments or over the designation review procedure.[6/] At best, giving every reasonable inference to the City and viewing the facts in the light most favorable to the City, the parties met once, and the FOP proposed changes to leave for female officers and "various" other changes which were incorporated into the general orders. These facts do not establish that the parties negotiated to agreement over the specific subjects at issue here (category B as a criteria and designation review procedure) nor does Brown's certification support that the parties negotiated to impasse before implementation. Accordingly, the change was made unilaterally without the acquiescence of the FOP. The City violated 5.4a(1)

6/ Brown's statements were too general and confusing, particularly regarding what proposals were made by the FOP, to support that the parties engaged in negotiations. See paragraph no. 8 of Brown certification.

and (5) of the Act when it did not respond to the FOP's December 1 demand to negotiate.

CONCLUSIONS OF LAW

1. The City violated 5.4a(1) and (5) of the Act when it unilaterally implemented and refused to negotiate general orders 178, 178A and 179, specifically regarding category B designation as a criteria for allocation of additional work and special assignments and regarding the designation review procedure. The City also violated 5.4a(1) and (5) when it dealt directly with employees represented by the FOP under its designation review procedure.

2. The City did not violate 5.4a(1) and (5) when it created categories A and B because it has a managerial prerogative to create those categories for the purposes of monitoring and verifying sick leave usage.

RECOMMENDED ORDER

1. The FOP's motion is granted in part regarding the City's unilateral implementation and refusal to negotiate portions of general orders 178, 178A and 179 related to category B designation as a criteria for allocation of additional work and special assignments and to the designation review procedure; and regarding the direct dealing related to the designation review procedure. The FOP's motion is denied to the extent the City has

a managerial prerogative to create categories A and B for the purposes of monitoring and verifying sick leave usage.

2. The City's cross-motion is granted in part regarding its managerial prerogative to establish categories A and B in general orders 178, 178A and 179 in order to monitor and verify sick leave usage. The remainder of its cross-motion is denied.

3. The City is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally establishing a category B designation as a criteria for allocating additional work and special assignments and a designation review procedure and by dealing directly with employees through the designation review procedure.

2. Refusing to negotiate in good faith with the FOP concerning terms and conditions of employment of employees in its unit, particularly by unilaterally establishing a category B designation as a criteria for allocating additional work and special assignments and a designation review procedure, and by dealing directly with employees through the designation review procedure.

B. Take this action:

1. Rescind and negotiate over portions of general orders 178, 178A and 179 related to the use of the category B designation as a criteria in the allocation of additional work and special assignments and regarding the designation review procedure.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the City's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

Wendy L. Young
Hearing Examiner

DATED: November 9, 2010
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-4.8(e) this ruling may only be appealed to the Commission by special permission in accordance with N.J.A.C. 19:14-4.6.

Any request for special permission to appeal is due by November 20, 2010.

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally establishing a category B designation as a criteria for allocating additional work and special assignments and a designation review procedure and by dealing directly with employees through the designation review procedure.

WE WILL cease and desist from refusing to negotiate in good faith with the FOP concerning terms and conditions of employment of employees in its unit, particularly by unilaterally establishing a category B designation as a criteria for allocating additional work and special assignments and a designation review procedure, and by dealing directly with employees through the designation review procedure.

WE WILL rescind and negotiate over portions of general orders 178, 178A and 179 related to the use of the category B designation as a criteria in the allocation of additional work and special assignments and regarding the designation review procedure.

Docket No. CO-2007-234 City of East Orange (Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"