P.E.R.C. NO. 82-79

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF JACKSON,

Respondent,

-and- Docket No. CO-81-241-170

JACKSON TOWNSHIP P.B.A.
LOCAL 168,

Charging Party.

SYNOPSIS

In an unfair practice proceeding, the Public Employment Relations Commission, reviewing a stipulated record, holds that the Township of Jackson ("Township") violated subsections N.J.S.A. 34:13A-5.4(a)(5) and (a)(1) of the New Jersey Employer-Employee Relations Act when it unilaterally altered a clause in its collective agreement with Jackson Township P.B.A. Local 168 ("Local 168") which provided paid sick leave up to one year for employees injured on duty. The Commission, finding that Local 168 did not meet its burden of proof, dismisses all other allegations of the Complaint, including charges that the Township unilaterally altered working conditions governing the assignment of police personnel during holidays, denied differential pay to employees temporarily occupying a higher rank, changed the conditions for granting differential pay, andchanged the method for taking off holidays on which employees were scheduled to work.

P.E.R.C. NO. 82-79

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF JACKSON,

Respondent,

-and- Docket No. CO-81-241-170

JACKSON TOWNSHIP P.B.A.
LOCAL 168,

Charging Party.

Appearances:

For the Respondent, Joseph F. Martone, Esq.

For the Charging Party, Abramson & Liebeskind Associates (Arlyne K. Liebeskind, Consultant)

DECISION AND ORDER

On February 18, 1981, the Jackson Township P.B.A., Local 168 ("P.B.A." or "Charging Party") filed an Unfair Practice Charge with the Public Employment Relations Commission. The PBA amended the charge on March 11, March 18, and August 12, 1981. The charge, as amended, alleged that the Township of Jackson (the "Township" or the "Respondent") violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically N.J.S.A. 34:13A-5.4(a)(1) and (5)[1/] when, in contravention of the parties' collective agreement, it unilaterally:

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, or refusing to process grievances presented by the majority representative."

(1) changed working conditions governing the assignment of police personnel during holidays, (2) denied differential pay to employees temporarily occupying a higher rank and changed the conditions for granting differential pay, (3) changed the method for taking off holidays on which employees were scheduled to work, and (4) modified an existing Township Code section which affected a provision in the collective agreement concerning payment to employees injured while on duty.

On June 17, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On August 21, 1981, the Township filed an Answer in which it asserted that it had acted within its managerial rights under the collective agreement and offered the following affirmative defenses: (a) the Charging Party failed to utilize the grievance and advisory arbitration procedure set forth in the contract, (b) the Commission had no jurisdiction since this matter involved a dispute as to the interpretation of the parties' collective negotiations agreement, and (c) it acted in good faith and within its managerial prerogatives.

Pursuant to N.J.A.C. 19:14-6.7, the parties stipulated the facts in this matter at the hearing, waived a Hearing Examiner's Recommended Report and Decision, and agreed to submit this matter to the Commission based upon the formal pleadings, the stipulation of facts, the contract between the parties, and the briefs.

Before considering the numerous issues in dispute, we emphasize that parties submitting a matter on the basis of stipulations should understand that the Commission will apply the same burden of proof rules we would apply in a case in which a full hearing was held. It is the Charging Party's burden to prove its case by a preponderance of the record evidence in all cases. The Commission has no discretion in stipulated cases involving contractual interpretations to go beyond the parties' stipulations and submissions.[2/]

We first consider and reject the Township's defense raised in its Answer that the Charging Party was required to utilize the grievance and advisory arbitration procedures in the collective agreement before coming to this Commission. The Commission has adopted a policy of deferring unfair practice charges involving allegations of contractual violations to binding arbitration mechanisms contained in parties' collective negotiations agreements.[3/] The Commission will not defer such charges if the parties' agreement provides for advisory arbitration as the ultimate step.

We next consider the Township's contention that the Commission lacks jurisdiction since this case involves a dispute concerning the interpretation of the parties' agreement. The Legislature granted this Commission exclusive power to prevent

2/ See, In re Township of Jackson, H.E. No. 81-12, 6 NJPER 533 (¶11272 1980), aff'd P.E.R.C. No. 81-76, 7 NJPER 31 (¶12013 1980).

3/ In re State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977); In re East Windsor Board of Education, E.D. No. 76-6, 1 NJPER 59 (1975).

anyone from engaging in any unfair practice listed in the Act.[4/] N.J.S.A. 34:13A-5.4(a)(5) specifically proscribes refusing to negotiate in good faith with a majority representative concerning terms and conditions of employment of employees in an appropriate unit. An employer may violate this subsection if, by breaching a contractual provision, it unilaterally alters a term and condition of employment. In re Piscataway Twp. Bd. of Ed., P.E.R.C. No. 77-65, 3 NJPER 169 (1977), aff'd 164 N.J. Super. 98 (App. Div. 1978); cf. C & C Plywood Corp. v. NLRB, 325 U.S. 421 (1967). Thus, in order to determine whether an employer has refused to negotiate by unilaterally altering terms and conditions of employment, it is sometimes necessary to determine if certain contractual provisions set terms and conditions of employment and if they have been breached. The present case raises precisely these questions and thus is within the Commission's province.[5/]

We now consider whether any of the Township's alleged unilateral changes violated our Act. In each instance, the PBA alleges that the Township violated a contractual provision setting a term and condition of employment. A two step analysis is thus required: (1) did the PBA prove by a preponderance of the evidence that the Township violated a particular contractual provision, and, if so, (2) did that provision set a term and condition of employment which could not be unilaterally altered.

The first issue involves an alleged change concerning holiday pay. The parties have stipulated the following:

4/ N.J.S.A. 34:13A-5.4(c).
5/ We reiterate, however, that the Commission prefers to defer, if appropriate, such charges to binding arbitration.

On February 5, 1981, the Township issued Personnel Order No. 81-78 entitled "Assignment of Police Personnel During Holidays...." The order requires manpower reductions in the Detectives Division and the Patrol Division for a number of days listed as paid holidays in Article IX Holidays of the Collective Bargaining Agreement.

Lieutenants, excepting the Service Division. Lieutenants, Captain and the Chief work the holidays they are scheduled and are paid at a rate of time and one-half (12 hours). However, the above order affects the Patrol and Detective Divisions in the following manner:

(A) Officer scheduled for holiday and works gets paid for a 40-hour week plus 12 hours in November (which equals time and one-half.

(B) Officer off-duty for the holiday gets paid for a 40-hour week plus 8 hours in November (which equals straight time).

(C) Officer who would have otherwise been scheduled to work on the holiday and who is required to take off, gets paid for a 40-hour week but works a 32-hour week getting nothing for this holiday in November (which expectation was 12 hours).

(D) Detectives who are required to be off-duty up to 14 holidays working a 32-hour week and being paid for a 40-hour week losing premium pay of 12 hours for each of the said holidays.

The Township concedes that the action affecting the patrol and detective divisions was ordered for reasons of budget considerations and relies upon management prerogative as a defense.

The Management Rights Clause of the parties' contract provides, in pertinent part:

> Section 1. The P.B.A. recognizes that there are certain functions, responsibilities, and management rights exclusively reserved to the Employer. All of the rights, power, and authority possessed by the Employer prior to the signing of this Agreement are retained exclusively by the Employer subject only to such limitations as are specifically provided in this Agreement.
>
> * * *
>
> The Employer shall have the right to determine all matters concerning the Management or Administration of the various Divisions of the Police Department, the right to direct the various Divisions, to hire and transfer Employees, to combine and eliminate jobs, and to determine the number of Employees needed for specific Job Assignments.
>
> Section 2. Nothing in this Agreement shall interfere with the right of the Employer in accordance with the applicable law, rules and regulations to:
>
> a. carry out the statutory mandate and goals assigned to a municipality utilizing personnel, methods and means in the most appropriate and efficient manner possible.
>
> b. Manage employees of the Employer, to hire, promote, transfer, assign or retain employees in positions within the Employer and in that regard to establish reasonable work rules in written form, with copies and amendments thereto to be provided to employees.
>
> (Emphasis supplied)

This clause appears to give the Township the right to determine how many employees will work on a given holiday. Nothing in the specific clause on holidays undercuts this appearance. In that clause, certain holidays are recognized and are to be paid at eight hours straight time; when an employee works on any of those days, however, he receives compensation at time and one-half. The holiday clause does not guarantee any employees that they will

work on those holidays, or require the use of a certain method to determine which employees will work. We are not persuaded that the PBA has established a violation of the holiday clause by a preponderance of the evidence.

The next issue concerns an alleged change involving holiday leave. The parties stipulated the following:

> On December 9, 1981, the Township issued "General Order 80-51 Holiday Leave Requests" demanding a reason for taking off a holiday and prescribing the utilization of RDO [regular day off] or Vacation Day allotments for that purpose
>
> Prior to the above date, it had been an established practice that members of the department were permitted to take off a day which falls on a recognized holiday by utilizing an RDO or Vacation Day allotment with prior approval and were not required to state a reason for taking off on a holiday.
> (Emphasis supplied)

The stipulations do not evidence a material change in either the method an employee must use if he wishes to take off on a holiday that he is scheduled to work or the number of officers allowed to take off on a holiday. Previously, such an employee had to obtain prior approval. This requirement establishes that the Township was not obligated to grant the request. Now, the Township requires a reason for taking off a holiday. Without more, the requirement of a reason may be only a clarification in the Township's approval process consistent with past practices. Again, the PBA has failed to establish a violation by a preponderance of the evidence.

The third issue involves pay differential for a higher rank. The parties stipulated the following:

> Captain Borden Applegate, who had been "Acting Chief" during Chief McCurdy's vacation, filed an Unfair Practice Charge claiming he was denied pay differential for acting in a higher rank as provided for in Article XIV Wages. The Township subsequently satisfied his demand on January 2, 1981, but has continued to deny officers differential pay for a higher rank in all other cases.[6/]
>
> The Township of Jackson admits that it has refused differential pay where such employees were not assigned to perform the duties of higher rank by their immediate supervisor.

Article XIV of the Agreement states: "An Officer temporarily assigned to the duties of a higher rank shall receive the minimum pay of the higher rank for the period of service: Temporarily Assigned for the purpose of this section is defined as 8 or more consecutive hours or 1 or more consecutive 8 hour shifts.

The Charging Party has failed to meet its burden of proof with respect to this allegation. There is nothing in the stipulations which would indicate that the Township has not adhered to the terms of the collective agreement.[7/] The Management Rights clause states that the Township has the right to "...assign or retain employees in positions...." The Township has the right to designate a person to make assignments. In this instance, it designated the immediate supervisor of the employee to be assigned.

6/ The Township, while agreeing to the factual accuracy of this paragraph, disputes its relevance.

7/ The stipulations very generally state that officers have not received differential pay for performing in a higher rank, but provide no information concerning who these employees, when they worked in the higher rank, how they came to perform these duties, or how much money they claim. The absence of such information makes it harder to assess the nature of the PBA's claim.

The clause on differential pay only comes into play once the assignment has been made. Employees who have not been assigned do not fall under that clause. Accordingly, we find that the Township's decision to condition differential pay upon assignment by an officer's immediate supervisor does not violate the contract.

The fourth issue concerns temporary assignments. The parties have stipulated the following:

> On May 27, 1981, Chief of Police McCurdy issued a memorandum which discontinued pay differentials for officers acting in a higher rank unless written authorization is submitted. [J-5]. A "General Order No. 81-54" issued July 10, 1981 further modified the above practice by stating that no differential will be paid unless a lieutenant is absent for more than two days [J-6].
>
> Prior to the above orders, the ranking sergeant would assume the position of watch commander in the absence of the lieutenant pursuant to Operations Order No. 77-57 and receive pay for working in a higher rank (Exhibit CP-1).
>
> In May of 1980, Chief of Police Walter S. McCurdy was called upon by Business Administrator Felix Cabarle to justify "promotions" not authorized by Township Committee. The Chief of Police responded that "temporary higher level assignments" were at issue rather than "promotions," as the Business Administrator had suggested. Further, authorization for such assignments was established by past practice, Article XIV of the PBA contract and Section 24-15 of the Jackson Township Codes.
>
> The Township of Jackson has taken the position that Chief of Police McCurdy's memo of May 27, 1981, and General Order No. 81-54 are both a matter of managerial prerogative of determining manpower needs and assignment of personnel.

Joint Exhibit 5 provides:

> Effective immediately, pay differentials shall be discontinued unless such differential is authorized by the Chief of Police or, in his absence, his designate.

and does not restrict the Township's right to make such assignments. Accordingly, the PBA has failed to establish by a preponderance of the evidence a contractual violation.[8/]

The fifth issue involves an alleged change concerning overtime for sergeants. The parties stipulated the following:

> General Order No. 81-54 [J-6], changed the procedure for filling the post of absent sergeants. It ordered that the senior ranking patrolman assume that position and receive the pay differential between the rank of patrolman and sergeant.
>
> Prior to that order, sergeants replaced sergeants when available pursuant to Article VII "Overtime" of the Collective Bargaining Agreement. The Township order negatively affects sergeants who are available to replace absent sergeants on upcoming shifts.

The PBA contends that this order violated the overtime clause of the contract because it resulted in the assignment of patrolmen to assume the position of acting sergeant contrary to the past practice of assigning an available sergeant from the previous shift. The PBA further asserts that the criteria governing temporary appointments are permissively negotiable. See, e.g., Kearny PBA Local No. 21 v. Town of Kearny, App. Div. Docket No. A-1617-79 (Dec. 12, 1981) ("Kearny"), affirming, In re Town of Kearny, P.E.R.C. No. 80-81, 6 NJPER 15 (¶11009 1980). The Township responds that setting such criteria is a non-negotiable managerial prerogative.

Regardless of whether the contract has been violated by the apparent deviation from past practice, there has not been

8/ We also note that the PBA has not alleged any specific instances in which these orders have adversely affected any employees. In addition, we underline that in those instances where we hold that the PBA has not established a contractual violation, we do not consider whether the clause in question constitutes a term and condition of employment.

> Unless an Officer is specifically ordered to assume a higher acting rank, differentials will not be approved. If designated to work in the capacity of a higher rank, written authorization must accompany the differential pay slip.

Joint Exhibit 6 provides in pertinent part:

> Pay differentials between the rank of sergeant and lieutenant will not be paid unless the lieutenant is absent for more than two (2) days. In the event that the lieutenant is absent for more than two (2) days, it will be the sergeant's responsibility to obtain permission, in writing, from the lieutenant, the division commander, or chief of police, prior to assuming duties as acting lieutenant.
> (Emphasis supplied)

The PBA contends that the cited orders violated the contract to the extent they resulted in "...officers who would normally assume the duties of a higher rank and receive differential pay...[having to] obtain written authorization from the absent officer and then only [being] eligible after that officer has been absent for two days."

Like the previous issue, this issue involves management's right to make assignments rather than the payment of differentials to employees who have already properly received and performed work in a higher rank. The orders specify only that before a sergeant starts to perform the work of a lieutenant, thus qualifying for differential pay, he must wait until the lieutenant has been absent for more than two days and then must receive the written permission of a superior officer. The contract does not provide an inherent right to start performing work in a higher rank before one has been properly assigned to perform that work

a unilateral alteration in the terms and conditions of employment. In In re Paterson Police PBA Local No. 1, 87 N.J. 78, 93 (1981), our Supreme Court recognized that certain items which are normally non-negotiable because they fall outside the terms and conditions of employment may be permissively negotiated by employers and representatives of police officers and firefighters. As Kearny holds and the PBA concedes, the subject of criteria for temporary assignments falls outside the terms and conditions of employment, even though it is permissively negotiable. Even if we assume arguendo that the Township violated the contract, it did not change a term and condition of employment and thus did not violate subsection (a)(5).9/

The final issue involves a Township ordinance concerning paid leaves of absence for injuries or illnesses incurred on duty. The parties stipulated the following:

> On March 5, 1981, the Township passed "Ordinance No. 10-81" which modified the existing Jackson Code Section 20-35 dealing with the payment of one year's salary when out Injured On Duty for a period of one year. The Ordinance changed the word "shall" to "may" thereby giving the Township an option it heretofore did not have.

9/ We hold only that the contractual provision in question is not enforceable in this unfair practice proceeding. A permissively negotiable clause may otherwise be enforceable in an appropriate forum. Additionally, we observe that the stipulations do not provide a reason for the Township's change. If the change was made to save money by paying patrolmen at a lower rate than sergeants would receive then the matter might well be mandatorily negotiable. Based on this record, however, we cannot reach that conclusion.

> Prior to the passage of Ordinance 10-81, employees were entitled to one year's leave of absence with pay and [were] not to be charged any sick leave time for time lost due to such a particular injury as incorporated into Article IV Sick Leave of the Collective Bargaining Agreement pursuant to Jackson Code Section 20-35 [J-9].
>
> The Township has taken the position that Ordinance 10-81 was adopted pursuant to and in furtherance of NJSA 40A:9-7 providing that the Township committee may provide for the granting of leaves of absence with pay.
> (Emphasis supplied).

Section five of the contractual sick leave article states: "Requests for leaves of absence with pay for injury or illness in line of duty or recuperation therefrom shall be made in accordance with Jackson Code Section 20-35 pursuant to N.J.S.A. 40A:14-137." At the time the parties entered into this agreement (May 22, 1979), Section 20-35 of the Jackson Code stated:

> When a full-time township employee is injured in the line of duty, the Committee shall, pursuant to N.J.R.S. 40:11-8, pass a resolution giving the employee up to one (1) year's leave of absence with pay. When such action is taken, the employee shall not be charged any sick leave time for time lost due to such particular injury.
> (Emphasis supplied)

N.J.R.S. 40:11-8, however, had been repealed by Public Law 1971, Chapter 200 (effective July 1, 1971) and replaced, in part, with N.J.S.A. 40A:14-137. Thus, at the time the parties entered into the current agreement, the pertinent statutory section provided:

> The governing body of any municipality, by ordinance, may provide for granting leaves of absence with pay not exceeding one year, to members and officers of its police department and force who shall be injured ill or disabled from any cause, provided that the examining physician appointed by said governing body, shall certify to such injury, illness or disability.10/
> (Emphasis supplied)

In 1981, the Township amended Section 20-35 of the Jackson Code to state that the Township may, rather than shall, grant an injured, ill or disabled police officer a paid leave of absence not exceeding one year.

We find that the new ordinance alters the parties' contractual clause on paid leaves of absence by substituting the word "may" for "shall." The Township conceded as much when it stipulated that the change gave it "...an option it heretofore did not have."11/ Accordingly, we find a contractual violation.

We also find that the contractual clause in question constitutes a term and condition of employment which an employer cannot unilaterally alter. In In re County of Middlesex, 5 NJPER 194 (¶10111 1979), aff'd in pertinent part, App. Div. Docket No. A-3564-78, 6 NJPER 338 (¶11169 1980), we held mandatorily negotiable a proposed contract clause which required an employer to

10/ N.J.R.S. 40:11-8 provided that a governing body may grant a paid leave of absence to injured or disabled employees. N.J.S.A. 40A-9.7 replaced this provision and remains effective today; it also uses the word "may" rather than "shall." N.J.R.S. 40:11-9 also repealed in 1971, provided that a governing body may grant a paid leave of absence, not to exceed one year, to an injured, ill, or disabled police or fire department member. N.J.S.A. 40A:14-137 replaced it.

11/ There is nothing in the record suggesting that this option has been exercised.

grant paid sick leave, not exceeding one year, to an employee who suffered a work-connected injury or disability. After finding that paid sick leave was a mandatorily negotiable subject, we rejected a contention that N.J.S.A. 40A:9-7, the counterpart to N.J.S.A. 40A:14-137 which covers police and fire employees, specifically preempted negotiations. See also, State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978); In re County of Morris, P.E.R.C. No. 79-2, 4 NJPER 304 (¶4153 1978). The same analysis applies here.

In sum, at all times prior to the adoption of the instant agreement, N.J.S.A. 40A:14-137 , its predecessors and its counterparts provided that an employer may grant paid sick leave up to one year, but did not restrict the employer's ability to agree, when negotiating upon this mandatory subject, to guarantee paid sick leave up to one year for employees injured on duty. This is precisely what the Township did when it executed the agreement in 1979 and what it cannot unilaterally alter now. Accordingly, we find that the Township violated subsections (a)(5), and derivatively (a)(1), of our Act when, by adopting the new ordinance in 1981, it unilaterally altered the contractual clause providing paid sick leave up to one year for employees injured on duty.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that:

A. The Respondent Township of Jackson shall cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act by unilaterally altering the provisions of the parties' collective agreement pertaining to paid sick leave for employees injured on duty, and

2. Refusing to negotiate with Jackson Township P.B.A. Local 168 prior to unilaterally altering provisions of the parties' collective agreement pertaining to paid sick leave for employees injured on duty.

B. The Respondent Township of Jackson shall take the following affirmative action:

1. Restore the status quo before it amended Section 20-35 of the Jackson Code in 1981 with respect to paid sick leave for employees injured on duty,

2. Negotiate with Jackson Township P.B.A. Local 168 before altering any terms and conditions of employment, specifically including provisions pertaining to paid sick leave for employees injured on duty, and

3. Post at 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 the receipt thereof, and after being signed by the Respondent's authorized representative, shall be maintained for a period of at least sixty (60) consecutive days. Reasonable steps shall be taken

by the Respondent to make sure that such notices are not altered, defaced or covered by other material.

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

C. All allegations of the Complaint besides those concerning paid sick leave for employees injured on duty are dismissed in their entirety.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Newbaker, Butch and Suskin voted for this decision. None opposed. Commissioners Graves and Hartnett were not present.

DATED: February 9, 1982
Trenton, New Jersey
ISSUED: February 10, 1982

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 interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act by unilaterally altering the provisions of the parties' collective agreement pertaining to paid sick leave for employees injured on duty.

WE WILL NOT refuse to negotiate with Jackson Township P.B.A. Local 168 prior to unilaterally altering provisions of the parties' collective agreement pertaining to paid sick leave for employees injured on duty.

WE WILL restore the status quo before we amended Section 20-35 of the Jackson Code in 1981 with respect to paid sick leave for employees injured on duty.

WE WILL negotiate with Jackson P.B.A. Local 168 before altering any terms and conditions of employment, specifically including provisions pertaining to paid sick leave for employees injured on duty.

TOWNSHIP OF JACKSON
(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, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.