I.R. NO. 96-16

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX,

Respondent,

-and- Docket No. CO-96-222

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL 1158,

Charging Party.

SYNOPSIS

International Brotherhood of Electrical Workers, Local 1158 applied for interim relief alleging that Essex County unilaterally changed an established past practice of allowing unit employees at the Turtle Back Zoo to accrue and use "holiday time" at their discretion. A Commission Designee denied interim relief on the basis that the County's actions were in accord with the express terms of the collective negotiations agreement. Consequently, the Designee found that the IBEW did not demonstrate a substantial likelihood of success on the merits, a requisite element to obtaining an order for interim relief.

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Appearances:

For the Respondent, Catherine E. Tamasik, Essex County Counsel (Lucille LaCosta-Davino, Employment Section Chief)

For the Charging Party, Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein, attorneys (Vincent J. Politan, of counsel)

INTERLOCUTORY DECISION

On February 7, 1996, the International Brotherhood of Electrical Workers, Local 1158 (IBEW) filed an unfair practice charge against Essex County (County) alleging that the County has engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically Sections 5.4(a)(1) and (5).[1/] The IBEW alleges that

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to

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the County violated the Act by unilaterally changing a term and condition of employment without negotiations.

On February 7, 1996, Charging Party also filed an application for interim relief, with supporting documents, requesting that the County be ordered to refrain from unilaterally modifying its alleged past practice of allowing unit employees who work at the Turtle Back Zoo to accrue "holiday time" on an unlimited basis and allowing employees to use such accrued time at their discretion. A return date on the IBEW's application was scheduled for February 28, 1996, at which time a hearing was conducted wherein the parties were afforded an opportunity to argue orally.

Employees at the Turtle Back Zoo work five days a week, including any holidays which may fall on the employee's regularly scheduled workday. Employees who work on a holiday do not receive additional monetary compensation, but are granted another day off. Zoo employees have been allowed to retain the holiday time accrued as the result of working on such holidays. The IBEW alleges that over the years, the County has allowed zoo employees to accrue as large a balance as the employee wished and has allowed the employee to use holiday time at his/her discretion. Zoo employees have

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1/ Footnote Continued From Previous Page

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."

accrued significant amounts of holiday time, some exceeding seventy days.

On January 5, 1996, zoo employees were advised that all accrued holiday time must be used by December 31, 1996. On January 23, 1996, Gene Sette, Assistant Business Manager for IBEW Local 1158, attended a County Freeholders' Budget Meeting and was advised that the County intended to close the Turtle Back Zoo as of March 31, 1996. Subsequent to January 23, 1996, the January 5 directive which required employees to use their accrued holiday time by December 31, 1996, was modified to require employees to use their accrued holiday time by March 31, 1996.

Article XXIV, paragraph 4, of the parties collective agreement states, in relevant part, the following:

> Whenever the work schedule is such that an employee is required to work on said holiday the employee will be granted a substitute day off at a later date mutually convenient to the employee and his supervisor.

The standards that had been developed by the Commission for evaluating interim relief requests are similar to those applied by the Courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for relief, the relative hardship to the parties in granting or denying the relief must be considered. Crowe v. DeGioia, 90 N.J. 126 (1982); Township

of Stratford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Township of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 37 (1975).

The IBEW contends that there exists a twenty-three year past practice which allows zoo employees to accrue an unlimited amount of holiday time which may be used at the employees discretion. The County argues that the express terms of the collective agreement require employees to schedule holiday time at a time which is "mutually convenient" for the County and the employee. The County asserts that it has not required zoo employees to take off any particular day as "holiday time", however, it retains the right under the collective agreement to advise zoo employees as to when it would be "convenient" for the County to have employees take holiday time and when it would be inconvenient. The County argues that by advising zoo employees to use holiday time prior to March 31, 1996, it merely puts zoo employees on notice as to when it would be "convenient" for the County to have employees use holiday time. Likewise, such advisory also indicates to zoo employees that after March 31, 1996, it would be inconvenient for the County to allow zoo employees to use holiday time. Thus, the County concludes that its actions are in accordance with the terms of the collective agreement.

A past practice is a term and condition of employment not appearing in the parties' collective agreement, but arising as

implied from their mutual conduct. Caldwell-West Caldwell Board of Education, P.E.R.C. No. 80-64, 5 NJPER 536 (¶10276 1979), aff'd in part., rev'd in part, 180 N.J.Super. 440 (App. Div. 1981). A past practice establishing a term and condition of employment is entitled to the same status as a term and condition of employment defined by statute or the parties' collective agreement. County of Sussex, P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982); Watchung Borough, P.E.R.C. No. 81-88, 7 NJPER 94 (¶12038 1981). Normally where a collective agreement is silent or ambiguous on an issue, past practice controls. Sussex. But mere silence on an issue does not give a past practice binding effect where the particular past practice is contrary to, or gives an effect different from, the express provisions of a collective agreement. N.J. Sports and Exposition Auth., P.E.R.C. No. 88-14, 13 NJPER 710, 711 (¶18264 1987); Randolph Tp. School Board, P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980). Where the mutual intent of the parties can be determined from a simple reading of the parties' agreement, a contrary past practice can not be relied upon. New Brunswick Board of Education, 4 NJPER 84 (¶4040 1978), mot. for recon. den., 4 NJPER 156 (¶4073 1978). The law is well settled that an employer has met its negotiations obligation when it acts pursuant to its collective agreement, even when such action is inconsistent with a past practice. Sussex-Wantage Reg. Board of Education, P.E.R.C. No. 86-57, 11 NJPER (¶16247 1985); Randolph Township Board of Education, P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Pascack

Valley Board of Education, P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980). Thus, even where an employer deviates from a practice that has existed for many years, it does not waive its contractual rights, and it does not violate the Act by subsequently acting pursuant to the collective agreement. See N.J. Sports & Exposition Authority.

The County's actions are arguably in accord with the express terms of the collective agreement. The collective agreement requires holiday time to be used at a time which is "mutually convenient" to both the employer and the employee.[2/] Since the County's actions are arguably consistent with the express terms of the collective agreement, I find that the charging party has not demonstrated that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision.

Charging party's application for interim relief is denied.

Stuart Reichman
Commission Designee

Dated: March 4, 1996
Trenton, New Jersey

2/ The issue of what happens to holiday time not used by the employee after March 31, 1996, is not before me in this application.