P.E.R.C. NO. 2017-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PERTH AMBOY,

Respondent,

-and- Docket No. CO-2015-059

PERTH AMBOY POLICE BENEVOLENT
ASSOCIATION LOCAL 13,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's recommended decision denying the PBA's motion for summary judgment as to its unfair practice charge and granting the City's cross-motion for summary judgment. The PBA's charge alleged that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), and (5), by unilaterally changing its method of calculating paid time off for military leave, causing two unit members to exhaust their statutory leave allotment more quickly. The Commission found that the PBA was bound by the calculation method, having entered into an agreement consenting to the terms of a general order, which set forth the calculation method conspicuously and multiple times. The Commission also agreed with the Hearing Examiner that N.J.S.A. 38A:4-4 and N.J.S.A. 38:23-1 do not preempt the disputed calculation method in the sense that they do not specify a particular method for calculating when the statutory leave allotment is exhausted. The Commission noted that the PBA did not carry its burden of proving that the disputed method shortchanged the officers in terms of their statutory entitlement.

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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Appearances:

For the Respondent, Decotiis, Fitzpatrick and Cole, LLP, attorneys (Arlene Quinones Perez, of counsel)

For the Charging Party, Marc Abramson, Labor Relations Consultant)

DECISION

This case comes to us by way of exceptions to a Hearing Examiner's decision on a motion and cross-motion for summary judgment. H.E. 2016-18, 42 NJPER 462 (¶126 2016). On September 18, 2014, the Perth Amboy PBA Local 13 (PBA) filed an unfair practice charge alleging that the City of Perth Amboy violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (2) and (5), when it unilaterally changed its method of calculating paid time off for military leave for two unit members, resulting in them exhausting their leave allotment more quickly than under prior practice.

On March 20, 2015, the Director of Unfair Practices issued a Complaint and a Notice of Hearing on the 5.4a(1) and (5)[1/] allegations but declined to do so with regard to the 5.4a(2) allegation, finding insufficient facts presented to support it. On April 8 the City filed an answer denying that it unilaterally or without negotiations changed the calculation method.

On September 28 and October 16, 2015, respectively, the PBA and the City filed a motion for summary judgment and a cross-motion for summary judgment. The PBA's motion included the certification of its vice president and the City's cross-motion included the certifications of its business administrator and attorney. On November 20, the motion and cross-motion were referred to a Hearing Examiner pursuant to N.J.A.C. 19:14-4.8. We adopt the findings of fact made by the Hearing Examiner, which are summarized below. H.E. at 4-12.

Prior to May 2011, the City's Police Department had no formal written policy regarding military leave. Effective May 12, 2011, the Police Department issued General Order No. 11-029

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 . . . (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."

(General Order), which, among other things, set out the types of leave on account of military duty for which officers would receive their regular pay, as well as types of military leave not authorized for paid time off. It also set forth the method for calculating paid military leave time in three different sections of the policy, each stating as follows:

> **NOTE:** For clarification of Military Leave Time, all members will be converted to an 8 hour day. For example, if working a 10 hour day the member will account for the military leave days as a 5-day 8-hour a day work schedule.

On July 5, 2011, the PBA filed an unfair practice, which was docketed as CO-2012-002. The charge alleged that as a result of the unilateral adoption of the General Order members were no longer permitted time off with pay for all military training and, as a result, members were forced to use their vacation or compensatory time or to lose pay when absent for training for which paid leave was no longer available.

In settlement of CO-2012-002 as well as an unrelated grievance, the parties entered into a Memorandum of Agreement (MOA) in 2012. The MOA states, among other things, that the PBA "agrees to abide by and not to challenge" the Department's policy on military leave as set forth in the General Order. In addition, the MOA grand-fathered five officers, including the PBA vice president, entitling them to paid leave for five weekend drills annually when the drills conflicted with their scheduled

work shifts. As for all other officers, the MOA provided that their entitlement to paid military leave would be determined pursuant to the General Order. The MOA also provided that either party could raise the issue of military leave during the next round of negotiations.

On September 18, 2014, the PBA filed the unfair practice charge that is the subject of this dispute. In pertinent part, the charge asserts as follows:

> On or about June 16, 2014, the Chief of Police and the Business Administrator informed two unit members that their active military duty days will be based on a five and two work schedule which neither member works and for that matter which no unit member works. The five and two schedule represents five days at eight hours a day and two days off. Both unit members worked a four on and four off schedule which represents four days on at ten hours per day and four days off.
>
> As a result of this unilateral calculation change, both unit members' leaves of absence will be terminated prematurely. Further, both unit members will be required to use more of their vacation, compensatory and personal time in order to continue to be paid. In the past, these calculations were always based on the actual schedule worked. Further, and perhaps more importantly, the City always reimbursed said employees with no loss of pay beyond the statutory ninety days.

The PBA's vice president certifies that he was present at all settlement discussions involving the MOA and that the only issue in dispute and discussed was the use of paid leave time for

weekend drills and that the method of calculation for military leave was not discussed. He further certifies that he had been on several military leaves of absence both before and after the effective date of the MOA and he was paid based on his regular four-day, ten-hour work schedule, not on the five-day on, two-day off, eight-hour day work schedule set forth in the General Order for calculating the use of military leave. However, on June 13, 2014, he was informed by the City that his calculation for military leave would be based on the five-two work schedule of eight-hour days and not on the four-four work schedule of ten-hour days, thus causing him to deplete his allotted ninety days of military leave time sooner.

The City's business administrator, who represented the City during negotiations for a successor agreement to the 2009-2013 CNA, certified that the PBA did not negotiate a change to the military leave provisions set forth in the MOA or make any proposals regarding the issue of military leave during those negotiations. Negotiations were completed in late 2014, and the parties entered into a successor CNA effective from January 1, 2014 through December 31, 2018.

N.J.S.A. 38A:4.4 provides in relevant part:

> a. A permanent or full-time temporary [public] employee . . . who is a member of the organized militia shall be entitled, in addition to pay received, if any, as a member of the organized militia, to leave of absence from his or her respective duties without

> loss of pay or time on all days during which he or she shall be engaged in any period of State or Federal active duty; provided, however, that the leaves of absence for Federal active duty or active duty for training shall not exceed 90 work days in the aggregate in any calendar year. Any leave of absence for such duty in excess of 90 workdays shall be without pay but without loss of time.
>
> b. Leaves of absence for such military duty shall be in addition to the regular vacation or other accrued leave allowed such officers and employees by the State, county or municipal law, ordinance, resolution or regulation.

N.J.S.A. 38:23-1 is similar, but it applies to public employees who are in the U.S. Reserves or the national guard of a state other than New Jersey. The statute entitles them to leave "without loss of pay or time on all work days on which he or she shall be engaged in any period of Federal active duty, provided, however, that such leaves of absence shall not exceed 30 work days in any calendar year." N.J.S.A. 38:23-1 further provides, "Such leaves shall be in addition to the regular vacation or other accrued leave allowed such officer or employee."

The Hearing Examiner took administrative notice of New Jersey State Department of Community Affairs, Division of Local Government Services Bulletin, LFN No. 2004-14 issued July 15, 2004, which interprets and provides guidance for State-mandated reimbursement to a public employer for an employee's military leave. That bulletin states at page 4:

> The routine work schedule of the individual is the basis for calculating the mandate obligation for State reimbursement. For example, law enforcement officers or firefighters that do not work 5 days on/2 days off schedules would be calculated on a case-by-case basis, using the individual's normal schedule.

The bulletin also explains that there is no statutory obligation or employee entitlement to receive employer pay for inactive duty training and states that local units may have separate personnel policies or labor agreements that may provide for compensation for that time.

The Hearing Examiner denied the PBA's motion for summary judgment and granted summary judgment in favor of the City. Rejecting the PBA's argument, she found that N.J.S.A. 38A:4-4 and N.J.S.A. 38:23-1 do not preempt the issue of how to calculate miliary leave because neither statute mandates a specific calculation method. The Hearing Examiner found that the PBA waived its right to negotiate regarding the terms of the General Order, having entered into the MOA and thereby accepted the General Order and its terms, and subsequently, by entering into a successor CNA that did not change the terms of the General Order.

The PBA takes exception to the Hearing Examiner's report. Substantively, it disagrees with the Hearing Examiner's interpretation of the MOA and preemption analysis and determination.

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(c). 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 officer], 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 particularly 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).

N.J.S.A. 34:13A-5.3 authorizes a majority representative to negotiate terms and conditions of employment on behalf of unit employees. Section 5.3 also defines when an employer has a 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.

Consistent with the statute, the Commission has held that changes in negotiable terms and conditions of employment must be addressed through the collective negotiations process because unilateral action is destabilizing to the employment relationship and contrary to the principles of our Act. Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd, 166 N.J. 112 (2000). Employment conditions arise not only through the parties' collective agreement, but also through established practice. An established practice 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 part, rev'd in part, 180 N.J. Super. 440 (App. Div. 1981). An employer violates its duty to negotiate when it changes an existing practice, unless the majority representative has waived its right to negotiate. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978); Middletown Tp.

We reject the PBA's exceptions to the Hearing Examiner's view of the MOA and to her conclusion that the PBA waived the right to negotiate changes to the MOA and, by extension, the terms of the General Order. The PBA did so by voluntarily entering into the MOA, which set forth conspicuously in multiple parts of the agreement the disputed calculation conversion, and by failing to raise any issue regarding military leave during successor contract negotiations. The PBA's argument that it is not bound by the calculation method because it did not discuss it before consenting to the MOA is contrary to basic principles of contract law. The Hearing Examiner correctly found that the PBA was bound by the method even if the parties did not discuss it when they negotiated a settlement to the earlier unfair practice charge (CO-2012-002) and the PBA assented to the terms of the MOA. The Hearing Examiner also correctly concluded that the MOA authorized the City's departure from past practice as to how it calculated time off for military leave. (H.E. at 16 to 21.)

We also agree with the Hearing Examiner's conclusion that N.J.S.A. 38A:4-4 and N.J.S.A. 38:23-1 do not preempt the calculation method in the sense that the statutes do not set forth a specific method for calculating when the statutory allotment of ninety or thirty work days is exhausted. We also note that while the PBA, as the charging party, had the burden of proof in this matter, it did not sufficiently show that the five-on, two-off calculation actually shortchanged the two officers in terms of their statutory entitlement to paid leave.[2/] We cannot conclude that calculating military leave based on a work schedule other than the employee's actual one conflicts with N.J.S.A. 38A:4-4 or N.J.S.A. 38:23-1 specifying the types of military duty for which paid leave is mandated.[3/] The PBA has not shown that the City violated section 5.4a(1) or (5) of the Act.

2/ For instance, the PBA did not provide the Hearing Examiner with copies of the officers' military orders, payroll records for the relevant time periods, or other documents and information to establish that the General Order's methodology conflicted with the statutes as it relates to the statutory allotment of paid leave for military duty other than weekend drills.

3/ Therefore, we need not address whether this agency would be the proper forum to remedy a statutory violation on account of the calculation method.

ORDER

The Hearing Examiner's Recommended Report and Decision is adopted. The complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau and Voos voted in favor of this decision. Commissioner Jones voted against this decision. Commissioners Bonanni and Wall recused themselves. Commissioner Eskilson was not present.

ISSUED: December 22, 2016

Trenton, New Jersey