

P.E.R.C. NO. 2006-62

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF BRIDGEWATER,

Respondent,

-and-

Docket No. CO-2005-035

BRIDGEWATER TOWNSHIP PBA LOCAL 174,

Charging Party.

TOWNSHIP OF BRIDGEWATER,

Respondent,

-and-

Docket No. CO-2005-036

BRIDGEWATER TOWNSHIP SOA,
AFFILIATED WITH BRIDGEWATER TOWNSHIP
PBA LOCAL 174,

Charging Party.

Appearances:

For the Respondent, Ruderman & Glickman, attorneys
(Ellen M. Horn, of counsel)

For the Charging Parties, Coughlin Duffy, attorneys
(Daniel J. Cohen, of counsel, Neil M. Day and Michael
W. Starr, on the brief)

DECISION

This case comes to us by way of cross-motions for summary judgment. On August 10 and December 28, 2004, Bridgewater Township PBA Local 174 and the Bridgewater Township SOA,

affiliated with Bridgewater Township PBA Local 174, filed unfair practice charges and amended charges against the Township of Bridgewater. The charges, as amended, allege that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and (5),^{1/} when it adopted an ordinance discontinuing a terminal leave benefit. The charging parties seek restoration of the status quo and a make-whole remedy.

On February 3, 2005, a Complaint and Notice of Hearing issued on the 5.4a(1) and (5) allegations. The Township relied on an August 30, 2004 position paper as its Answer. The Township states that it simply ended a practice of making "one for one" payments of unused sick leave as terminal leave and now follows unambiguous contractual language providing retiring employees with a lump sum of one day's pay for every three days of unused sick leave.

^{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. (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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. . . ."

On November 2, 2005, the Township moved for summary judgment and submitted certifications of its mayor, its council president, and three councilmen. It claims that the parties' contract authorized discontinuance of the previous practice and that any past payment of terminal leave benefits was ultra vires. On December 15, the charging parties filed a brief opposing the Township's motion and supporting their cross-motion. They also filed a certification of the PBA's president. They claim that as the contracts are silent with respect to terminal leave, the past practice had to be maintained. They further claim that the Township's argument that terminal leave was ultra vires is based on the incorrect assumption that the former mayor did not have authority to grant the benefit.

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. N.J.A.C. 19:14-4.8(d); 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). The following are undisputed material facts.

The Township and the charging parties have entered into collective negotiations agreements effective until December 31, 2004. Both contracts have a Sick Leave provision that provides:

Upon retirement, an employee who has served with the Bridgewater Police Department shall receive one (1) day's pay for every three (3) days of accumulated unused sick leave based

on a maximum accumulation of two hundred and forty (240) sick days.^{2/}

In addition to payment for unused sick leave upon retirement, the Township's prior mayor had authorized retiring employees whose sick day accrual bank exceeded the maximum cash allowance to use the overage as terminal leave. Terminal leave refers to the practice of permitting retiring police officers to use a predetermined amount of leave time, and thus stop working before their effective retirement date, even though they are not actually sick. While on terminal leave, a police officer remains an employee but does not report to work. The amount of terminal leave has been determined by the aggregate amount of unused sick days, personal days, holidays, vacation days and accrued compensatory time.

Some officers have received a one-for-one total payment in compensation and time for accrued but unused sick time. The lump sum payment for accumulated sick leave to which officers are contractually entitled is reduced by the number of sick days used during the terminal leave period. For example, an officer who retired in 1994 had 223.5 accumulated sick days. He took 90 of

^{2/} The Township Code provides, in part:

Employees who retire from employment with the Township after 10 years of service or more shall be entitled to 25% of their unused accumulated sick leave up to 180 days, based upon the rate of compensation in effect on the date of retirement.

those days immediately before retirement as terminal leave. He was then paid a lump sum for 44.5 days upon retirement, one day's pay for every three of his remaining 133.5 accumulated sick days. For purposes of these motions, the Township accepts the charging parties' assertion that at least 33 officers have received such terminal leave benefits. The Township's governing body was not aware of the terminal leave benefit and did not approve it.

The Township operates under the Optional Municipal Charter Law, N.J.S.A. 40:69A-1 et seq., and has adopted the mayor-council form of government.

On July 19, 2004, the mayor and council adopted Ordinance #04-21. The ordinance eliminates terminal leave benefits and provides:

Terminal Leave. Notwithstanding the language of Subsections A and E of § 26-32 (entitled "Sick Leave") hereinabove, a "retiring employee" (as defined below) who will be retiring between July 8, 2004 and December 31, 2004, shall have the right to utilize accumulated unused sick time within six months of his/her effective retirement date (as confirmed by the New Jersey Division of Pensions and Benefits) up to a maximum of 180 days even though such employee is not sick (as that term is defined in Subsection A hereinabove) so that he/she may terminate actual working on the job prior to that employee's official retirement date.

* * *

The benefits granted by this subsection of this article shall remain in effect through December 31, 2004, when the clear and unambiguous language of each Township

collective bargaining agreement shall be enforced.

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their 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 Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978). The Act requires negotiations, but not agreement. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989); Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000).

Terminal leave benefits and paying employees upon retirement for unused leave allowances are both mandatorily negotiable. See, e.g., Galloway Tp., P.E.R.C. No. 98-133, 24 NJPER 261 (¶29125 1998). There is no dispute that the employer changed the parties' practice concerning terminal leave. The dispute is over whether the contractual language governing payment for accumulated sick leave upon retirement authorized the change. Put differently, the employer asserts that the clear and unambiguous language of the sick leave payment clauses authorized it to eliminate terminal leave benefits, while the unions contend

that the parties' practice requires the employer to continue such benefits. The unions assert that sick leave payment and terminal leave are two distinct benefits, one set by contract, one set by practice.

Where clear and unambiguous contract language defines or limits a benefit, an employer does not violate the Act by ending a past practice granting a more generous benefit and returning to the benefit level set by the contract. See, e.g., Kittatinny Reg. Bd. of Ed., P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991); New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd NJPER Supp.2d 60 (¶42 App. Div. 1979).

There is no dispute that the parties negotiated for payment of a lump sum for unused sick leave upon retirement. There is also no dispute that a prior mayor authorized terminal leave prior to retirement in addition to payment for unused sick leave upon retirement. The question we must answer is whether the employer was required to negotiate before ending the practice of granting a terminal leave benefit. The answer to that question is yes unless the contract language on payment for unused sick leave authorized the employer to eliminate the terminal leave benefit.

Terminal leave before retirement and payment of accumulated benefits upon retirement are conceptually different benefits.

Although the source of both benefits may be accumulated sick leave, parties often provide both benefits to retiring employees and do so by differing formulas. Absent any additional contract language or negotiations history suggesting that these parties intended to provide one benefit and prohibit the other, we have no basis to conclude that the contractual provisions on payment for unused sick leave upon retirement authorized discontinuation of a practice of providing terminal leave prior to retirement. The cases cited by the employer authorizing an employer to end a practice that is contrary to a contract are all distinguishable. See Borough of Franklin, D.U.P. No. 99-6, 25 NJPER 69 (¶30026 1998) (no Complaint issued where employer reduced disability benefit from 100% to 66 2/3% of weekly earnings as set by contract); City of Millville, D.U.P. No. 96-24, 22 NJPER 192 (¶27100 1996) (no Complaint issued where charge was untimely; contract requirement that employee pay difference in cost between HMO and employer's plan authorized employer to make such deductions); Kittatinny Reg. Bd. of Ed. (charge dismissed where employer ended practice of reducing hours during holidays and recess periods and restored contractual workday during those periods); Burlington Cty. Bridge Comm'n, P.E.R.C. No. 92-47, 17 NJPER 496 (¶22242 1992) (contract authorized not considering sick or vacation time in computing overtime; but not excluding

bereavement or personal leave); Neptune Tp., P.E.R.C. No. 91-111, 17 NJPER 332 (¶22146 1991) (union did not prove a practice of allowing officers to use accumulated sick leave as terminal leave; Commission did not decide effect of parties' contract); Randolph Tp. Bd. of Ed., P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980) (board properly increased employee's work day to level within limit set by parties' contract). Unlike these cases where contracts authorized the employer's departure from past practices, the contracts in this case are silent on the use of accumulated sick leave as terminal leave prior to retirement. And unlike Neptune Tp., there is no argument that the contract defines sick leave in a manner that precludes the use of accumulated sick leave prior to retirement as terminal leave.

We must next consider whether the charge should nevertheless be dismissed because the terminal leave payments were ultra vires -- beyond the Township's legal authority. We rejected a similar argument in Denville Tp., P.E.R.C. No. 81-146, 7 NJPER 359 (¶12163 1981). In that case, the employer routinely provided leaves of absence with pay for up to one year to injured or disabled police officers without having adopted an authorizing ordinance as required by N.J.S.A. 40A:14-137. We held that the unilateral discontinuance of the past practice violated the Act and reasoned that the municipality's failure to enact an ordinance did not permit it to evade its responsibility to

maintain terms and conditions of employment established by a practice of long duration. Id. at 360. We remedied the unfair practice by directing the employer to revert to the prior practice. We noted that compliance with our order might require the adoption of an implementing ordinance, but we left that determination to the employer.

We also hold that the Township cannot change the practice established by its former mayor until it discharges its negotiations obligation under our Act. Our earliest cases establish that a public employer can be bound by the actions of a representative with apparent authority to act. See, e.g., Bergenfield Bd. of Ed., P.E.R.C. No. 90, 1 NJPER 44 (1975). If the Township Council is required to ratify the mayor's action, it may do so now.^{3/}

Under these circumstances, we deny the Township's motion for summary judgment and grant the unions' cross-motion. We will order the Township to restore the prior practice and to cease and desist from changing terms and conditions of employment until it

3/ City of Paterson v. Paterson Police PBA Local 1, App. Div. Dkt. No. A-5759-03T5 (3/16/05), a case cited by the Township, is distinguishable. There, the Court vacated a grievance arbitration award because the arbitrator had improperly found that the parties' practice should prevail over the clear and unambiguous language of the contract and had rewritten the contract. Here, the contracts do not clearly and unambiguously preclude payment of terminal leave as an additional benefit to the one set forth in the contracts.

has met its negotiations obligation under N.J.S.A. 34:13A-5.3.

We leave it to the Township to determine what ordinances it needs to repeal or adopt to comply with our Order.

We emphasize that we are not holding that the unions have a contractual right to have the terminal leave benefit maintained. We simply hold that if the Township wished to make a change, it had to first negotiate with the unions in good faith. In Middletown Tp., we distinguished between:

1. a claim that a past practice was contractually binding for the life of a contract, a claim that must be submitted to a grievance arbitrator; and
2. a claim that an existing employment condition could not be changed without prior negotiations, a claim that may be raised in an unfair practice charge.

Unlike an arbitrator, we cannot find a breach of an allegedly binding past practice and order restoration of the status quo for the life of the contract. Our jurisdiction in this case is limited to enforcing an employer's statutory obligation under section 5.3 to negotiate before modifying existing employment conditions and our remedial authority is limited to restoring the status quo before the change and ordering negotiations before any further changes.

ORDER

The Township of Bridgewater is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by not negotiating before rescinding a past practice of providing terminal leave benefits to retiring PBA and SOA unit members.

2. 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, particularly by not negotiating before rescinding a past practice of providing terminal leave benefits to retiring PBA and SOA unit members.

B. Take this action:

1. Restore the status quo concerning terminal leave.
2. Make whole any adversely affected retirees.
3. Negotiate in good faith before changing any 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. Within twenty (20) days of receipt of this decision, notify the Chairman of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed. Commissioner Katz was not present.

ISSUED: February 23, 2006

Trenton, New Jersey



**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 cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by not negotiating before rescinding a past practice of providing terminal leave benefits to retiring Bridgewater Township PBA Local 174 and Bridgewater Township SOA unit members.

WE WILL cease and desist from 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, particularly by not negotiating before rescinding a past practice of providing terminal leave benefits to retiring PBA and SOA unit members.

WE WILL restore the status quo concerning terminal leave.

WE WILL make whole any adversely affected retirees.

WE WILL negotiate in good faith before changing any terminal leave benefit.

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BRIDGEWATER TOWNSHIP

(Public Employer)

Date: _____

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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"