P.E.R.C. NO. 92-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and- Docket No. CO-H-90-363

STATE TROOPERS NCO ASSOCIATION
OF N.J., INC.,

Charging Party.

STATE OF NEW JERSEY,

Respondent,

-and- Docket No. CO-H-90-367

STATE TROOPERS FRATERNAL ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the State of New Jersey violated the New Jersey Employer-Employee Relations Act by failing to negotiate with the State Troopers NCO Association of N.J., Inc. and State Troopers Fraternal Association over the elimination of a terminal leave benefit.

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STATE TROOPERS FRATERNAL ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Robert J. Del Tufo, Attorney General
(Melvin E. Mounts, Deputy Attorney General)

For the Charging Parties, Loccke & Correia, attorneys
(Richard D. Loccke, of counsel)

DECISION AND ORDER

On June 13 and 18, 1990, the State Troopers NCO Association of N.J., Inc. ("NCO") and State Troopers Fraternal Association ("STFA") respectively filed unfair practice charges against the State of New Jersey. The charges allege that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), (4), (5) and

(7),[1/] when, in April 1990, the employer unilaterally ended a 30-day terminal leave benefit for retiring employees of the Division of State Police.

On October 18, 1990, a consolidated Complaint and Notice of Hearing issued. The State filed Answers denying that it violated the Act. It claimed that terminal leave was not uniformly granted; is not authorized by law; and is not mandatorily negotiable.

On November 29, 1990, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by April 8, 1991.

On April 30, 1991, the Hearing Examiner issued his report and recommendations. H.E. No. 91-38, 17 NJPER 286 (¶22128 1991). He found that the employer violated subsections 5.4(a)(1) and (5) when it unilaterally ended terminal leave for unit employees. He

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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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (7) Violating any of the rules and regulations established by the commission."

recommended that the benefit be restored and employees denied this benefit be made whole.

On May 24, 1991, after an extension of time, the employer filed exceptions. It claims that the Hearing Examiner erred by concluding that: (1) terminal leave was routinely granted in all but discipline cases; (2) the evidence did not show that employees had used terminal leave to complete their 20 years of service; (3) terminal leave did not contravene N.J.S.A. 34:13A-8.1; (4) abolition of the barracks system over 14 years ago did not permit the unilateral discontinuance of terminal leave; and (5) terminal leave is not a gift of one month's salary. The employer also incorporates its brief, appendix and reply brief filed with the Hearing Examiner.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-12) are undisputed and accurate. We incorporate them.

N.J.S.A 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over mandatorily negotiable terms and conditions of employment. Section 5.3 also defines an employer's duty to negotiate before changing working conditions:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

See also Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978). Under all the circumstances, we conclude that the

employer violated its negotiations obligations when it unilaterally discontinued terminal leave.

Before 1976, terminal leave was granted to compensate Division employees for time served in the barracks system and during civil and prison disturbances and weather emergencies. In 1976, the barracks system was abolished and a 30-day terminal leave benefit was uniformly granted to all Division employees who voluntarily retired on a regular retirement after 25 years (later 20 years) of creditable service.[2/] The same 30-day benefit was granted regardless of how much time, if any, was spent in the barracks system. In April 1990, the employer unilaterally ended the terminal leave benefit.

The employer argues that terminal leave was a discretionary act based upon a rationale which no longer exists. But the record indicates that, except in certain discrete circumstances, the benefit was uniformly granted for years after the barracks system was abolished.

The employer argues that finding terminal leave mandatorily negotiable would contravene the statutory command that nothing in the Act shall be construed to modify any pension statute. See N.J.S.A. 34:13A-8.1. Specifically, the employer argues that the terminal leave benefit effectively modifies the amount of service

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2/ Some employees did not receive the benefit because they separated from service for disciplinary reasons, retired directly from sick or disability leave, or waived it.

required for retirement under the system from 20 years to 19 years and 11 months. We disagree. Like any other leave time where an employee is paid and accrues pension credit while not actually working, terminal leave is a mandatorily negotiable term and condition of employment. The benefit does not modify the requirement in N.J.S.A. 53:5A-8(b) that retiring employees complete at least 20 years of creditable service. Creditable service means service rendered for which credit is allowed on the basis of contributions made by the member or the State. N.J.S.A. 53:5A-3(g). Since pension contributions are made by the member or the employer, the requirement of 20 years of creditable service is not compromised.

The employer argues that since the State, not the Division, negotiates terms and conditions of employment, the State cannot be required to continue terminal leave merely because managers at the Division did not naturally phase it out. Terminal leave is a benefit that could have been negotiated during contract negotiations between the employer and the majority representatives. It was not. The absence of a negotiated agreement on the subject, however, does not extinguish the employer's obligation to negotiate before ending a benefit granted uniformly since at least 1976 and known about by the employer's Office of Employee Relations since at least 1982.

The employer argues that terminal leave was a gift of one month's salary granted immediately before retirement so that an employee could complete the 20 years of service required for pension benefits. The argument that terminal leave is a gift of public

money has been rejected. Middlesex Cty. Prosecutor, P.E.R.C. No. 91-83, 17 NJPER 219 (¶22093 1991), app. pending App. Div. Dkt. No. A-3834-90T1; River Vale Tp., P.E.R.C. No. 86-82, 12 NJPER 95 (¶17036 1985). Unions can negotiate compensation, whatever the label, as a reward for past service. Maywood Ed. Ass'n Inc. v. Maywood Bd. of Ed., 131 N.J. Super. 551, 557 (Ch. Div. 1974).

Finally, the employer argues that State of New Jersey (Dept. of Corrections), P.E.R.C. No. 89-111, 15 NJPER 275 (¶20120 1989), aff'd 240 N.J. Super. 26 (App. Div. 1990), relied on by the Hearing Examiner, is distinguishable. But the factual distinctions cited do not make the case's holding any less relevant. For example, the employer points out that in Corrections, doctors were told of a policy of ten extra vacation days as an inducement to take the job. Here, troopers were told of their terminal leave benefit during their training period. That distinction does not change the basic legal principle that an employer cannot unilaterally rescind a mandatorily negotiable term and condition of employment. Hunterdon. Whatever the justifications for granting and then continuing this benefit for many years, the fact remains that it was granted and the law remains that the employer must negotiate before this benefit is taken away. Accordingly, we find that the employer violated subsections 5.4(a)(1) and (5) and order it to restore the terminal leave benefit and make whole any employees denied this benefit. We dismiss the remaining allegations as unsupported by the record.

ORDER

The State of New Jersey is ordered to:

A. Cease and desist from:

1. 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 State Troopers NCO Association of N.J., Inc. and State Troopers Fraternal Association over the elimination of a terminal leave benefit.

2. Refusing to negotiate in good faith with the Associations, particularly by failing to negotiate over the elimination of a terminal leave benefit.

B. Take this action:

1. Restore the terminal leave benefit.

2. Pay former employees who were denied terminal leave the amount they would have received for that benefit but for the State's unlawful action.

3. Negotiate with the Associations over any future attempt to eliminate the terminal leave benefit.

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 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.

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

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: July 12, 1991
Trenton, New Jersey
ISSUED: July 15, 1991

NOTICE TO EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED,

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the State Troopers NCO Association of N.J., Inc. and State Troopers Fraternal Association over the elimination of a terminal leave benefit.

WE WILL NOT refuse to negotiate in good faith with the Associations, particularly by failing to negotiate over the elimination of a terminal leave benefit.

WE WILL restore the terminal leave benefit.

WE WILL pay former employees who were denied terminal leave the amount they would have received for that benefit but for the State's unlawful action.

WE WILL negotiate with the Associations over any future attempt to eliminate the terminal leave benefit.

Docket No. CO-H-90-363 CO-H-90-367

STATE OF NEW JERSEY

(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

APPENDIX "A"

H.E. NO. 91-38

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

In the Matter of

STATE OF NEW JERSEY,

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STATE TROOPERS NCO ASSOCIATION
OF N. J., INC.,

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STATE OF NEW JERSEY,

Respondent,

-and- Docket No. CO-H-90-367

STATE TROOPERS FRATERNAL ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the State of New Jersey violated the New Jersey Employer-Employee Relations Act when it unilaterally eliminated a terminal leave benefit for certain employees of the Division of State Police. The Hearing Examiner found that the benefit was an established past practice, not preempted by statute or regulation, and that the State violated subsection 5.4(a)(5) and (1) 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.

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STATE OF NEW JERSEY,

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STATE TROOPERS FRATERNAL ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Hon. Robert Del Tufo, Attorney General (Melvin E. Mounts, D.A.G.

For the Charging Parties, Loccke & Correia, Attorneys (Richard D. Loccke, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

Unfair Practice Charges were filed with the Public Employment Relations Commission (Commission) on June 13 (CO-H-90-363) and June 18, 1990 (CO-H-90-367) by State Troopers NCO Association of N.J. Inc. (Association or NCO), and State Troopers Fraternal Association (Association or STFA), respectively, alleging the State of New Jersey (State) violated subsections 5.4(a)(1), (2),

(3), (4), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[1/] The Associations, in nearly identical charges, alleged the State violated the Act by unilaterally terminating a 30-day terminal leave benefit on or after April 1, 1990. That benefit has been applied to all qualifying employees of the Division of State Police (Division) who announced their voluntary intention to retire with at least 20 or more years of service. In practice, nearly all Division employees received 30 additional leave days as the terminal benefit just prior to the actual retirement date. The Associations seek an order reinstating the terminal leave benefit; making whole all adversely affected employees; and awarding counsel fees.

A consolidated Complaint and Notice of Hearing (C-1) issued on October 18, 1990. The State filed nearly identical Answers (C-2 and C-3) on September 4 and November 1, 1990, respectively, denying

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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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (7) Violating any of the rules and regulations established by the commission."

that it violated the Act and arguing it was not obligated to negotiate over that issue. The State argued that terminal leave was not uniformly applied; was only granted with discretion; and was not authorized by law.

A hearing was conducted on November 29, 1990.[2/] Both parties filed briefs and reply briefs by April 8, 1991.

Based upon the entire record I make the following:

Findings of Fact

1. Col. Clinton Pagano became State Police Superintendent in 1975. A 30-day terminal leave policy existed at that time to award employees for uncompensated time served in the barracks system, during civil and prison disturbances, and weather emergencies, but the policy was not uniformly applied (T72-T73, T96-T97, T100-T103, T105-T108). In early 1976 Pagano dissolved the barracks system and instituted the policy of applying the terminal leave benefit, on a uniform basis, to all Division personnel who voluntarily retired on a regular retirement after 25 years (later 20 years) of service (T104-T105). The terminal leave benefit was routinely given regardless of how much--if any--time was spent in the barracks system. (T46-T47; T67-T68; T88). Some employees did not receive the benefit either because they waived it; they retired directly from sick leave; they were separated from service for disciplinary reasons; or did not receive it in some disability retirement situations. (T38-T39, T55-T59, T98).

2/ The hearing transcript will be referred to as "T."

There was no reference to terminal leave in any of the Associations' collective agreements.[3/] The State's Office of Employee Relations (OER), the official State negotiator, was not aware of the Division's terminal leave policy until November 1981 (T121). During negotiations in October 1979 (presumably negotiations leading to J-7C or J-7D) the NCO proposed a terminal leave benefit clause (R-4).[4/] There was some discussion about that clause early in negotiations, but it was not discussed again and that demand was subsequently dropped (T120), but the terminal leave practice continued.

In negotiations for a subsequent collective agreement (presumably J-7E) the NCO, on November 17, 1981, again proposed a terminal leave clause (R-5). The introductory language to the proposed terminal leave clause in R-5 stated:

3/ Exhibits J-1 and J-2 are the STFA and NCO respective 1987-90 collective agreements with the State. The other collective agreements presented on behalf of each Association and the State include for the NCO: J-7A (1974-76); J-7B (1976-78); J-7C (1978-80); J-7D (1980-82); J-7E (1982-84); and J-7F (1984-87); and include for the STFA: J-8A (1970-72); J-8B (1974-76); J-8C (1976-78); J-8D (1978-80); J-8E (1980-82); J-8F (1982-84). There were no STFA agreements for 1972-74 and 1984-87.

4/ The NCO 1979 proposal provided:

> Each employee covered by this Agreement shall be entitled to a granted terminal leave of 15 days for each year of service with the Division. Such leave may be taken for the purpose of early retirement, or an employee may work until retirement, at which time he may be entitled to a terminal leave payment equivalent to 15 days pay (at the rate in effect at the time of his retirement) for each year of service with the Division.

> No existing contract provision. Past practice has been an administrative grant of 30 days leave with pay immediately prior to retirement.[5/]

That introductory language in R-5 was the first time OER became aware of the terminal leave past practice (T121).

During those negotiations the NCO explained the terminal leave practice that existed within the Division. By memorandum of March 10, 1982 (J-3), OER staff representative, Nancy Schaefer, informed Col. Pagano that the NCO sought a terminal leave clause in its collective agreement, and she asked him to provide the basis upon which the leave was granted (T122-T123).

On or about March 15, 1982 the NCO withdrew its proposal in R-5 and substituted its proposal in R-6, which merely added one sentence to its R-5 language.[6/] On March 23, 1982 (J-4) Pagano responded to J-3. He informed Schaefer that a thirty-day terminal leave policy had existed within the Division since 1948 for retiring members whose time loss could not be reconstructed. He expressed

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5/ The terminal leave language in R-5 provides:

> Each employee shall be entitled to paid terminal leave of fifteen (15) days for each year of service within the Division. Such leave shall be taken prior to the date of retirement, or, at the employee's option, may be accumulated and a lump sum payment in respect thereof at the rate of pay then in effect shall be made on the date of retirement.

6/ The additional sentence in R-6 which was added to the terminal leave clause in R-5 provides:

> In no case shall such leave be less than 30 days or exceed in time or in cash payment the equivalent of $12,000.

surprise that officials of the Department of Law and Public Safety (Department) were ignorant of the practice, and noted his continued support for the practice which in his view was:

> minimal repayment for time lost so long as the retiring member has come through the barracks system.

Pagano opposed the inclusion of terminal leave in collective agreements, thus recommended that R-5 (or R-6) be rejected. Pagano concluded J-4 by saying he was offended by any implication that the terminal leave practice was illegal or improper.

Subsequently there were some discussions between the parties regarding R-6, but that proposal was withdrawn on May 19, 1982 (T124).

During this time period Pagano had discussions with the Attorney General and the Governor's Chief of Staff regarding the terminal leave policy (T100). As a result, Pagano, by memorandum of October 1, 1982 (J-5), sent the Attorney General a copy of J-4, and explained that the terminal leave practice was intended:

> ...to compensate members of [the] Division for time lost in the line of duty for which compensation has not been provided.

Pagano asked for the Attorney General's support in continuing the policy.

During the next round of negotiations (presumably leading to J-7F) the NCO on October 21, 1983 again presented the State with a terminal leave proposal (R-7) containing the same language as R-6. There was some discussion regarding that proposal but it, too, was subsequently withdrawn (T125). The STFA did not submit a

terminal leave proposal during negotiations prior to April 26, 1990 (T118). Despite the withdrawal of R-4, R-5, R-6 and R-7 during negotiations, the terminal leave policy remained in effect throughout the Division with OER's knowledge since at least 1982 (T127).

On October 13, 1989 Major Reim, Administration Section Supervisor of the Division, sent the following confidential memorandum (J-6) to other section supervisors:

> The Division's policy of granting terminal leave to its sworn members prior to retirement, is modified as follows:
>
> > Sworn members who have attained a minimum of twenty years of creditable service and are retired on either ordinary or accidental disability, may be granted terminal leave prior to the effective date of their retirement.

On or about April 18, 1990, the Division unilaterally ended the terminal leave policy. Employees who attended retirement "exit interviews" on or after that date were not given terminal leave (T25-T26). The terminal leave policy has not been reinstated.

On April 26, 1990 the STFA, during negotiations for a successor agreement to J-1, submitted the following terminal leave proposal (R-3):

> It is proposed that the contract set forth and codify that all employees who retire, as is defined by the Pension System, should be paid 30 working days compensation at the employee's daily rate of compensation which existed immediately preceding the date of retirement.

No evidence was presented that R-3 has been withdrawn from negotiations or that a new agreement has been reached. No evidence was presented that the NCO submitted a similar proposal.

2. After the barracks system was eliminated terminal leave became a commonly accepted retirement benefit for all Division employees (T18, T21-T22, T61-T63) regardless of how much--if any--time an employee spent in the barracks system (T46-T47, T67-T68, T88, T107). Terminal leave was discussed as an employee benefit at both recruitment and pre-retirement sessions (T66).

An employee who was eligible and interested in retiring had to submit a report to the Superintendent requesting retirement on a particular date (T15). If approved by the Superintendent after his review and a check with internal affairs, the request was forwarded to the Personnel Bureau (T16, T20, T36-T37). After Personnel received the approved request, the Assistant Bureau Chief scheduled an exit interview with the employee.

At the exit interview the employee was informed of his/her estimated pension amount and retirement benefit package including medical coverage. The terminal leave benefit was explained to the employee and the effective retirement date was fixed after first determining when the employee would use up all accumulated recorded leave, such as, vacation, compensatory, special leave and adjustment days, etc., and then adding on the thirty day terminal leave. The effective retirement date was the date after terminal leave was completed (T17, T24-T36). A Personnel Bureau employee completed the Pension Certification of Service and Final Salary form (R-1) and submitted it to the State Division of Pensions (T34-T36). While on terminal leave employees were still considered to be Division

employees. They retained their weapon, identification, assigned automobile, appeared in court, and were subject to recall (T22-T23, T42-T43).

On April 18, 1990 Lt. Colonel Jankowski verbally ordered Lt. Walter Kowal, Assistant Bureau Chief in the Personnel Bureau, to cease giving terminal leave to Division employees effective that date. Employees who had their exit interviews prior to April 18 received terminal leave even if that leave occurred after that date. But employees who had their exit interviews on or after April 18 did not receive terminal leave even though they may have had an effective retirement date on the same day as someone who received terminal leave (T25-T27).

3. The STFA represents all troopers employed by the Division excluding sergeants and superior officers (J-1). The NCO represents all non-commissioned officers (sergeants) employed by the Division excluding troopers and superior officers (J-2). Both Associations have been parties with the State to numerous separate collective negotiations agreements (see note 3). None of those collective agreements contain language regarding a terminal leave benefit or any other retirement benefit. But all of the agreements contained a complete agreement clause. The relevant language of those clauses in J-1 and J-2 is identical in section A; Art. 25, Sec. A of J-1, and Art. 29, Sec. A of J-2 which provides:

> Complete Agreement
>
> A. The State and the Association acknowledge this to be their complete Agreement and that this Agreement

> incorporates the entire understanding by the parties on all negotiable issues whether or not discussed. The parties hereby waive any right to further negotiations except as specifically agreed upon and except that proposed new rules, or modifications of existing rules, affecting working conditions, shall be presented to the Association and negotiated upon the request of the Association as may be required pursuant to the laws of the State of New Jersey.

But the language is different in Section B of those clauses.

Art. 25, Sec. B of J-1 provides:

> The State agrees that all mandatorily negotiable benefits, terms and conditions of employment relating to the status of Troopers of the Division of State Police covered by this Agreement shall be maintained at standards existing at the time of the agreement.7/

Art. 29, Sec. B of J-2 provides:

> The State agrees that wages, fringe benefits and terms and conditions of employment and the past practices related thereto of employees covered by this agreement shall be maintained at the highest standards uniformly existing at the time of the agreement.8/

7/ It appears that J-1 was signed on April 26, 1990, but the handwritten date is unclear, thus I cannot be certain of the date.

8/ The signature page of J-2 does not contain a date, thus I do not know when it was signed.

The language in Art. 25, Sec. B of J-1 is the same in J-8F, J-8E, and J-8D.[9/] The language in Art. 29, Sec. B of J-2 is the same in J-7F, J-7E, J-7D, and J-7C.[10/]

Both J-1 and J-2 provide in Art. 5 an Hours of Work and Overtime clause. Those clauses are not identical, but both provide language dealing with hours of work, overtime, compensatory time and call-in time. J-2 also provides for standby time. The predecessor agreements to J-1 and J-2, J-8F and J-7F, respectively, contained the following Emergency Work Program section in their hours of work and overtime clause:

> One Hundred and seventy-five (175) hours of uncompensated time for each employee will be set aside semi-annually (January 1st and July 1st) for emergency recall to duty, when such emergency recall to duty is

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9/ The relevant language in J-8C, J-8B, and J-8A is different than that contained in Art. 25, Sec. B of J-1 and provides:

> The State agrees that all benefits, terms and conditions of employment relating to the status of Troopers of the Division of State Police covered by this Agreement shall be maintained at not less than the highest standards in effect at [since] the time of the commencement of collective negotiations. (J-8C contained the bracketed language instead of the underlined language).

10/ The complete agreement clauses in J-7B and J-7A do not contain language similar to Art. 29, Sec. B of J-2. But J-7B and J-7A do contain a Maintenance of Standards clause providing:

> The State agrees that all beneficial conditions of employment relating to wages, hours of work and other general work conditions and all past practices shall be maintained at not less than the highest standard in effect at [since] the time of the commencement of collective negotiations leading to the execution of this agreement. (J-7B contains the bracketed language while J-7A contains the underlined language).

> authorized or declared by the Governor. The State will apply to the Legislature for payment at straight time for each of the one hundred and seventy-five (175) hours of emergency time worked by an employee and not otherwise compensated.
>
> Any emergency time expended by an employee which is in addition to the one hundred and seventy-five hours emergency time shall be compensated for at straight time pay for each hour so worked.11/

4. Division employees have unlimited sick leave (T51, T55), and were the only State employees who received terminal leave (T112, T117). Although various Division operating orders and procedures beginning in 1949 mandated maintenance of employee time records (R-2A--R-2G), during most of the time the barracks system remained in effect there was no regular recording of compensatory time, overtime, and recall time (T29-T31, T69-T70). Beginning in the early 1970's, and with the development of collective agreements, all work time, including compensatory and overtime was accounted for and reimbursed prior to retirement (T30-T31, T48-T50, T74-T75).

ANALYSIS

The State violated the Act by unilaterally eliminating the terminal leave benefit. That benefit existed over a long period of time, it intimately and directly affects employee welfare, thus it

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11/ The same or similar language was also contained in the hours of work clauses in J-8E, J-8D, J-8C and J-7E, J-7D, J-7C, and J-7B.

J-8A, Art. 5, Sec. (g) also contained the following language:

> General duty Troopers, who are required to work during their normal duty leave for reasons other than disciplinary action, shall be entitled to compensatory time off.

was an established, and mandatorily negotiable, term and condition of employment. There were no State statutes or regulations "expressly, specifically, and comprehensively" preempting negotiations over that benefit, Bethlehem Tp. Ed. Assn. v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 41 (1982); no contractual defenses existed excusing or waiving negotiations over that benefit; and negotiations over that benefit would not have interfered with the determination of governmental policy or the delivery of governmental services. In re IFPTE Local 195 v. State, 88 N.J. 393 (1982); Bd. of Ed. Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Assn., 81 N.J. 582 (1980).

The defenses raised by the State in its answers and post-hearing briefs that the benefit: was only applied discretionarily; violated pension statutes; was an unlawful gift of public money; and was not authorized by statute, were insufficient to justify its unilateral action. Neither the facts, nor the law, support those arguments.

First, although it is true that not all retiring Division employees received terminal leave, that was limited to employees who separated from service due to disciplinary problems, or in some cases when employees were retiring directly from a disability or sick leave. The record shows, however, that all other Division employees who announced their intention to voluntarily retire on a regular retirement after 20 (earlier 25) years of service routinely

received the benefit before they retired.[12/] They received that benefit regardless of how much time was spent in the barracks system or any other particular work environment. There was no evidence that the Superintendent denied terminal leave to any employee except those separating from service as a result of discipline, and he certainly did not use discretion to deny the benefit to some employees because of their lack of barracks time. In fact, while discretion may have been used prior to 1975 to deny the benefit to some employees, Pagano rejected that lack of uniformity, and beginning in 1976 made certain the benefit was available to all Division employees regardless of barracks time or any other time. Other than the discipline exception, the evidence does not support a finding that discretion, rather than routine and uniform entitlement, formed the basis for approving terminal leave.

Second, the State argued that terminal leave was non-negotiable because it was a retirement benefit and violated N.J.S.A. 53:5A-8(b) and other elements of Title 53:5A-1 et. seq. of the State Police Retirement System,[13/] and violated subsection 8.1

12/ There was no evidence that employees retiring with less than 20 years of service received the terminal leave benefit.

13/ The pertinent part of N.J.S.A. 53:5A-8(b) provides:

> Any member of the retirement system may retire on a service retirement allowance upon the completion of at least 20 years of creditable service....

Footnote Continued on Next Page

of the Act.[14/] Those arguments lack merit. Terminal leave is not a retirement benefit, it is a benefit earned, received and used by an employee while on active status. N.J.S.A. 53:5A-8(b) merely provides that employees may retire upon completion of at least 20 years of creditable service. The State theorized that an employee who received their 30-day terminal leave after completing only 19 years and 11 months violated the intent of the statute. I disagree. The State did not produce evidence that any employee who received terminal leave used it to complete their 20 years of service rather than using it after having completed 20 years of service. But even if it was used in the former fashion it would not violate the pension statute. Terminal leave was creditable active duty time served prior to retirement. It does not annul or modify any pension statute. The mere fact that terminal leave has been referred to as part of the "retirement program" does not make it a retirement benefit. As the Supreme Court said in Bethlehem:

> [T]he mere existence of legislation relating to a given term and condition of employment does not automatically preclude negotiations. Negotiation is

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13/ Footnote Continued From Previous Page

N.J.S.A. 53:5A-3(g) provides:

> "Creditable service" means service rendered for which credit is allowed on the basis of contributions made by the member of the State.

14/ The pertinent part of 8.1 of the Act provides:

> ...nor shall any provision hereof annul or modify any pension statute or statutes of this State.

> preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively...and leave nothing to the discretion of the public employer.... Id. at 44.

Here there is no statute or regulation that expressly, specifically or comprehensively prohibits the earning and using of terminal leave prior to the effective date of retirement.

Third, terminal leave is not a gift. It is an earned benefit for having worked for the Division for 20 or more years and not seeking to separate from employment due to a disciplinary problem. It is an earned benefit for long service to the State which is no different than the benefit earned by thousands of other State employees who receive a fifth week of vacation after 20 years of service to the State. Those employees obviously do not work that extra week but are paid for the time. Neither terminal leave, nor a fifth vacation week, is a gift of public money. They are inducements to stay in public service for a particular period of time and a form of compensation deferred until that time is reached but prior to retirement. See Teachers Ass'n, Cent. H.S.D. No. 3 v. Bd. of Ed. etc., 34 A.D. 2d 351, 312 N.Y.S. 2d 252, 256 (1970). Although the fifth vacation week is provided by contract and perhaps by State regulation or statute and terminal leave is not, the concept is the same. Division employees receive terminal leave for 20 or more years of time worked.

In Maywood Ed. Ass'n, Inc. v. Maywood Bd. of Ed., 131 N.J. Super. 551 (Ch. Div. 1974), the Court addressed the "gift of public funds" issue in holding that a public employer could negotiate a provision paying retired employees for unused sick leave and said:

> It is fair to say that our courts generally have adopted the view that compensation paid to public employees, whatever the label, is not a gift so long as it is included within the conditions of employment either by statutory direction or contract negotiation. Id. at 557.

Although terminal leave did not literally become a condition of employment by statute or contract negotiations, it did become a condition of employment through the parties' established practice, and the Commission has held that an established practice is entitled to the same status as a condition of employment defined by statute or 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).

In fact, the NCO collective agreement J-2, Art. 29, Sec. B specifically provided that existing past practices shall be maintained at standards existing at the time of the agreement. That language, and similar language in the STFA agreement J-1, Art. 25, Sec. B, made terminal leave, which was a past practice existing at the time J-1 and J-2 became effective, a term and condition of employment protected by the parties' collective agreements.

In another case, Township of River Vale, P.E.R.C. No. 86-82, 12 NJPER 95, 97 (¶17036 1985), the Commission found it was not a gift of public money for the employer to pay employees for vacation leave which accrued during a terminal leave:

> ...and before the date of retirement, and based on length of service, would appear to be a form of compensation rewarding employees for long service.

That language is precisely relevant to the facts here. Terminal leave became a form of compensation rewarding employees for long service and it was earned, received, and used before the date of retirement.15/

Fourth, the lack of statutory authorization for terminal leave does not protect the State's unilateral action for two reasons: (1) Statutory authorization is not the basis upon which to determine whether a particular subject is mandatorily negotiable; and (2) a term and condition of employment which is an established past practice is entitled to the same status as a term and condition of employment defined by statute or collective agreement. County of Sussex; Watchung Borough.

The standard for determining the negotiability of a particular subject is the three-part test established by the State Supreme Court in Local 195:

> ...a subject is negotiable...when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. Id. at 404.

Terminal leave is an item that intimately and directly affects employee welfare, and negotiations over terminal leave is neither preempted, nor would it interfere with the determination of governmental policy.

15/ See also City of Newark, H.E. No.90-14, 15 NJPER 640 (¶20267 1989), aff'd P.E.R.C. No. 90-122, 16 NJPER 394, 397 (¶21164 1990); Lawrence Tp. Bd. of Ed., P.E.R.C. No. 81-69, 7 NJPER 13 (¶12005 1980).

Thus, terminal leave is a mandatorily negotiable term and condition of employment. It has existed as a past practice and been consistently applied since 1976.

A past (or established) practice is:

> ...a term and condition of employment which is not enunciated in the parties' agreement but arises from the mutual consent of the parties, implied from their conduct. Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536, 537 (¶10276 1979), aff'd in pt., rev'd in pt., 180 N.J. Super. 440 (App. Div. 1981).

Past Practice controls where a collective agreement is silent on the issue and it is entitled to the same status as a term and condition of employment defined by statute. County of Sussex. The State did not negotiate over the elimination of terminal leave nor address past practice issues in its post-hearing briefs. However, in addition to arguing preemption and gift of public fund defenses, the State also argued that since the rationale for the original grant of terminal leave no longer existed (compensation for unpaid hours of work while employees worked in the barracks system), there was no longer a basis for continuation of that benefit. That argument lacks merit.

Terminal leave does not lose its status as a negotiable term and condition of employment merely because the barracks system has been eliminated and all employee work time is now recorded and compensated. The barracks system was eliminated by 1976 and recording and compensation for all work time was in place soon thereafter. Nevertheless, the Division continued to provide

terminal leave, which was provided regardless of an employee's barracks time, and OER knew of that benefit by 1982. Yet, even through successive contract negotiations, including negotiations where at least the NCO withdrew terminal leave proposals from negotiations, the State did not negotiate over the elimination of the existing terminal leave policy, nor argue that the Associations waived their right to further negotiations over that benefit. In fact, despite the NCO's withdrawal of a terminal leave policy from negotiations, the State, through the Division, continued its longstanding practice of providing employees with the established terminal leave benefit.

Terminal leave evolved into a benefit recognizing employee service with the Division for 20 or more years. If the State believed no basis existed for the benefit, it should have sought to negotiate over its elimination. A public employer generally has the burden to initiate negotiations with the majority representative over any proposed change to an established practice. New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84, 85 (¶4040 1978).

Contrary to the State's position, this case is similar to the pertinent facts, and the result, in State of N.J., Dept. of Corrections, P.E.R.C. No. 89-111, 15 NJPER 275 (¶20120 1989), aff'd 204 N.J. Super. 26 (App. Div. 1990). In that case physicians employed by the Department of Corrections received ten additional leave days per year as compensation for additional work time. That specific benefit was not provided for by the parties' collective

agreement nor by statute, but had been given to the employees on a continuous basis since about 1974. In 1987 the State unilaterally eliminated that benefit arguing it was preempted by statute.

I found that the additional leave time was an established practice, and, citing Bethlehem, found that it was not preempted. The Commission and Appellate Division affirmed, ordered the benefit reinstated, employees made whole, and ordered the State to negotiate over any future attempt to withdraw the benefit. The result here is the same.

The State's argument that Department of Corrections is not applicable here because in that case employees received the benefit for actual work, while here the basis for terminal leave had, allegedly, ceased to exist, lacks merit. It is a commonly accepted labor relations practice for employees to receive an additional employment benefit for specific length of service. That is what occurred here. It is immaterial that the original basis for terminal leave no longer exists. Terminal leave is still a viable term and condition of employment which cannot be unilaterally eliminated.

The facts do not support a finding that the State violated subsections 5.4(a)(2), (3), (4) and (7) of the Act.

Conclusion

The State violated subsection 5.4(a)(5) and derivatively 5.4(a)(1) of the Act by unilaterally eliminating the terminal leave benefit.

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

Recommended Order

I recommend 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 Associations over the elimination of the terminal leave benefit.

B. That the State take the following action:

1. Restore the terminal leave benefit.

2. Pay former employees who were denied terminal leave the amount they would have received for that benefit but for the State's unlawful action.

3. Negotiate with the Associations over any future attempt to eliminate the terminal leave benefit.

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 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.

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

C. That the remaining allegations be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: April 30, 1991
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 Associations over the elimination of the terminal leave benefit.

WE WILL restore the terminal leave benefit.

WE WILL pay former employees who were denied terminal leave the amount they would have received for that benefit but for our unlawful action.

WE WILL offer to negotiate with the Associations over any future attempt to eliminate the terminal leave benefit.

Docket No. CO-H-90-363
CO-H-90-367

STATE OF NEW JERSEY
(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.