P.E.R.C. NO. 89-111

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DEPARTMENT OF CORRECTIONS)

Respondent,

-and-

Docket No. CO-H-87-352

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the State of New Jersey (Department of Corrections) violated the New Jersey Employer-Employee Relations Act when, without prior negoiations with the Communications Workers of America, AFL-CIO, it rescinded a policy granting prison physicians ten extra days a year off.

P.E.R.C. NO. 89-111

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DEPARTMENT OF CORRECTIONS)

Respondent,

-and-

Docket No. CO-H-87-352

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Peter N. Perretti, Jr., Attorney General (Michael L. Diller, Deputy Attorney General)

For the Charging Party, Steven P. Weissman, Esq.

DECISION AND ORDER

On June 2, 1987, the Communications Workers of America, AFL-CIO ("CWA") filed an unfair practice charge against the State of New Jersey, (Department of Corrections) ("DOC"). The charge alleges that DOC violated subsections 5.4(a)(1), (3) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,

---

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; (3) discriminating in regard to...any term or condition of employment to encourage or discourage 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 conditions of employment of employees in that unit....

when, without prior negotiations with CWA, it rescinded a policy granting prison physicians ten extra days a year off.

On April 13, 1988, a Complaint and Notice of Hearing issued.

On April 27, 1988, DOC filed an Answer. It asserts that the charge was untimely and that Department of Personnel overtime regulations outlawed policies -- allegedly including this one -- granting NL employees overtime compensation for on-call situations.[2/]

On June 15 and 21, 1988, Hearing Examiner Arnold H. Zudick conducted a hearing. At the outset, CWA withdrew its 5.4(a)(3) allegation. The parties stipulated facts, examined witnesses and introduced exhibits. Post-hearing briefs were submitted by October 19, 1988.

On November 18, 1988, the Hearing Examiner issued his report. H.E. No. 89-16, 15 NJPER 3 (¶20001 1988). He found that the ten extra days off a year were not overtime compensation and concluded that DOC had violated subsections 5.4(a)(1) and (5) by unilaterally terminating them. He recommended an order requiring the employer to restore the days off, credit physicians with days lost in 1987 and 1988, negotiate with CWA, and post a notice of the violation and remedy.

On February 3, 1989, after receiving two extensions of time, DOC filed exceptions. It asserts that overtime regulations mandated discontinuing the days off and that the charge was untimely.

2/ NL means having irregular or variable work hours. N.J.A.C. 4A:3-5.2.

On February 27, 1989, CWA filed a response. It supports the Hearing Examiner's findings of fact and conclusions. It argues that the ten days off were leave time, not overtime compensation.

On March 8, 1989, the DOC filed a response reiterating that the ten days were given as overtime compensation.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-9) are thorough and accurate. We incorporate them.[3/] We add to finding no. 3 that the payroll supervisor at the Skillman Training School for Boys recorded these extra days off as "P" days, meaning permission day with pay. He conceded that there was no such category on the DOC forms and that vacation was the logical category for recording these days off.

This charge was timely filed. The employer did not discontinue the days off until April 16, 1987. The charge was filed six weeks later, well within the six month statute of limitations. N.J.S.A. 34:13A-5.4(c). The employer asserts that CWA should have anticipated (even if DOC did not) that this policy would be changed since the overtime regulations promulgated in May 1986 preordained that course. This contention really goes to the merits of the preemption defense, not the timeliness of the charge. Majority representatives need not interpret new regulations and guess what

---

3/ The Hearing Examiner properly excluded the opinion testimony of a Department of Personnel official about the overtime regulations.

employment conditions might be changed. They may wait until the employer acts before initiating litigation.[4/]

It is undisputed that the employer: (1) changed a term and condition of employment (2) without negotiations (3) without a managerial prerogative and (4) without a contract defense. It therefore violated the Act unless the overtime regulations mandated eliminating the days off. Preemption will not be found unless a regulation "expressly, specifically, and comprehensively" sets an employment condition so that the employer has no discretion to vary it. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982).[5/]

The employer argues that N.J.A.C. 4A:3-5.7(a)(2) compelled it to take away the days off. This regulation provides:

4/ The employer notes that CWA never filed unfair charges challenging the promulgation of the new regulations. We recently rejected, at the employer's behest, an attempt to litigate similar charges. State of New Jersey (Office of Employee Relations, Department of Personnel), P.E.R.C. No. 89-67, 15 NJPER 76 (¶20031 1989).

5/ The Fair Labor Standards Act, 29 U.S.C. §201 et seq., sets certain minimum standards for overtime compensation. State of New Jersey (State Troopers), P.E.R.C. No. 86-139, 12 NJPER 484 (¶17185 1986). After Garcia v. San Antonio MTA, __ U.S. __, 105 S.Ct. 1005, 83 L.E.2d 1016 (1985), upheld applying the FLSA to state and local governments, New Jersey and other states had to change their regulations to meet the FLSA's minimum standards. When proposing its revised rules, the Department of Personnel stated that "where possible existing policies and practices have been kept intact" and that the rules "preserved the existing system for exempt employees." 18 N.J.R. at 516. The FLSA does not preempt more generous negotiated arrangements or apply to these doctors. State Troopers; 29 U.S.C. §213(a)(1).

> (a) Eligibility for overtime compensation for on call employees shall be as follows:
>
> > ...2. Employees in exempt positions (3E, 4E, NL, N4) shall have no claim or entitlement to compensation for such time.6/

It also relies on a Department of Personnel letter (J-10) advising the employer that these physicians may not receive overtime compensation for on-call situations. To the extent the ten days of leave were given in exchange for work done -- being called in instead of just being on-call -- the employer asserts that N.J.A.C. 4A:3-5.3(a) caps time off at one hour for each hour worked and that in any event the prison doctors are not eligible for such compensation because they are above grade 28.

Under all the circumstances, we agree with the Hearing Examiner that these regulations did not mandate unilaterally eliminating the ten days off. That employees might not be entitled by law to overtime cash or overtime compensatory time off based on on-call status does not mean that an employer could not grant improved benefits in light of the round-the-clock demands of their jobs, demands which probably resulted in doctors working more than ten extra days. J-10 indicated that these regulations did not rule out the possibility that prison physicians might receive the extra days as vacation days. On this record, the extra days off were a

---

6/ The overtime regulations have been recodified often. For example, this regulation originally was N.J.A.C. 4:6-5.1(b) and became N.J.A.C. 4:2-2.7.5(a)(2). We will use the current citations.

form of vacation leave rather than overtime compensation. These days off were treated as vacation days: they were recorded as such, available at the start of the year, and scheduled the same way as other vacation days. When interviewed for jobs, doctors were told that they would receive these extra days off. An employer representative credibly testified that physicians had never received compensatory time off for overtime and were not eligible for it. The overtime and comp time boxes on their timesheets were left blank. The employee and employer, in short, both treated these days off as extra vacation days rather than overtime compensation days as defined in the rules and implemented by specified requirements and procedures.7/ Given these circumstances, we hold that the employer violated subsections 5.4(a)(1) and (5) when it unilaterally eliminated the extra days off. We adopt the Hearing Examiner's recommended remedy and enter this order.

7/ N.J.A.C. 4A:3-5.2 defines overtime compensation as cash overtime compensation or compensatory time off as permitted. We agree with the Hearing Examiner (pp. 16-19) that the days off were not overtime compensation under this definition. If DOC had viewed the matter as an overtime compensation question, it presumably would have applied its internal policy to deny employees over salary grade 28 any compensatory time off. This internal policy, incidentally, was not preemptive: DOC had discretion to grant compensatory time off on a hour-for-hour basis under N.J.A.C. 4A:3-5.3(d). Had it done so, these doctors could have received more than ten days off (or 70 hours off). These employees have not received a windfall.

5. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
April 28, 1989
ISSUED: May 1, 1989

APPENDIX "A"

NOTICE TO ALL 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 failing to negotiate with CWA over terminating a ten day leave policy for prison physicians.

WE WILL restore the ten day leave policy.

WE WILL credit the physicians with any unused portion of the ten days for 1987, and the full ten days for 1988.

WE WILL negotiate with CWA over any future attempt to terminate the ten day leave policy.

Docket No. CO-H-87-352 STATE OF NEW JERSEY (DEPARTMENT OF CORRECTIONS) (Public Employer)

Dated _____ By _____ (Title)

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 St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 89-16

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

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT
OF CORRECTIONS,

Respondent,

-and-

Docket No. CO-H-87-352

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the State of New Jersey, Department of Corrections, violated the New Jersey Employer-Employee Relations Act when it unilaterally terminated a policy granting ten additional leave days to physicians. The State argued that N.J.A.C 4:2-27.1 et seq. preempted negotiations over the termination of the leave policy. The Hearing Examiner, however, found that the particular provisions of the Code did not expressly and specifically preempt negotiations; thus, he found that the State violated subsection 5.4(a)(5) of the Act.

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. 89-16

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

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT
OF CORRECTIONS,

Respondent,

-and- Docket No. CO-H-87-352

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

Appearances:

For the Respondent, W. Cary Edwards, Attorney General of New Jersey (Michael L. Diller, D.A.G.)

For the Charging Party, Steven P. Weissman, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on June 2, 1987 by the Communications Workers of America, AFL-CIO (CWA) alleging that the State of New Jersey, Department of Corrections ("State" or "DOC") violated subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

(Act).[1/] The CWA alleged that the State violated the Act on or about April 16, 1987 by unilaterally rescinding a policy granting physicians employed by the DOC ten additional days off per year in lieu of overtime worked during the calendar year.

A Complaint and Notice of Hearing (C-1) was issued on April 13, 1988. The State filed an Answer (C-2) on April 27, 1988 denying that it violated the Act. The State primarily argued that the Charge was untimely filed and that its actions complied with new rules of the New Jersey Administrative Code (N.J.A.C.) regarding compensation for overtime in on-call situations.

I conducted hearings on June 15 and 21, 1988, at which the parties stipulated certain facts and examined witnesses.[2/] On June 15 the CWA withdraw the 5.4(a)(3) allegation (TA4). Both parties filed post-hearing briefs by September 27, 1988. The CWA filed a reply brief on October 19, 1988.

Based upon the entire record I make the following:

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. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ TA refers to hearing of June 15, 1988, and TB refers to hearing of June 21, 1988.

Findings of Fact

1. The parties stipulated the following facts:

a) In accordance with the Department of Corrections policy, which has been designated for the record as J-7, doctors have been told when interviewed and hired that they would receive ten additional days off, beyond the leave normally provided by the Department as sick leave, vacation leave and administrative leave.[3/]

b) Doctors affected by the policy, J-7, received credit for ten days off at the beginning of each calendar year.

c) During the period that the policy was in effect, doctors were not required to maintain records of actual time worked while on call as a condition of receiving the ten days off.

3/ J-7 is DOC personnel bulletin No. 77-2, dated April 4, 1977, concerning "Time Off Benefits for Physicians." It provides in pertinent part:

> All physicians employed at the operational units are unclassified and have an NL workweek. Accordingly, all full time physicians will work a minimum of thirty-five hours per week, to be distributed over a normal operational schedule.
>
> Since professional and ethical responsibilities require physicians to provide patient care on an around-the-clock basis, on-call schedules will be established within each institution to maintain such coverage during evening hours and weekends.
>
> In order to compensate the medical staff who provide on-call coverage, they shall be granted ten (10) additional days of time off annually. However, these extra days leave cannot be taken until six months of on-call status has been completed. Incumbents who have completed this six month requirement are eligible immediately.

d) Doctors affected by the policy, J-7, are unclassified employees and are "NL" (or no limit employees) pursuant to Department of Personnel regulations.

e) As of April 16, 1987, doctors affected by the policy indicated in J-7 no longer received ten additional days pursuant to that policy.

f) The Department of Corrections policy described in J-7 was in force at least from August, 1974.

g) The practice of the Department of Corrections is to send copies of Human Resources Personnel Bulletins to all labor organizations representing Department of Corrections employees. (TA6-TA7).

I find:

2. The State and CWA (and its predecessor) have been parties to collective agreements covering professional employees (including DOC physicians) since 1976 (J-1). The parties' most recent collective agreement, J-6, expires June 30, 1989. Nothing in J-6 refers to J-7 or to granting ten additional days off to physicians.

3. Physicians receive 20 vacation leave days per year pursuant to J-6.[4/] The ten leave days provided in J-7 were added

---

4/ Article 24 of J-6 concerns vacation and administrative leave for unclassified employees. It gives unclassified employees, such as the physicians here, an option between the vacation

Footnote Continued on Next Page

to the physicians' regular vacation days, resulting in their receiving 30 days of leave beginning January 1 (Exhibits CP-2, CP-3 and CP-4; TB34). The physicians were entitled to use the ten extra leave days in the same manner they used regular vacation days (TB35). The ten extra leave days were recorded by the DOC as vacation leave on the DOC's official time records (CP-2, CP-3, CP-4; TB54). They were not listed as compensatory time, overtime, sick leave or administrative leave which were the other categories on the time records forms.

4. Donald Doherty, the DOC Special Assistant to the Assistant Commissioner, testified that DOC physicians were given the ten extra leave days because they had around-the-clock patient care responsibilities (TB37). Doherty explained that hospital staff frequently telephone physicians after they leave the institution for advice on medication and treatment of patients. Regarding J-7, Doherty stated:

> ...based on this Bulletin, doctors who have a specific responsibility as professionals in the medical field to provide almost what you call around-the-clock coverage to

---

4/ Footnote Continued From Previous Page

policy provided for the classified employees in Art. 23G, or the leave policy established by the Department Head for unclassified employees. Art. 23G provides for an incremental vacation policy, 12 days through the first five years; 15 days between six and twelve years; 20 days between thirteen and twenty years; and 25 days after the twentieth year. I presume that the Department Head policy created a straight 20 days vacation leave policy from the first year, and having studied CP-2, CP-3, CP-4, I infer that the physicians elected to receive a straight 20 days vacation.

> their patients, and I know for a fact that they are called after they leave the institution by the hospital staff of the various institutions for advice on medication and treatment, and in consideration for coming in to admit patients and the like, and all the extra phone duty, and on-call duty when they would have to come into the institution, the Department gave them ten additional days off (TB22).

I credit his testimony.

Since around-the-clock patient care is part of a physician's professional responsibilities, the DOC believed that all physicians should receive an extra ten days off over those of other employees (TB37). The DOC also believed that the physicians were probably working more than ten additional days (TB37).[5/]

George Bruner is the DOC Employee Relations Administrator. On December 16, 1987 he sent a letter (J-9) to Peter Calderone, Assistant Commissioner in the Department of Personnel, explaining the historical basis for granting the ten extra leave days to DOC physicians. He said:

> The Department of Corrections has had a long standing practice of providing additional time off to our institutional physicians in order to compensate them for additional work time. This practice is based on the reality that physicians have ethical and professional responsibilities that transcend those of most other professional employees. As a the [sic] result of these responsibilities, physicians are required, on a regular basis, to provide around the clock patient care and to be on-call twenty-four (24) hours a day in order to maintain proper medical coverage--a legal responsibility of the Department. In consideration for the above extra duty, the medical staff members who provide such coverage were granted ten (10) additional days off per year.

5/ Since no records were kept of that time, it was possible that some physicians worked less than ten additional days (TB40).

5. The DOC regulates the use and receipt of compensatory time. Compensatory time is time off an employee receives in lieu of cash for working overtime, or in the case of NL employees, compensatory time is time off for additional time worked on an hour-for-hour basis (TB36). Employees who receive some form of compensation for such time are required to maintain specific records (TB38-TB39). Compensatory time is directly tied to working a specific number of hours and is credited only after it is earned. Employees do not receive credit for compensatory time at the beginning of the calendar year (TB36). The DOC compensates eligible employees for overtime either by cash or compensatory time, but only for actual overtime worked (TB39).

DOC NL employees below grade 28 are eligible for hour-for-hour compensatory time (TB42). Physicians are above grade 28, and according to Doherty they have never received and are not eligible to receive compensatory time (TB35-TB37). In fact, Doherty testified that the ten additional leave days received by physicians fit into a category other than compensatory time (TB36-TB37). He further explained that the reason the physicians received the ten additional leave days was because they had "around-the-clock patient care responsibilities" (TB37). I credit his remarks.

6. On or about June 3, 1986, Doherty prepared DOC Bulletin 86-11 (R-1), notifying high level DOC officials of new overtime regulations that became effective on April 15, 1986. Bruce

Fralinger, a CWA Staff Representative, did not know if CWA received a copy of R-1 (TB11). The pertinent part of R-1 states:

> NL and N4 employees [above range 28] are not eligible for compensation for time served during on-call situations.

Notwithstanding R-1, no change was made in granting the ten extra leave days to physicians until April 16, 1987. On that day the DOC issued Bulletin 87-13 (J-8), rescinding J-7, and terminating the grant of the ten extra leave days. The DOC did not notify or negotiate with the CWA about the termination of the old policy before issuing J-8 (TB41). The CWA first became aware of the termination of the old policy after J-8 was issued (TB10).

On May 20, 1987, the CWA filed a grievance (R-3) over the termination of the ten additional leave days (TB12). On June 2, the CWA filed the unfair practice charge. DOC has not issued a decision on the grievance, pending the processing of the Charge (TB28-TB29).

On December 16, 1987, Bruner sent J-9 to Calderone asking for his comments about whether the DOC could continue providing the ten additional days for two years. By letter of March 3, 1988, (J-10) Judy Winkler, an Administrator in the Department of Personnel, responded to J-9. She first cited N.J.A.C. 4:2-27.5(a)(2) (formerly N.J.A.C. 4:6-5.1(b)) which states:

> (2) Employees in exempt positions (3E, 4E, NL, N4) shall have no claim or entitlement to compensation for such time.

Winkler interpreted that rule to mean:

> ...physicians may not be compensated for on call situations. Further, in reading this rule in its

> entirety, it is apparent that on call compensation is directly related to hours actually worked or hours where an employee cannot effectively use their own time. (J-9)

Winkler also explained that the ten extra days was not administrative leave. Winkler further explained that since the statutes and code were silent regarding vacation leave for unclassified employees, her Department took no position as to whether the ten additional leave days could be considered vacation leave. She then referred to a Governor's memorandum, J-11, issued to all "Department Heads" on January 31, 1975, which states in pertinent part that unclassified personnel can receive twenty days of vacation leave.

ANALYSIS

The State argues that the Charge was untimely filed, and that the Overtime Rules (Rules) in N.J.A.C. 4:2-27.1 et seq. preempt negotiations over the disputed ten days.[6/] The State also argued that the CWA made no demand to negotiate other benefits in lieu of the ten days.

The Statute of Limitations Defense

The Act requires that a charge be filed within six months after an alleged unfair practice occurred. N.J.S.A. 34:13A-5.4(c).

6/ The Rules codified in N.J.A.C. 4:2-27.1 et seq. are the newest Overtime Rules which became effective on July 6, 1987. Prior thereto, the Rules were codified as N.J.A.C. 4:6-1.1 et seq. Since there is reference to the old codification in the parties' submissions, I will cite the old codification in parentheses behind the current code numbers.

I find that the six month period in this case began on April 16, 1987, when the State issued J-8, and not on April 15, 1986, the date the new overtime rules became effective as announced in R-1.[7/] The J-8 memorandum notified CWA that the ten-day leave policy was discontinued. Since the Charge was filed within six months of April 16, 1987 it was timely.

Notice of a change is a key element in considering statute of limitation issues. But where there was no notice of a change or an impending change, a charging party cannot be expected to file an unfair practice charge. The State did not prove that the CWA had knowledge of R-1 when it issued or that R-1 on its face was intended to terminate the ten day leave policy. Even assuming that the CWA knew of R-1, that fact does not establish that the policy was terminated on April 15, 1986.

On April 15, 1986 there was no change in an established term and condition of employment, and even though the State may have considered the leave policy terminated on that date, the CWA did not have knowledge of any change on that date. The change occurred on April 16, 1987 and the CWA filed the Charge well within six month of that date.

The Act at section 5.4(c) also provides that if an aggrieved party was "prevented" from filing a charge within six

---

7/ The overtime rules that became effective April 15, 1986, were N.J.A.C. 4:6-1.1 et seq., which have been recodified as N.J.A.C. 4:2-27.1 et seq.

months, the six months would be computed from the day the party was no longer prevented. Since it had no notice of a change on April 15, 1986, the CWA was prevented from filing within six months of that date. Once J-8 was issued advising the employees that the policy was being terminated, the CWA promptly filed a charge.

Finally, in its post-hearing brief the State admitted that it was the DOC's mistake for not applying R-1 to the physicians and necessitated the issuance of J-8. The CWA should not be penalized for the State's mistake.

The Negotiations Defense

In its post-hearing brief, the State argued that the CWA never demanded negotiations over any benefits in lieu of the ten additional leave days. Whether the burden to demand negotiations lies with the CWA depends to some extent upon the success of the State's preemption defense.

Employee leave time, such as vacation leave, is mandatorily negotiable. City of Orange, P.E.R.C. No. 79-10, 4 NJPER 420 (¶4188 1978); Hudson County, P.E.R.C. No. 80-161, 6 NJPER 352 (¶11177 1980). Generally, when an established practice exists regarding the granting of a particular term and condition of employment a public employer has the burden to initiate negotiations with the majority representative over any proposed change to that term and condition of employment prior to implementing any change. New Brunswick Bd.Ed., P.E.R.C. No. 78-47, 4 NJPER 84, 85 (¶4040 1978). When a public employer unilaterally alters a particular term and condition

of employment, a majority representative that files an unfair practice charge is relieved of any burden to demand negotiations on that particular subject for as long as the employer fails to reinstate the status quo. Hudson County, P.E.R.C. No. 78-48, 4 NJPER 87, 90 (¶4041 1978).

By analogy, if an employer wants to eliminate an established leave policy it has the burden to initiate negotiations over such a proposal before eliminating the policy. If an employer changes a term and condition of employment without negotiations, the majority representative who files a timely unfair practice charge is relieved of any burden to engage in or demand negotiations over that subject until the employer reinstates the status quo.

The result might be different, however, if the employer exercised a managerial prerogative or its actions were required by law. A majority representative has the burden to demand negotiations on the severable aspects of a managerial decision. Monroe Tp. Bd.Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984); Trenton Bd.Ed., P.E.R.C. No. 88-16, 13 NJPER 714 (¶18266 1987).

This case, however, involves neither the severable aspects of a managerial decision, nor the severable aspects of the State's decision to unilaterally terminate the ten day leave policy. The CWA has not alleged that the State violated the Act by failing to negotiate after it unilaterally terminated the ten day leave policy. Rather, it alleged that the Overtime Rules (Rules) in N.J.A.C. 4:2-27.1 et seq. did not preempt negotiations and therefore

the State violated the Act by terminating the policy without first initiating negotiations with the CWA regarding such a change. If the CWA is correct about the preemption issue, then by filing the Charge it had no burden to demand negotiations over the State's unilateral termination of the policy.

The Preemption Defense

The tests used to determine whether certain State statutes, rules and regulations preempt negotiations on what would otherwise be negotiable terms and conditions of employment have been well established by our Supreme Court and the Commission. State of N.J. v. State Supervisory Employees Assoc., 78 N.J. 54, 80-82 (1978)(State Supervisory); Local 195, IFPTE v. State, 88 N.J. 393, 411-12 (1982)(Local 195); Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd.Ed., P.E.R.C. No. 80-5, 5 NJPER 290 (¶10159 1979), aff'd 177 N.J. Super. 479 (App. Div. 1981), aff'd 91 N.J. 38, 44 (1982)(Bethlehem); Hoboken Bd.Ed., P.E.R.C. No. 81-97, 7 NJPER 135 (¶12058 1981), aff'd App. Div. Dkt. No. A-33-79-80T2, app. dism. 93 N.J. 263 (1983); State of N.J. & IFPTE, P.E.R.C. No. 84-77, 10 NJPER 42 (¶15024 1983), aff'd App. Div. Dkt. No. A-2408-83T3 (2/8/85)(IFPTE), UMDNJ & AAUP, P.E.R.C. No. 85-106, 11 NJPER 290 (¶16105 1985), recon. den. P.E.R.C. No. 86-7, 11 NJPER 452 (¶16158 1985), aff'd. App. Div. Dkt. No. A-11-85T7 (4/14/86)(UMDNJ); Hunterdon County, P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986), and P.E.R.C. No. 87-150, 13 NJPER 506 (¶18188 1987), aff'd App. Div. Dkt. No. A-5558-86T8 (3/21/88), app. to S. Ct. Dkt. No. 28,806 (Hunterdon).

In State Supervisory the Court held:

> The adoption of any specific statute or regulation setting or controlling a particular term or condition of employment will preempt negotiations on that subject. This preemption doctrine applies to any validly adopted regulations, regardless of which agency or department promulgated it, provided the regulation definitively and specifically fixes a term or condition of employment. 78 N.J. at 80-81.
>
> Furthermore, we affirm PERC's determination that specific statutes and regulations which expressly set particular terms and conditions of employment, as defined in Dunellen, for public employees may not be contravened by negotiated agreement. For that reason, negotiations over matters so set by statutes or regulations is not permissible. We use the word "set" to refer to statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer. 78 N.J. at 80.

The Court also explained that where a statute or regulation permits an employer to exercise some discretion regarding a particular term and condition of employment, that regulation does not "speak in the imperative," and has only a limited preemptive effect on collective negotiations. 78 N.J. at 81.

In Local 195 the Supreme Court established a three-part test for determining whether a subject was mandatorily negotiable. The second part of that test was that the subject was preempted by statute or regulation. 88 N.J. at 404-405.

In Bethlehem The Supreme Court more fully set forth the rules for determining when a statute or regulation preempts negotiations. The Court held:

> As a general rule, an otherwise negotiable topic cannot be the subject of a negotiated agreement if it

> is preempted by legislation. However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations. Negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively." Council, 91 N.J. at 30,449 A.2d 1244. The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." In re IFPTE Local 195 v. State 88 N.J. 393, 403-04, 443 A.2d 187 (1982), quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80, 393 A.2d 233 (1978). If the legislation, which encompasses agency regulations, contemplates discretionary limits or sets a minimum or maximum term or condition, then negotiation will be confined within these limits. Id. at 80-82, 393 A.2d 233. See N.J.S.A. 34:13A-8.1. Thus, the rule established is that legislation "which expressly set[s] terms and conditions of employment...for public employees may not be contravened by negotiated agreement." State Supervisory, 78 N.J. at 80, 393 A.2d 233. 91 N.J. at 44.

Where the language of particular rules and regulations does not expressly, specifically and comprehensively cover and/or prohibit the subject or actions the employer asserts are preempted, the regulations will not preempt negotiations, or at most will only partially preempt negotiations. IFPTE; UMDNJ; Hunterdon.

In IFPTE, for example, a case which involved the same Overtime Rules at issue here, the State argued that pertinent overtime rules completely preempted negotiations and arbitration over the relevant subject. The Commission and Appellate Division found, however, that N.J.A.C. 4:6-3.1 (reworded and recodified as N.J.A.C. 4:2-27.3(a)), and N.J.A.C. 4:6-7.1 (N.J.A.C. 4:2-27.7(a) and (b)) did not expressly, specifically, and comprehensively prohibit the employer from agreeing to pay cash for overtime worked

rather than require an employee to take compensatory time off. Thus, the State was required to arbitrate over whether the employees were required to accept compensatory time rather than cash for overtime.

In deciding whether the Overtime Rules preempt negotiations here, I must first decide whether the ten extra leave days were overtime compensation, and whether the extra work being performed by the physicians for which they received the extra ten days was covered by the Rules. I find that the ten extra leave days was neither compensatory nor cash overtime as defined by the Rules; it was given to the physicians for performing services beyond on-call duty; and, that the Rules do not expressly, specifically and comprehensively prohibit the kind of additional leave time given to the physicians. Since the additional leave time was a term and condition of employment not specifically and definitively preempted by a regulation, the State violated 5.4(a)(5) and derivatively (a)(1) of the Act by unilaterally discontinuing the ten day leave policy.

The Overtime Rules were created to regulate overtime compensation for State employees. N.J.A.C. 4:2-27.1. N.J.A.C. 4:2-27.2 (formerly N.J.A.C. 4:6-2.1) defines "overtime compensation" as "cash overtime compensation or compensatory time off as permitted." Cash overtime is defined as one and one-half times the employees rate of pay, and "compensatory time off" is defined as "time off in lieu of cash payment where permitted for excess or unusual work time."

The physicians are normally scheduled to work 35 hours per week, and N.J.A.C. 4:2-27.3 (4:6-3.1) which concerns overtime regulations applicable to 40 hours or less, provides at 4:2-27.3(a)(1)(ii) (4:6-3.1(a)(2)):

> Employees in non-limited titles (NL, NE) who meet unusual work time requirements may, at the discretion of the appointing authority, be compensated as provided in N.J.A.C. 4:2-27.3(b)(2).8/

N.J.A.C. 4:2-27.3(b)2 (4:6-3.2(b)) provides:

> Employees in non-limited titles (NL, NE) who meet unusual work time requirements may, at the discretion of the appointing authority, be compensated through either a provision for flexible work patterns or a grant of comparable amounts of time off to a maximum of one hour for each hour of unusual work time. They shall have no claim or entitlement to cash overtime compensation.9/

Those Rules do not cover nor expressly prohibit the ten additional days provided to physicians. Based upon the facts here,

---

8/ The physicians here are "NL" employees. N.J.A.C. 4:2-27.2 (4:6-2.1) defines NL as an: Exempt non-limited title which means a title having irregular or variable workhours.

9/ N.J.A.C. 4:2-27.4 (4:6-4.1) concerns Federal fair labor standards applicable to more than 40 hours in a workweek. To the extent that rule covers the physicians here, 4:2-27.4(b)3 contains the same pertinent language as contained in 4:2-27.3(b)2.

N.J.A.C. 4:2-27.4(b)3 (4:6-4.2(c)) provides:

> 3. Exempt employees in non-limited workweek titles (NL, N4) who meet unusual work time requirements may, at the discretion of the appointing authority, be compensated through either a provision for flexible work time patterns or a grant of comparable amounts of time off to a maximum of one hour for each hour of unusual work time. See N.J.A.C. 4:2-27.5(e)2 as to special project rates.

physicians have not received overtime compensation. N.J.A.C. 4:2-27.2 (4:6-2.1) defines overtime compensation as cash or compensatory time. The physicians have never received additional cash, and according to Doherty, the State's own witness whom I have credited, and as evidenced by CP-2, CP-3, and CP-4, the physicians were not entitled to receive and did not receive compensatory time.

Employees who receive compensatory time are required to keep accurate records, and they do not receive and cannot use compensatory time until after it is actually earned. The physicians have never been required to record the actual amount of their after hours work, they received the ten days at the beginning of the calendar year well before they actually worked an equivalent of ten extra days, and the ten days were not based upon an hour-for-hour credit. Had the State or DOC intended the ten days to be compensatory time they would have required compliance with the Rules. The ten day benefit was not listed on CP-2, CP-3 and CP-4 as compensatory time, and was not in conformance with compensatory time requirements set forth in the Rules. Further, the State's witness confirmed that physicians do not receive compensatory time. Since overtime compensation is defined only as cash or compensatory time,

I find that the ten days at issue here was not overtime compensation and was not specifically and expressly prohibited by the Rules.10/

To the extent that the ten days may be overtime compensation, the State relies primarily upon N.J.A.C. 4:2-27.5(a)(2) (N.J.A.C. 4:6-5.1(b)) to support its preemption defense. N.J.A.C. 4:2-27.5(a) concerns eligibility for overtime compensation for on-call employees; 4:2-27.5(a)1 concerns non-exempt positions and provides for overtime compensation in certain on-call circumstances. N.J.A.C. 4:2-27.5(a)2 (N.J.A.C. 4:6-5.1(b)) then provides:

> Employees in exempt positions (3E, 4E, NL, N4) shall have no claim or entitlement to compensation for such time.

I find that N.J.A.C. 4:2-27.5(a)2 does not expressly and specifically prevent the grant of the disputed ten days. First, 4.2-27.5(a) concerns overtime compensation and since overtime compensation is defined as cash or compensatory time, and since the ten extra days was neither cash nor compensatory time, it is not covered by or prohibited by that Rule. N.J.A.C. 4:2-27.5(a) defines overtime compensation as one and one-half times an employee's regular rate, or one and one-half hours for each hour worked in

---

10/ Thus, although the CWA alleged in the Charge that the ten additional days was granted in lieu of overtime, that is not an admission that the ten days was overtime compensation within the meaning of the Rules. The evidence shows that the ten days was not compensatory time, thus, was not overtime compensation. I find that the word "overtime" was used in the Charge in the traditional sense, and not as defined by the Rules.

excess of the regular workweek after 40 hours a week. N.J.A.C. 4:2-27.5(b) provides that hours worked in excess of 35 but less than 40 hours in a workweek would be compensated on an hour for hour basis. In interpreting N.J.A.C. 4:2-27.5 in general and 4:2-27.5(a)2 in particular, Winkler explained in J-10 that although physicians could not be compensated for on-call situations, on-call compensation is "directly related to hours actually worked or hours where an employee cannot effectively use their own time." The physicians' receipt of the ten extra days here, however, was not related to hours actually worked, and there was no showing that physicians contacted by telephone were always unable to effectively use their own time.

Second, the physicians received the ten days for more than on-call work. Bruner's statement in J-9, Doherty's testimony, and J-7 establish that physicians received the ten extra leave days because of the additional work time traditionally required of them, including their availability to advise hospital staffers by telephone, their attendance at the institution to admit or treat patients, and their around-the-clock patient care in addition to on-call duty.

To the extent that those responsibilities or duties amounted to on-call work, however, the form of compensation provided to physicians was not specifically prohibited by the Rules. Physicians did not record their extra hours worked, and they received the ten days before a comparable amount of time was

worked. The ten days was not compensatory time, it was some other form of leave time not expressly, specifically and comprehensively prohibited by the Rules. Bethlehem.

Finally, the State challenged the CWA's characterization of the ten days as additional vacation leave. If the ten days were vacation leave they would not be subject to the Overtime Rules. The State, relying upon J-11, argued that the ten days were overtime compensation and not vacation leave.

The evidence does not support the State's contention. First, Doherty established that the ten additional days was not compensatory time. Since the ten days was neither cash nor compensatory time I found that it was not overtime compensation within the meaning of the Rules. Second, the Rules require that overtime must be accurately recorded. Since the physicians were not required to keep records of the additional work, and since the ten days were not recorded as overtime compensation, I found that the ten days was not subject to the Rules. Third, the employee time record forms, CP-2, CP-3 and CP-4 provide for sick leave, vacation leave, administrative leave, and compensatory time and overtime. Doherty explained that physicians did not receive compensatory time, and the comp. time/overtime section of CP-2, CP-3 and CP-4 is blank. Winkler explained in J-10 that the ten extra days was not administrative leave, nor was it sick leave, and those sections of the forms do not reflect the recording of the ten extra days. The ten days were recorded in the vacation column, were given to the

physicians with their regular vacation time, and were used as vacation days.

Since I earlier found that the ten days was not overtime compensation, it is not necessary for me to categorically determine here that the ten days was vacation leave. The State may have some other official designation for them. I do find, however, that those ten days were treated as vacation leave days and not as overtime compensation. Since those ten days are leave days other than compensatory time, they are not subject to the Overtime Rules. The Rules, therefore, did not preempt negotiations over the termination of the ten day leave policy.

Conclusion

The State violated subsection 5.4(a)(5) and derivatively 5.4(a)(1) of the Act by unilaterally terminating the ten day leave policy.

Based upon the above findings and analysis, I make the following:

Recommended Order

I recommend that the Commission ORDER:

A. That the State cease and desist from:

Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the CWA over the termination of the ten day leave policy.

B. That the State take the following affirmative action:

1. Restore the status quo ante by reinstating the ten day leave policy.

2. Credit the affected physicians with any unused portion of the ten days for 1987, and the full ten days for 1988.[11/]

3. Negotiate with the CWA over any future attempt to terminate the ten day leave policy prior to actually terminating the policy.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be 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.

11/ The record does not show whether the physicians used any of their ten day allotment prior to April 1987 when the policy was terminated. I am only assuming that some physicians may have used some of those days in 1987. If none of those days were used the physician(s) should receive their full allotment for 1987. If some days were used the physician(s) should be credited with the balance for that year.

5. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

Arnold H. Zudick
Hearing Examiner

Dated: November 18, 1988
Trenton, New Jersey

Recommended Posting

Appendix "A"

NOTICE TO ALL 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 our employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the CWA over the termination of the ten day leave policy for physicians employed by the DOC.

WE WILL reinstate the ten day leave policy.

WE WILL credit affected physicians with the additional leave days they would have had had WE not unilaterally terminated the policy.

WE WILL offer to negotiate with the CWA over any future attempt to terminate the ten day leave policy.

Docket No. CO-H-87-352 STATE OF NEW JERSEY, DEPARTMENT OF CORRECTIONS
(Public Employer)

Dated _____ By _____
(Title)

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 St., CN 429, Trenton, NJ 08625 (609) 984-7372.