P.E.R.C. NO. 2021-50

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF EAST ORANGE,

Respondent,

-and- Docket No. CO-2019-270

EAST ORANGE SUPERIOR OFFICERS' ASSOCIATION, FRATERNAL ORDER OF POLICE, LODGE NO. 188 a/w FOP NEW JERSEY LABOR COUNCIL,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission affirms, on different grounds, a Hearing Examiner's decision, H.E. NO. 2021-5, 47 NJPER 355 (¶83 2021), granting the FOP's motion for summary judgment on its unfair practice charge (UPC). The UPC alleges that the City of East Orange (City) unilaterally implemented a policy, which required employees to use paid leave concurrently with leave under the Family Medical Leave Act, 29 U.S.C. §2601 et seq. (FMLA), and/or the New Jersey Family Leave Act, N.J.S.A. 34:11B-1 et seq. (NJFLA), and that such paid leave must be taken in a specific sequence. The Hearing Examiner found that the City's implementation of the Policy was mandatorily negotiable, and that the FMLA and NJFLA mandate a minimum level of family leave benefits that does not bar the employer from granting greater benefits through negotiations. The City's exceptions to the Hearing Examiner's decision argue, among other things, that its unilateral implementation of the policy was necessary to counter sick leave abuse, and that the Hearing Examiner's decision failed to properly consider such evidence of sick leave abuse. The Commission agrees with the Hearing Examiner's decision that the City's unilateral implementation of the policy violated the Act, but arrives at the conclusion after fully considering the City's allegations of leave abuse and applying the Local 195 test. The Commission finds that the City had a managerial prerogative to unilaterally implement measures to verify leave at any time, and/or could have negotiated such measures with the FOP. However, after balancing the parties' interests under the Local 195 test, the Commission finds the City's unilateral implementation of the policy was an invasive measure to address

the alleged leave abuse, and foreclosed the City's use of other less invasive measures that would not have infringed upon mandatorily negotiable terms and conditions of employment. The Commission further finds that the policy made changes to negotiable terms and conditions of employment during pending contract negotiations, and such unilateral changes are destabilizing to the employment relationship, create a chilling effect on negotiations for a successor contract, and constitute a refusal to negotiate.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Charging Party.

Appearances:

For the Respondent,
Eric M. Bernstein & Associates, L.L.C.
(Eric M. Bernstein, Esq. and Brian M. Hak, Esq., of counsel and on the brief)

For the Charging Party,
Markowitz and Richman
(Matthew D. Areman, Esq., on the brief)

DECISION

This case is before the Commission on exceptions filed by the City of East Orange (City) to a Hearing Examiner's Report and Recommended Decision on a motion for summary judgment filed by the East Orange Superior Officers' Association, Fraternal Order of Police, Lodge No. 188 a/w FOP New Jersey Labor Council (FOP) and the City's cross-motion for summary judgment. H.E. NO. 2021-5, 47 NJPER 355 (¶83 2021). The case involves the FOP's May 2 and 15, 2019 unfair practice charge (UPC) alleging that the City violated subsections 5.4a(1) and (5) of the New Jersey Employer-

Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[1/] The UPC alleges that the City, on December 6, 2018, unilaterally implemented Revised General Order 6:27 (the Policy), which required employees to use paid leave concurrently with leave under the Family Medical Leave Act 29 U.S.C. §2601 et seq. (FMLA), and/or the New Jersey Family Leave Act, N.J.S.A. 34:11B-1 et seq. (NJFLA), and that such paid leave must be taken in a specific sequence. The UPC further alleged that the City's unilateral implementation of the Policy occurred while the parties were engaged in negotiations for a successor contract.

On February 14, 2020, the Director of Unfair Practices issued a Complaint and Notice of Pre-hearing. On March 3, the City filed an Answer denying that it violated the Act and asserting affirmative defenses. On April 15, FOP filed a motion for summary judgment supported by a brief, the certification of Sean Lavin, and exhibits. On May 8, the City filed a cross-motion for summary judgment supported by a brief, exhibits, and the certification of Phyllis Bindi, East Orange Chief of Police.

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act;" 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, or refusing to process grievances presented by the majority representative."

On February 10, 2021, the Hearing Examiner issued a decision granting the FOP's motion for summary judgment and denying the City's cross-motion for summary judgment. The Hearing Examiner framed the issue as whether the City's implementation of the Policy, with its requirements that employees use paid leave concurrently with FMLA and/or NJFLA leave, and that paid leave must be taken in a specific sequence, is mandatorily negotiable. (H.E. at 8). Based on applicable case law, the Hearing Examiner found the issue to be mandatorily negotiable, and therefore, concluded that the City violated the Act and should have negotiated with the FOP before unilaterally implementing the Policy. (H.E. at 14).

On March 11, 2021, the City filed a letter brief with the following exceptions to the Hearing Examiner's report and recommended decision:

> 1. The City takes exception to the Hearing Examiner's failure to give appropriate consideration to the fact that the City was forced to undertake emergency measures, via the enactment of the Policy, in order to address the clear abuse of leave time by some members of the Police Department in which, at any time, between forty (40) and fifty (50) officers were out on FMLA and/or intermittent FMLA leave at the same time.
>
> 2. The City takes exception to the Hearing Examiner's determination that the implementation of a policy requiring employees to use paid leave concurrently with FMLA and/or NJFLA leave is mandatorily negotiable.

> 3. The City takes exception to the Hearing Examiner's determination that the specific sequence in which paid leave must be used to run concurrently with FMLA and/or NJFLA leave is also mandatorily negotiable.

On March 16, the FOP filed a letter brief in opposition to the PBA's exceptions.

The matter is now before the Commission to adopt, reject or modify the Hearing Examiner's recommendations. See N.J.A.C. 19:14-8.1(a). We have reviewed the record, the Hearing Examiner's findings of fact and conclusions of law, and the parties' submissions. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. at 3-4), as follows.

1. The City and FOP are, respectively, public employer and public employee representative within the meaning of the Act.

2. FOP is the exclusive majority representative for all sergeants, lieutenants and captains employed by East Orange.

3. FOP and the City are parties to a collective negotiations agreement (CNA), effective July 1, 2013 through December 31, 2017.

4. Upon expiration of the CNA, the parties engaged in negotiations for a successor agreement until August 28, 2019, when the parties entered into a Memorandum of Agreement, effective January 1, 2018 through December 31, 2022.

5. Article IX of the parties' expired CNA, entitled "Vacation and Vacation Pay," outlines the manner in which employees may earn and use vacation time.

6. Article X of the parties' expired CNA, entitled "Sick Leave Incentive Program and Retirement Benefit," outlines an incentive program through which employees may receive additional vacation days for non-use of sick leave.

7. Neither Article IX nor Article X address FMLA or NJFLA leave in any way.

8. On December 6, 2018, during negotiations for a successor agreement, the City implemented the Policy, amending certain provisions of the sick leave policy as it relates to leave taken under the FMLA and/or NJFLA.

9. Specifically, the Policy requires that employees use their paid leave entitlements concurrently with any FMLA and/or NJFLA leave, and further requires that such paid leave must be taken in a specific sequence as set forth in the Order. Section II, Part E of Revised General Order 6:27 provides in pertinent part:

> Employees of this agency are required to use paid leave concurrently with FMLA leave in the following sequence, which is subject to change at the Chief's discretion:
>
> 1. Vacation leave (including contract vacation days, sick leave incentive days and "in lieu" days) accrued in the current year; then
>
> 2. If applicable, accumulated vacation leave (including contract vacation days, sick leave incentive days and "in lieu" days) carried over from prior years with the Chief's approval; then,

> 3. Personal leave; then,
> 4. Excused days off (applicable only to employees with a 5/2 work schedule); then,
> 5. Compensatory time; then,
> 6. Accumulated sick leave.
>
> FMLA leave taken after all other paid leaves are exhausted shall be unpaid.
>
> If an employee's vacation leave is already scheduled in accordance with the agency's policy on vacation selection under General Order 2:25 (Vacation Selection), but he/she takes FMLA leave prior to that vacation leave, the number of days (or hours) taken for FMLA leave will be deducted from the employee's scheduled vacation leave in the order it falls on the calendar.

10. Section III, Part E of Revised General Order 6:27 includes the same requirements and language as Section II, Part E above, but with regard to NJFLA leave instead of FMLA leave.

11. As provided above in the Policy, if an employee takes FMLA and/or NJFLA leave prior to "already scheduled" vacation leave, the employee may have the amount of FMLA and/or NJFLA leave taken deducted from the "already scheduled" vacation leave.

12. There were no negotiations between the City and FOP regarding these new requirements that paid leave must be used to run concurrently with FMLA and/or NJFLA leave, and that concurrent paid leave must be taken in a specific sequence prior to they City's implementation of the Policy.

We add to the background of this case as follows. The Chief certified that:

> 3. Prior to the enactment of the Policy, the Police Department was experiencing a huge abuse of leave time by certain members of the department. At the time, the Department consisted of approximately two hundred and two (202) sworn officers, fifty-eight (58) of which were patrol officers. However, at times, there were anywhere between (40) and (50) officers out on FMLA and/or intermittent FMLA leave at the same time.
>
> 4. With so many officers out on FMLA and/or intermittent FMLA leave at the same time, there was a tremendous negative impact on the abilities of the Department to carry out its responsibilities. Such manpower issues resulted in significant overtime payments by the City and in "forced" overtime for officers who were not out on leave and who were required to work double shifts on a regular basis.
>
> 5. The above circumstances created a domino effect when the officers who were being forced into overtime and working double shifts began to "burn-out" resulting in them taking leave as well.
>
> 6. The clear abuse of leave time by some members of the Department necessitated the enactment of the Policy in which paid leaves are required to be used concurrently with FMLA/NJFLA leave in the sequence provided for in the Policy.
>
> 7. Since the enactment of the Policy, the Department has seen a significant reduction in the abuse of leave time taken by its officers.
>
> [Bindi Cert. ¶ 3-7].

In response to the City's assertion that the Policy was enacted to counter sick leave abuse, the FOP argues as follows:

> The only true justification that the City provided for its unilateral implementation, was that it desired to address overtime and

> staffing issues [See Bindi Cert. ¶¶3-7]. The desire to address overtime and staffing issues does not, however, obviate the City's bargaining obligation under the Act, and any suggestion to the contrary is without legal support. Moreover, the City's admission that it implemented General Order 6:27 to address overtime within the FOP bargaining unit belies any suggestion that the policy is either long-standing for that bargaining unit or was applied City-wide [See Bindi Cert. ¶6 certifying "…abuse of leave time….necessitated the enactment of the Policy in which paid leaves are required to be used concurrently with FMLA/NJFLA leave in the sequence provided for in the Policy."].
>
> [FOP Reply Brief, pgs. 2-3].

STANDARD OF REVIEW

The standard we apply in reviewing a Hearing Examiner's decision and recommended order is set forth in part in N.J.S.A. 52:14B-10©. In the context of a motion for summary judgment, the relevant part of the statute provides:

> The head of the agency, upon a review of the record submitted by the [hearing examiner], shall adopt, reject or modify the recommended report and decision . . . after receipt of such recommendations. In reviewing the decision . . ., the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so. . . . In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter

of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). N.J.A.C. 19:14-4.8(e) provides:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

In determining whether there exists a "genuine issue" of material fact that precludes summary judgment, we must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. We "must grant all the favorable inferences to the non-movant." Id. at 536. The summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 183 (App. Div. 1981), certif. denied, 87 N.J. 388 (1981).

ANALYSIS

N.J.S.A. 34:13A-5.3 requires that: "the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment." "[U]nilateral

imposition of working conditions is the antithesis of [the Legislature's] goal that the terms and conditions of public employment be established through bilateral negotiation." Atlantic Cty., 230 N.J. 237, 252 (2017), quoting Galloway Twp. Bd. of Educ., 78 N.J. 25, 48 (1978).

Public employers are prohibited from "[r]efusing 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." N.J.S.A. 34:13A-5.4a(5). Public employers are also prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). This provision will be violated derivatively when an employer violates another unfair practice provision. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

A subject is negotiable between public employers and employees 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. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial

> prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
>
> [In re Local 195, IFPTE, 88 N.J. 393, 404-405.]

Here, the Hearing Examiner found that the City's implementation of the Policy was mandatorily negotiable, and that the FMLA and NJFLA mandate a minimum level of family leave benefits that does not bar the employer from granting greater benefits through negotiations. Lumberton Tp. Bd. of Ed., P.E.R.C. No. 2002-13, 27 NJPER 37 (¶32136 2001), aff'd, 28 NJPER 427 (¶33156 App. Div. 2002), among others; New Jersey State Police v. State Troopers Fraternal Ass'n., P.E.R.C. No. 2019-30, 45 NJPER 304 (¶79 2019); Piscataway Tp. Bd. of Ed. v. Piscataway Tp. Ed. Assoc., P.E.R.C. No. 2016-3, 42 NJPER 95 (¶26 2015). Moreover, the Commission has found that the order in which an employee exhausts annual and accumulated sick leave is mandatorily negotiable. Hoboken Bd. of Ed., P.E.R.C. 81-97, 7 NJPER 135 (¶12058 1981), aff'd, NJPER Supp. 2d 113 (¶95 App. Div. 1982), app. dism., 93 N.J. 263 (1983).

We agree with the Hearing Examiner's conclusion that the City was required to negotiate with the FOP before implementing the Policy, but arrive at that conclusion for different reasons and find it necessary to apply the Local 195 test to fully consider the City's exceptions and leave abuse claims. The first and second prongs of the Local 195 test are not at issue before

us. The City's arguments on appeal turn on the third prong of the Local 195 test – whether negotiations over the implementation of the Policy would significantly interfere with the determination of governmental policy. We find that the answer to that question is no.

The City alleges that the leave abuse by officers taking FMLA and NJFLA caused increased overtime, forced burnout for working officers, and interfered with the Department's ability to carry out its responsibilities. Aside from the Chief's certification that a high number of officers were out on FMLA or NJFLA, the City does not document or explain the underlying details or causes of alleged abuses of leave. However, we view the City's factual assertion in the most favorable light - that it unilaterally implemented the Policy because of its interests in curbing leave abuse. We also recognize that FOP members have strong interests in maintaining paid and unpaid leaves of absences, issues that have consistently been found to be mandatorily negotiable. Burlington Cty. College Faculty Ass'n v. Board of Trustees, Burlington Cty. College, 64 N.J. 10, 14 (1973), Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235, 243-44 (1977).

A public employer has a managerial prerogative to verify that sick leave is not being abused, which includes the prerogative to verify sick leave at any time regardless of the amount of days used. City of Elizabeth and Elizabeth Fire

Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶ 13039 1982). Therefore, the City's interests in curbing leave abuse could have been addressed through the implementation of practices commonly used by employers to curb leave abuse (increased monitoring or documentation for leaves, issuing non-disciplinary counseling memoranda, home checks etc.) rather than unilaterally implementing the Policy over paid and unpaid leaves, which are generally mandatorily negotiable terms and conditions of employment. Moreover, any policy negotiated with the FOP could have included measures to curb the alleged abuse. Thus, the City had a managerial prerogative to unilaterally implement measures to verify leave at any time, and/or could have negotiated other measures with the FOP. The unilateral implementation of the Policy without negotiating with the FOP was the most invasive measure available to the City to address the alleged abuse, and foreclosed its use of other less invasive measures that would not have infringed upon mandatorily negotiable terms and conditions of employment.

Accordingly, we agree with the Hearing Examiner's decision that the City's unilateral implementation of the Policy violated 5.4a(1) and (5) of the Act, but arrive at the conclusion after fully considering the City's allegations of leave abuse and applying the Local 195 test. The Policy made changes to negotiable terms and conditions of employment during pending

contract negotiations, and such unilateral changes are destabilizing to the employment relationship and contrary to the principles of our Act. See Atlantic County, 230 N.J. 237, 252 (2017). Further, such unilateral changes create a chilling effect on negotiations for a successor contract and constitute a refusal to negotiate. See State of NJ and CWA, P.E.R.C. No. 2018-35, 44 NJPER 328 (¶193 2018). We find that the City was required to negotiate with the FOP about the Policy before its implementation, and thus, we affirm the Hearing Examiner's decision, as modified herein.

ORDER

We affirm and adopt the Hearing Examiner's Decision and Order, as modified herein.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Ford, Jones, Papero and Voos voted in favor of this decision. Commissioner Bonanni was not present.

ISSUED: May 27, 2021

Trenton, New Jersey