

P.E.R.C. No. 90-99

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JERSEY CITY MEDICAL CENTER,

Respondent,

-and-

Docket No. CO-H-88-78

A.F.S.C.M.E. COUNCIL 52, LOCAL 2254,
AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Jersey City Medical Center violated the New Jersey Employer-Employee Relations Act when it unilaterally charged employees twenty dollars per month for parking and when it refused to negotiate with AFSCME over that fee. The unfair practice charge was filed by AFSCME Council 52, Local 2254, AFL-CIO.

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AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Grotta, Glassman & Hoffman, attorneys
(M. Joan Foster and Judith S. Miller, of counsel)

For the Charging Party, Szaferman, Lakind, Blumstein,
Watter & Blader, attorneys
(Sidney H. Lehmann, of counsel)

DECISION AND ORDER

On September 15, 1987, AFSCME Council 52, Local 2254, AFL-CIO filed an unfair practice charge against Jersey City Medical Center. The charge alleges that the Medical Center violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),^{1/} when it unilaterally charged employees \$20 a month for parking and when it refused to negotiate with AFSCME over that fee.

^{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," 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...."

On October 19, 1987, a Complaint and Notice of Hearing issued.

On November 4, 1987 and March 21, 1989, respectively, the Medical Center filed an Answer and an Amended Answer. It admits that AFSCME demanded to negotiate, but asserts that AFSCME waived any right to negotiate by not responding to an invitation to meet and discuss valet parking. It further asserts that it had a prerogative to institute valet parking and a contractual right to charge a fee; employees represented by AFSCME never had a contractual right to free parking, and there was no established practice of free parking.^{2/}

While this charge was pending, the Medical Center petitioned for a scope-of-negotiations determination. It sought a restraint of binding arbitration of a grievance filed by the majority representative of the Medical Center's nurses. We held that the Medical Center had a prerogative to subcontract with a valet parking service, but the parking fee issue was mandatorily negotiable and legally arbitrable. Jersey City Med. Center, P.E.R.C. No. 89-24, 14 NJPER 577 (¶19244 1988).^{3/} Processing of this case resumed.

^{2/} The Medical Center is now a private non-profit hospital. The parties, however, have agreed that we have jurisdiction since this dispute arose when the Medical Center was a public employer subject to our Act.

^{3/} The arbitrator denied the grievance, finding no past practice of free parking for nurses.

On May 25 and June 12, 1989, Hearing Examiner Susan Wood Osborn conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by September 25, 1989.

On January 31, 1990, the Hearing Examiner issued her report. H.E. No. 90-37, 16 NJPER 166 (¶21068 1990). She concluded that the Medical Center had violated N.J.S.A. 34:13A-5.4(a)(1) and (5) by unilaterally imposing a parking fee. She recommended that we order the Medical Center to negotiate with AFSCME over the amount of fees, retroactive to July 15, 1987, and to return the difference between the amount negotiated and the fees collected from employees represented by AFSCME.

On March 2, 1990, after an extension of time, AFSCME filed exceptions asking that we order the Medical Center to restore free parking to AFSCME-represented employees on a first-come, first-served basis and to reimburse employees for any fees deducted from their paychecks. On March 27, the Medical Center replied to these exceptions and filed cross-exceptions asking us to find that free parking was not a term and condition of employment and to dismiss the Complaint.^{4/}

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 4-12) are thorough and generally accurate. We incorporate them, with these observations.

^{4/} The Medical Center also requested oral argument. We deny that request.

We accept the statement in finding no. 5 that the record does not show how many spaces in the Cornelison lot were unreserved and available to employees in AFSCME's unit. We also agree that the record does not nail down how many spaces were available in the plaza, but it appears that at least 75 unreserved spaces were available on a first-come, first-served basis to all day-shift employees--represented by AFSCME or not--and anyone else--e.g. patients and visitors--who did not have a reserved space. We add the testimony of an AFSCME vice-president, an evening shift employee who had worked many overtime shifts during the day, that "[t]he 7:00 to 3:00 and the 9:00-5:00 shift is plainly the largest." We also add the testimony of the Medical Center's vice-president for human resources that no non-contractual representations were made to employees about free parking.

We accept the statement in finding no. 6 that the record does not show that AFSCME objected to the imposition of a parking fee in the early 1980's. We read this statement in conjunction with the statement in finding no. 8 that during the 1981 negotiations, AFSCME sought free parking for unit employees and eventually agreed with the Medical Center that free parking would be provided in the EDA lot if the City purchased it.

We add to finding no. 15 that some unstriped road areas were not included in the valet system and remain available for parking. About 30 cars can be parked on Mill Road between the archway and Montgomery Street; about 10-15 cars can be parked on Mill Road near the nurses' home; about 10-15 cars can be parked in

the rock pile area behind the storage building, and about 5-8 cars can be parked by the dock (1T32; 1T190-1T191).

N.J.S.A. 34:13A-5.3 requires an employer to negotiate with a majority representative over terms and conditions of employment and specifically to negotiate before implementing "proposed new rules or modifications of existing rules governing working conditions." Violating these requirements violates subsection 5.4(a)(1)'s prohibition against interfering with employee rights guaranteed by the Act and subsection 5.4(a)(5)'s prohibition against refusing to negotiate in good faith.

When AFSCME learned that a parking fee might be imposed, it demanded to negotiate. A Medical Center official prepared, but AFSCME did not receive, a letter in response to the demand to negotiate. The letter merely offered to "meet and discuss" the issue of free parking, an offer consistent with the Medical Center's position then that it had no duty to negotiate over that issue and with the admission in its Answer that it had refused to negotiate. Even if this letter had been received, the letter would not have been a sufficient response to AFSCME's proper demand to negotiate. The fee was a mandatorily negotiable subject. The employer nevertheless imposed a fee without negotiations. We agree with the Hearing Examiner that it did not have a contractual right to do so and that AFSCME had not acquiesced in that unilateral action. Accordingly we hold that the Medical Center violated subsections

5.4(a)(1) and (5). For this violation, we order reimbursement of parking fees up until the time the Center became a private employer. The Center may then seek retroactive negotiations over the amount, if any, of parking fees for that period.

The Hearing Examiner found an unfair practice on a different theory--that the Medical Center unilaterally changed an established past practice of providing free parking for all unit members on a first-come, first-served basis. The Medical Center contests this conclusion while AFSCME contests the recommended remedy since it would not restore that practice.

We doubt whether there was an established practice of providing free parking to employees represented by AFSCME. No contractual provision gave these employees that right and AFSCME was turned down the one time it sought free parking on all Medical Center lots. The employer made no other representations to these employees about free parking or available spaces nor did it set aside any lots for employee parking instead of public parking. The employer had often reduced the number of parking spaces over the years by reserving spaces for department heads, administrators, interns, delivery trucks, and emergency vehicles. AFSCME did not object to these reductions. The Medical Center employs about 1800 workers, 750 of whom are represented by AFSCME; the number of unreserved daytime spaces in the plaza lots was estimated to be about 75 or more. The valet parking system further reduced the number of spaces for first-come, first-served parking, but some

parking areas are still available nearby. Under these circumstances, it appears that "free parking" was and remains a happenstance for a few employees rather than a term and condition of employment for all unit employees.

Even if we found the past practice claimed, we would not order the relief sought. While we have authority to order retroactive relief based on a finding that an unfair practice occurred at a time when our Act applied, we doubt our authority to order prospective relief when the Act no longer applies.

Based on the unfair practice we have found and the considerations we have discussed, we adopt the following remedy:

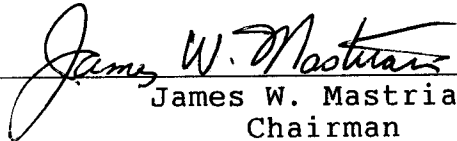
ORDER

The Jersey City Medical Center is ordered to:

1. Reimburse unit employees for any parking fees collected between July 15, 1987 and the time the Center became a private employer.
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 Respondent'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. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

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: May 14, 1990
Trenton, New Jersey
ISSUED: May 15, 1990

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 reimburse employees represented by AFSCME Council 52, Local 2254 for any parking fees collected between July 15, 1987 and the time the Center became a private employer.

Docket No. CO-H-88-78 JERSEY CITY MEDICAL CENTER
(Public Employer)
Dated: _____ 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, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

H.E. NO. 90-37

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

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A.F.S.C.M.E. COUNCIL 52, LOCAL 2254,
AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find Jersey City Medical Center violated N.J.S.A. 34:13A-5.4(a) (1) and (5) when it imposed a \$20 monthly fee for employees using the Medical Center parking facilities without first negotiating with the majority representative. The Hearing Examiner finds that the unilateral imposition of the parking fees changed the past practice of free parking.

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. 90-37

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Appearances:

For the Respondent

Grotta, Glassman & Hoffman, Esqs.

(M. Joan Foster and Judith S. Miller, of counsel)

For the Charging Party

Szaferman, Lakind, Blumstein

Watter & Blader, Esqs.

(Sidney H. Lehmann, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On September 15, 1987, Local 2254, Council 52, American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission"). AFSCME alleges that the Jersey City Medical Center ("Medical Center") violated subsections 5.4(a)(1) and (5)^{1/} of the New Jersey

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., ("Act") when it contracted with a valet service to park cars in its parking areas and unilaterally imposed a parking fee on employees for that service.

A Complaint and Notice of Hearing issued on October 19, 1987. The Medical Center filed an Answer on November 4, 1987 and an amended Answer on March 21, 1989. It admits it contracted with a valet parking service, charged employees \$20 a month to park in the Medical Center lots, and that AFSCME demanded to negotiate over the implementation of paid valet parking. It denies changing employees terms and conditions of employment. The Medical Center asserts that (a) its decision to subcontract control over its parking facilities to a valet parking service is a non-negotiable managerial determination; (b) implementing valet parking service for a fee is within the Medical Center's contractual right to manage its facilities; (c) free parking for employees was not a benefit established by contract or by past practice; and (d) AFSCME waived its right to negotiate over the parking fees.

1/ Footnote Continued From Previous Page

restraining or coercing 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."

On September 30, 1987, the Medical Center filed a Petition for Scope of Negotiations Determination (docket No. SN-88-25) seeking to restrain arbitration initiated by District 1199J, representing another employee group, concerning the same valet parking issue. The Medical Center contended in the Scope matter that the implementation of paid valet parking was a non-negotiable managerial decision. AFSCME and the Medical Center agreed to hold this Complaint in abeyance pending resolution of the Scope Petition. On August 15, 1988, the Commission issued a decision on the Scope matter, finding that the Medical Center had a managerial prerogative to subcontract to a valet parking service to maximize parking spaces, but the provision of free parking in available spaces on a first-come, first-serve basis was negotiable. Jersey City Medical Center, P.E.R.C. No. 89-24, 14 NJPER 577 (¶19244 1988). Thereafter, I ordered a hearing on AFSCME's Complaint.

After several postponements, I conducted a hearing on May 25 and June 12, 1989,^{2/} The parties examined witnesses and introduced exhibits.^{3/} Both parties filed post-hearing briefs by September 25, 1989.

Upon the entire record, I make the following:

FINDINGS OF FACT

2/ "1T-" refers to the hearing transcript of May 25; "2T-" refers to the hearing transcript of June 12.

3/ Jointly submitted exhibits are referred to as "J"; Charging Party's exhibits are referred to as "CP" and Respondent's exhibits are referred to as "R".

1. At the time this Charge was filed, the Medical Center was a public employer within the meaning of the Act. The Medical Center has since become a private non-profit hospital and is no longer under the Commission's jurisdiction. However, the parties agreed that the Commission retains jurisdiction to decide this matter since it arose when the parties were under the jurisdiction of the Act.

2. The Medical Center employs about 1,800 employees. For many years, AFSCME has represented the Medical Center's blue and white collar employees. AFSCME's unit consists of about 750 employees and is the largest employee group at the Medical Center (1T18, 1T61, 1T63).

3. The present dispute arose during the January 1 1986 through December 31, 1987 collective agreement (J-1). The terms of that agreement were finalized and implemented in December, 1986 through a written memorandum of agreement between the parties, but the parties did not execute the full agreement until they began negotiations in 1988 for the successor agreement (J-2) to cover 1988 through 1989 (1T104). J-1 provided a three percent salary increase for all unit employees, effective July 1, 1987. J-2 provided unit employees a four percent salary increase effective January 1 of each year of the contract.

4. Neither the 1986-87 contract nor the 1988-89 contract has any provision concerning parking. Both contracts contain the identical management rights clause providing, in relevant part, that

The Medical Center retains full jurisdiction and authority on matters of policy and retains the exclusive rights to manage and control its facilities and in addition retains the right to...plan, direct and control its operations and in all respects to carry out the ordinary and customary functions of management (J-1 and J-2).

5. Except for a period of about two years in the early 1980's (see fact number 6), AFSCME unit employees have always been permitted to park free within certain lots owned and operated by the Medical Center, on a space available basis. Employees were permitted to park in three paved areas in the core of the Medical Center complex, known as the "plaza". The plaza consists of an "L" shaped lot behind the nurses' home, an area south of "C" building near the emergency room, and an area south of the surgical building near the ambulance garage. Another employees parking area exists on the west side of Cornelison Avenue ("Cornelison lot")^{4/} near the dental college (CP-1).

Prior to valet parking, the Cornelison lot contained 48 spaces. The record does not show how many, if any, spaces were available to AFSCME employees during the various shifts. Beginning in 1982, department heads were afforded free parking in Medical Center lots by contractual agreement. By 1986, spaces in the Cornelison lot were reserved for department heads and other day shift employees, including those represented by AFSCME, were

^{4/} This lot is not to be confused with a lot once owned by the New Jersey Economic Development Authority on the east side of Cornelison Avenue, which I will refer to as the "EDA lot." See fact number 7.

restricted from parking in those spaces (1T58, 1T123). The record does not indicate, however, whether all 48 spaces were reserved around the clock.

There is also no reliable evidence in the record to indicate the number of spaces available to AFSCME employees in the plaza area prior to the implementation of valet parking.^{5/} I find that there were spaces for at least 163 cars, and a maximum of 88 were reserved during the day for visitors (20), residents on call (8), administrators (12), and department heads (48).^{6/} Nevertheless, it is impossible to determine how many of these spaces

^{5/} Security Director Joseph Fitzgerald testified that "a ballpark figure" of 180 cars could be parked in the main plaza area, but it appears he may have been referring to the valet parking capacity. (1T136). He also estimated that 30 cars could be parked in each of the other two plaza areas, near the surgical building and near the emergency room. Fitzgerald's estimates depended on how drivers parked and "whether they are single or double [parked]." (1T137). Gar Reed, the Assistant Medical Center Director responsible for security, testified that, based on his physical count of the lined spaces, the plaza area contained 115 spaces, and about 60 spaces were reserved daily, leaving 65 spaces for employees. I note that Reed's numbers do not total accurately. Additionally, they differ with both the numbers his certification supporting the Medical Center's Scope Petition (which Reed specifically adopted as accurate at this hearing) and with the estimates he provided to the Medical Center's public relations officer for newspaper publication. Accordingly, I do not credit either Fitzgerald's account or Reed's account of the total number of parking spaces prior to valet parking.

^{6/} Reed testified that 60 spaces were reserved--19 for administrators, 19 for residents, and up to 20 for visitors (1T152). I accept Fitzgerald's credible testimony about the number of reserved spaces, but add Reed's estimated 20 visitors spaces (1T124, 1T127-1T128). Reed was the person responsible for reserving the spaces.

, even on average, were available to AFSCME unit members on the day shift since they had to compete with other employees for the spaces. While there is no record evidence about the availability of spaces on the evening and night shifts, I infer that parking was free and readily available for night shift employees.

While AFSCME unit employees work shifts around the clock, a large number of AFSCME employees work the 7:00 a.m. to 3:00 p.m. day shift. Some nurses also work that shift. Most administrative and management employees work 9:00 a.m. to 5:00 p.m.. Consequently, AFSCME unit members were first in the lot in the morning and secured parking places (1T25).

6. About 1980, the Medical Center decided to charge a daily parking fee. Toll booths were erected at all entrances to the hospital grounds, and employee and visitors were charged a fee to park. Initially the fee was \$2, but was shortly reduced to \$1 daily. According to Security Director Fitzgerald, paid parking continued for "about two years."^{7/} There is no evidence that

^{7/} Dwayne Bradley, AFSCME's local vice-president had a very unspecific recollection of the paid parking period (1T21-1T22, 1T44, 1T47, 1T55). Fitzgerald, whose responsibilities included day-to-day supervision of the parking areas, had the clearest recollection and I credit it accordingly (1T113-1T114, 1T119-1T121, 1T131). Sample daily parking tickets (R-1 and R-3) and a sample daily parking receipt tabulation (R-4) were admitted into evidence. However, the record contains no clearcut evidence showing the period of time paid parking was in effect. Accordingly, I accept Fitzgerald's rough approximation that paid parking in the Medical Center's lots continued approximately two years from sometime in 1980 through sometime in 1982.

AFSCME ever objected to the imposition of the parking fee in the early 1980's.

7. The New Jersey Economic Development Authority owned a separate parking lot across Cornelison Avenue ("EDA lot") and it permitted Medical Center employees to park there free. In October, 1979, the Medical Center leased that lot from the State EDA, and initiated a daily \$1 parking charge. The United Nurses Organization and the Pharmacists Association filed unfair practice charges alleging that the parking fee constituted a change in past practice in violation of contractual past practice clauses. The Commission dismissed the charges, finding that while parking in the EDA lot was free, the lot was not owned or controlled by the Medical Center. Jersey City Medical Center, P.E.R.C. No. 81-89, 7 NJPER 97 (¶12039 1981). ^{8/} That lot has since been sold (1T21).

8. In 1981, the possibility arose that the City would acquire the EDA lot from the State and turn it over to the Medical Center for its use. During contract negotiations in 1981, AFSCME sought free parking for its members. The Medical Center rejected AFSCME's demand but counterproposed to provide free parking if and when the City purchased the EDA lot for the Medical Center. AFSCME agreed. (R-7)^{9/} That agreement was not memorialized in the AFSCME

^{8/} At the hearing in the instant matter, I advised the parties that I would take administrative notice of the facts in the Commission's previous decision (1T20).

^{9/} A similar proposal was accepted by the Nurses Organization in 1981 (R-6).

contract. The issue of parking has not been raised in negotiations since 1981. In approximately 1982, the Medical Center rescinded the parking fees in all lots.

9. In approximately January, 1987, an attack on a nurse in a Medical Center parking lot precipitated a meeting between Medical Center Executive Director Harvey Holzberg and the presidents of all 11 Medical Center unions to discuss security. AFSCME Local 2254 President Douglas Howard attended the meeting. During that meeting, Holzberg raised the idea of valet parking. He vacillated about whether parking might continue to be free under such a system or whether employees might be charged a fee. Howard took no position at that meeting since it was not yet certain whether parking would continue to be free (1T61-64).

10. In February, 1987, Holzberg told Howard that he was very interested in implementing valet parking which would permit more cars to park in the lot. Holzberg told Howard he was unsure if there would be a fee, and indicated he intended to distribute a survey to all employees to gauge support for valet parking (1T63-1T64). Holzberg distributed the survey (CP-5) to all employees in March. Howard then learned Holzberg intended to implement the valet parking plan and initiate parking fees.

At Howard's request, AFSCME Council 52 Staff Representative Liz Baker sent a letter (CP-6) to Holzberg on March 5 objecting to the planned \$20 monthly parking fee, and contending (free) parking was a long-standing benefit and demanding negotiations on the parking issue.

11. On April 24, 1987 John Doyle, Assistant Executive Director for Human Resources, wrote a letter (R-2) to AFSCME responding to Baker's demand to negotiate about the parking fee. Doyle's letter indicated that the Medical Center was considering implementing valet parking to provide a more equitable method of parking for employees and to improve parking for visitors. Doyle's letter also stated that the Medical Center was not obligated to negotiate the proposed change since "free parking" had never been a term and condition of employment for AFSCME employees. The letter offered to meet and discuss the details of valet parking and listen to AFSCME's comments and suggestions. AFSCME Council 52 never received the letter.^{10/}

12. Holzberg sent a different letter (R-10) to presidents of the other 10 unions representing Medical Center employees on May 1, 1987 announcing its intention to implement valet parking to provide more equitable access to the available spaces. The letter invited comments by May 15. The Department Heads Union and the Supervisors Union responded (R-11, R-12). The Department Heads Union asserted that the fees should be structured by the day, month

^{10/} Doyle recalled signing the letter and giving it to a clerk for mailing. While what is mailed is generally presumed to be received, and I credit Doyle's testimony, Doyle could not testify that the letter was actually mailed. I credit Baker's testimony that she did not receive the letter (1T86-1T87, 1T99). However, AFSCME's non-receipt of the letter is not material to my finding that the Medical Center refused to negotiate the parking fees, which the Medical Center admitted in its Answer to the Complaint.

or year. It also requested that members cars be parked in a specific area since its contract provided for reserved parking spaces. The Medical Center agreed to have department heads cars parked in an area in the Cornelison lot. (R-13; R-13A) It also agreed to modify the rate (for all employees) to \$20 a month or \$200 yearly, payable by payroll deductions.

13. By memoranda to employees of July 2 and July 14, 1987 Reed formally advised all employees that valet parking would begin July 15. The charge would be \$20 a month or \$200 yearly, payable by check or by payroll deduction (CP-3; CP-4).

14. On July 14, 1987 AFSCME sent Holzberg a telegram stating that the Medical Center was illegally changing conditions of employment by eliminating free parking. AFSCME demanded that free parking be maintained.

The Medical Center did not reply to AFSCME and the parking issue was not discussed again between them. The Medical Center implemented valet parking and the fee structure on July 15, 1987 (1T40).

15. There are 324 employees subscribing to the valet parking system through payroll deductions. Of these, 41 are members of the AFSCME unit (CP-8). Another 50 employees are on a waiting list to subscribe. Employee subscription fees cover about one-fifth of the cost of the valet service, which totals \$321,000 annually (1T159). According to Reed, the Medical Center applied the \$20 monthly charges to employees to discourage parking demand (1T170).

The valet system now permits 240 cars to be parked in the parking areas. All employees wishing to use the Medical Center's lots must subscribe to valet parking. All parking subscribers pay the \$200 annual fee, except physicians who pay \$100 yearly.

ANALYSIS

A public employer is prohibited from unilaterally implementing new terms and conditions of employment or changing existing terms and conditions of employment without negotiating with the majority representative. Galloway Township Bd. of Ed. v. Galloway Tp Ed. Assn., 78 N.J. 25 (1978). Thus, a unilateral change in terms and conditions of employment without first negotiating the change violates N.J.S.A. 34:13A-5.4(a)(5) and derivatively, 5.4(a)(1). An employer may defeat such a claim if it is able to show that the employee representative waived its right to negotiate over the change.

The Commission has already found that the Medical Center had a managerial prerogative to contract with the valet service to control its parking lots. The Commission also held that the separate question of the amount of the valet parking fee for available spaces was mandatorily negotiable. Jersey City. The Commission observed,

We recognize the Center's strong interest in rationalizing the distribution of scarce parking spaces, just as an employer with financial problems has a strong interest in rationalizing the distribution of scarce dollars. But that interest,

while it may make an alleged agreement unwise, does not make it illegal. The employer may protect itself in negotiations by saying no when appropriate....To the extent, however, that imposing a fee seeks to reallocate the number of spaces available to employees in non-emergency situations, it is mandatorily negotiable.

Here, the record is clear that employees enjoyed free parking in available spaces on a first-come, first served basis. There were at least 75 spaces available to day shift employees and probably many more spaces available to the evening and night shifts employees. The facts are undisputed that parking was continuously free to all employees since at least 1982 until the implementation of the fee--a period of five years. I find that this prior practice of continuous free parking for AFSCME employees on a space-available basis constituted a term and condition of employment established through prior practice.

The Medical Center contends that parking was not a term and condition of employment provided by either the contract or past practice for AFSCME employees. The Medical Center argues that at most, parking was a gratuity. Terms and conditions of employment may exist either as a contractual benefit or through the parties' past practice. Here, the parties' contract is silent on parking. However, for at least five years the Medical Center has given employees parking at no cost on a first-come, first-served basis. This benefit was no less a term and condition of employment because only some AFSCME employees could take advantage of the benefit at one time. Many contractual terms and conditions of employment, such

as longevity pay, uniform allowance, and overtime pay, are not enjoyed by all employees simultaneously. Like overtime, the parking was available to all employees on a first-come, first-serve basis, and it was continuously free to all employees who used it. I find that AFSCME has demonstrated that free parking for all unit members on a space available basis was a term and condition of employment established by past practice.

The Medical Center argues that the change was permitted by the parties contract and by AFSCME's prior failure to negotiate about free parking for its members. Any change imposed without negotiations violates subsection 5.4(a)(5) unless the employer can prove that the employee representative waived its right to negotiate. A contract waiver of section 5.3 rights will not be found unless a contract or practice clearly, unequivocally and specifically authorizes a unilateral change. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978); Elmwood Park Board of Education, P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985); Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983); State of New Jersey, P.E.R.C. No. 77-40, 3 NJPER 78 (1977). There is nothing in the contract which allows the Medical Center to initiate parking fees. The contract language permitting the Medical Center to manage its facilities permits the Medical Center to implement the valet parking system, but not to charge the employees for it. I find that the contract did not authorize the Medical Center to implement a parking fee without negotiating with AFSCME.

An employee representative may also waive its right to negotiate about a change in terms and conditions of employment by its past conduct. If the employee organization has been apprised of proposed changes in advance and declines the opportunity to negotiate, or has routinely permitted the employer to make similar changes in the past, it may have waived its right to negotiate those changes. South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd App. Div. Dkt. No. A-5176-85T6 (3/10/87); New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), motion for reconsid. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd App. Div. No. A-2450-77 (4/2/79); Rutgers University, P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982). The Medical Center asserts that it is not obliged to negotiate the parking fees because a consistent past practice constitutes a clear and unmistakable waiver of the Association's right to negotiate over these changes.

I find that the one occasion in 1980 when the Medical Center implemented paid parking does not constitute a consistent pattern of permitting the employer to routinely make such changes. Accordingly, I find that AFSCME did not waive its right to negotiate about the mid-contract change in free parking.

Finally, it is clear that the Medical Center did not negotiate with AFSCME prior to implementing the parking fees. AFSCME demanded to negotiate shortly after it learned about the valet parking plan and its cost to employees. The Medical Center's response offering to "meet and discuss" valet parking, even if it

had been received, was not an offer to negotiate. Doyle's letter made the Medical Center's position clear: it did not believe it had a negotiations obligation. Negotiation involves a genuine good faith effort to reach an agreement through bilateral give and take. The Medical Center's offer to listen to AFSCME's comments was not an offer to negotiate. I find that the Medical Center failed to negotiate with AFSCME over parking fees prior to their implementation.

CONCLUSIONS

The Jersey City Medical Center violated N.J.S.A. 34:13A-5.4(a)(5) and derivatively, (a)(1) by imposing a parking fee on employees without first negotiating the fee with the majority representative.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the Medical Center cease and desist from:

1. Interfering with, restraining or coercing employees represented by AFSCME in the exercise of the rights guaranteed to them by the Act, particularly, by imposing a parking fee on employees represented by AFSCME.

2. Refusing to negotiate in good faith with AFSCME Local 2254 concerning the implementation of employees' parking fees.

B. Take the following affirmative action:

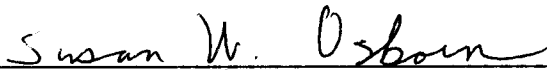
1. Negotiate with AFSCME retroactive to July 15, 1987, over the amount, if any, of the employees' parking fees.^{11/}

2. Thereafter, return the difference between the all parking fees collected from employees represented by AFSCME since the implementation of paid valet parking and the negotiated amount.

3. 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/} I decline to recommend restoration of free parking to the employees on a first-come, first-serve basis. AFSCME never proved how many parking spaces were available to its members prior to the institution of valet parking. Absent a quantifiable number of parking spaces, I cannot restore spaces to the AFSCME unit without revoking the parking privileges of other Medical Center employees who have purchased subscriptions. There is no record evidence of whether the present parking subscriptions were distributed to employees on a first-come basis, seniority basis, or some other basis. The parties are in negotiations for a successor contract to the 1988-89 contract and are free to negotiate the number of spaces available to AFSCME unit members as well as an appropriate method for their distribution among those employees.

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



Susan Wood Osborn
Hearing Examiner

Dated: January 31, 1990
Trenton, New Jersey

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 NOT Interfering with, restrain or coerce employees represented by AFSCME in the exercise of the rights guaranteed to them by the Act, particularly, by imposing a parking fees on employees represented AFSCME.

WE WILL NOT refuse to negotiate in good faith with AFSCME Local 2254 concerning the implementation of employees' parking fees.

WE WILL negotiate with AFSCME retroactively back to July 15, 1987, the amount of the employees' parking fees.

WE WILL thereafter return the difference between all parking fees collected from employees represented by AFSCME since the implementation of paid valet parking and the negotiated amount.

Docket No. CO-H-88-78

Jersey City Medical Center
(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.