

P.E.R.C. NO. 2019-40

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ORANGE TOWNSHIP,

Respondent,

-and-

Docket No. CO-2018-162

PBA LOCAL 89,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's recommended decision on cross motions for summary judgment filed by PBA Local 89 and the City of Orange Township, finding that the City violated 5.4a(5) and, derivatively, 5.4a(1) when it adopted an ordinance which announced the elimination of the payment of terminal leave to PBA unit members on December 31, 2020 or at the expiration of the parties' current agreement, whichever is later, unless already agreed to otherwise by the parties in an existing agreement. The Commission rejects the City's exceptions, finding that under either the Hearing Examiner's or the City's interpretation, the ordinance violates the Act, both through its announcement and its implementation of a unilateral change to the terminal leave benefit, a mandatorily negotiable subject.

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, Scarinci Hollenbeck, attorneys
(Ramon E. Rivera, of counsel)

For the Charging Party, Detzky, Hunter & DeFillippo,
attorneys (David J. DeFillippo, of counsel)

DECISION

On January 22, 2018, the Policemen's Benevolent Association Local No. 89 (PBA) filed an unfair practice charge against the City of Orange Township (City). The charge alleges the City violated section 5.4a(1), (2), (3), (5) and (7)^{1/} of the New

^{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. (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. (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 (continued...)"

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), by adopting an ordinance on November 8, 2017, which announced the elimination of the payment of terminal leave to PBA unit members "[a]t the expiration of the current collective bargaining agreements, or December 31, 2020, whichever is later, unless already agreed to in an existing Collective Bargaining Agreement." The PBA contends that the City adopted this ordinance in contravention of the parties' current agreement, which provides for the payment of terminal leave to unit officers, without negotiating the change with the PBA. On March 13, 2018, the City filed an answer.

On July 19, 2018, the Acting Director of Unfair Practices issued a Complaint and Notice of Pre-hearing on the (a)(1) and (5) allegations.

On September 10, 2018, the PBA filed a motion for summary judgment. On September 20, 2018, the City filed opposition and a cross-motion for summary judgment.

On October 4, 2018, the motion and cross-motion for summary judgment were referred to a Hearing Examiner for decision pursuant to N.J.A.C. 19:14-4.8(a).

On December 12, 2018, the Hearing Examiner issued a report and recommended decision, H.E. No. 2019-1, 45 NJPER 222 (¶59

1/ (...continued)
the majority representative. (7) Violating any of the rules and regulations established by the commissions."

2018), concluding that the City violated N.J.S.A. 34:13A-5.4(a)(5) and, derivatively, (a)(1) of the Act by adopting the ordinance without negotiating in good faith with the PBA over its changes to the provision of terminal leave.

On December 21, 2018, the City filed the following exceptions to the Hearing Examiner's report and recommended decision:

1. The Hearing Examiner erred by finding that the ordinance eliminates terminal leave for PBA members if no CNA is in place by December 31, 2020. Indeed, this interpretation of the ordinance improperly renders nearly all of the ordinance's introductory clause mere surplusage.
2. The Hearing Examiner erred by failing to construe the ordinance's interpretation and construction in favor of the City.
3. The Hearing Examiner erred by finding that the City unilaterally altered the payment of terminal leave without negotiating in good faith with the PBA.
4. The Hearing Examiner erred by misstating the City's interpretation of the ordinance as conflating the words "current collective bargaining agreements" and "existing Collective Bargaining Agreement."
5. The Hearing Examiner erred by applying the ordinance's changes to the City's employee handbook and personnel policies and procedures for non-union employees and general personnel to the PBA.
6. The Hearing Examiner erred by determining that the ordinance's "plainly stated purpose" is to discontinue terminal leave for the PBA until a new agreement is in place.

7. The Hearing Examiner erred by interpreting the ordinance to discontinue terminal leave for PBA officers effective December 31, 2020 resulting in a violation of Article XXXVI, Section 2 of the CNA.

On December 24, 2018, the PBA filed opposition to the City's exceptions, arguing for the adoption of the Hearing Examiner's decision based upon the following points:

1. Terminal leave benefits are mandatorily negotiable;
2. The parties' 2010-2020 CNA contains a detailed entitlement for terminal leave, depending upon the officer's date of hire;
3. Although the terms of the 2010-2020 CNA are scheduled to expire on December 31, 2020, its terms will remain in full force and effect beyond said date, pursuant to N.J.S.A. 34:13A-33, until the parties resolve the terms of a new CNA;
4. Resolution 63-2017 eliminates payment for accumulated sick leave beyond December 31, 2020; and
5. The only exception to the December 31, 2020 elimination of the terminal leave benefit is if same was "already" - not "otherwise" - "agreed to in an existing Collective Negotiations Agreement".

The matter is now before the Commission to adopt, reject or modify the Hearing Examiner's recommendations. We have reviewed the record and the Hearing Examiner's Findings of Fact and Conclusions of Law. We find that the Hearing Examiner's findings of fact, H.E. at 5-11, summarized below, are supported by the record and we adopt them. We further hold that the Hearing

Examiner has correctly resolved the legal issues presented by this dispute. We also find, however, that a violation of N.J.S.A. 34:13A-5.4(a)(5) and, derivatively, (a)(1), would arise under either the Hearing Examiner's or the City's interpretation of the ordinance, as further detailed below.

SUMMARY OF FACTS

The PBA is the exclusive majority representative of all police officers employed by the City below the rank of sergeant. The City and the PBA are parties to a collective negotiations agreement (CNA) in effect from January 1, 2010 through December 31, 2020. Article XXXVI, Section 2 of the CNA provides: "This Agreement shall remain in full force and effect beyond the date of expiration set forth herein during collective bargaining negotiations between the parties."

Article V, Section 7 of the CNA provides for the payment of "terminal leave" at retirement based upon an officer's accumulated, unused sick leave. The amount of such compensation is calculated pursuant to formulas by which employees may opt for a terminal leave payment at the rate of 70% for all accumulated sick days, or for compensation in cash for up to one year of all accumulated time off. The date of hire for employees who opt for the "one-year, time-off" payment determines the maximum number of days for which they will receive one full day's pay for each day of accumulated leave. Article V imposes no across-the-board or

flat cap on the amount payable to employees under the Terminal Leave provision. Under Article XVII of the CNA, a decedent officer's estate is entitled to receive the terminal leave benefits provided for in Article V of the CNA.

On November 8, 2017, the City adopted Ordinance No. 63-2017, without prior negotiations with or the knowledge of the PBA. The ordinance provides:

AN ORDINANCE TO AMEND TITLE 23 CITY OF ORANGE TOWNSHIP EMPLOYEE HANDBOOK OF PERSONNEL POLICIES AND PROCEDURES, CHAPTER V-UNUSED SICK LEAVE AND TERMINAL LEAVE FOR THE CITY OF ORANGE TOWNSHIP POLICE, FIRE, AND NON-UNIFORMED WORKERS OF THE CODE OF THE CITY OF ORANGE TOWNSHIP PERTAINING TO UNUSED SICK LEAVE AND TERMINAL LEAVE.

WHEREAS, the Administration of the City of Orange Township from time to time reviews all employee personnel policies and procedures; and

WHEREAS, the City takes into consideration the needs of their employees and provides paid time off for sick leave; and

WHEREAS, sick leave is only allowed when an employee is sick, thus accrual is allowed and expected; and

WHEREAS, upon retirement any earned unused sick leave is paid out to the employee mindful of keeping excessive payments at a reasonable level.

NOW THEREFORE BE IT RESOLVED by the Municipal Council of the City of Orange Township, that Title 23 City of Orange Township Employee Handbook of Personnel Policies and Procedures, Chapter V-Unused

Sick Leave and Terminal Leave, is hereby amended and supplemented as follows.

23:1-5.4 UNUSED SICK LEAVE AND TERMINAL LEAVE

All employees who have accumulated more than \$12,000 worth of sick leave as of December 31, 2020 cannot accumulate additional time and the dollar value (\$12,000) is frozen in place and cannot be increased. This does not affect the accrual of sick leave days that are earned; it only caps the amount of cash received at retirement.

There shall be no accumulated sick leave payment for employees who resign, die or are terminated beyond December 31, 2020.

Terminal Leave for Members of OMEBA, the Police and Fire Departments

At the expiration of the current collective bargaining agreements, or December 31, 2020, whichever is later, unless already agreed to in an existing Collective Bargaining Agreement, the terms of this Ordinance must apply as follows: there will be no terminal leave payout for accumulated unused sick leave.

Terminal Leave for OMEBA Members - In accordance with their current collective bargaining agreement.

* * * *

EFFECTIVE DATE:

This Ordinance shall take effect twenty (20) days after the final reading and passage.

On December 11, 2017, by memorandum, the PBA demanded that the City rescind and/or amend the ordinance "to reflect and otherwise incorporate the relevant terms of the CNA" governing

terminal leave, namely Articles V and XVII. The PBA noted that changes to terminal leave "must be negotiated following the expiration of the 2010-2020 CNA and not unilaterally imposed by the City." By memorandum dated February 8, 2018, the City responded, in pertinent part:

With regard to the ordinance you have identified, the ordinance has not and does not impact the current CBA, which expires in 2020. The ordinance constitutes a statement and codification of City policy. That policy will guide negotiations for a new CBA with yours and other unions when current CBAs expire. No corrective action is required at this time.

STANDARD OF REVIEW

The standard we apply in reviewing a Hearing Examiner's decision is set forth in pertinent part at N.J.S.A. 52:14B-10(c):

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. The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. 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); see also, Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954); N.J.A.C. 19:14-4.8(e). In determining whether summary judgment is appropriate, we must ascertain “whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” Id. at 523. “Although summary judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial” and “should be denied unless the right thereto appears so clearly as to leave no room for controversy.” Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1995); see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006). We have denied summary judgment when the facts in the record do not definitively answer whether a public employer has or has not committed the unfair practices alleged. See, e.g., Hillsborough Tp. Bd. of Ed., P.E.R.C. 2006-97, 32 NJPER 232 (¶97 2006). We have also denied summary judgment when credibility determinations

need to be made. See, e.g., New Jersey State (Corrections), H.E. No. 2014-9, 40 NJPER 534 (¶173 2014).

ANALYSIS

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).

Public employers have an unconditional duty to negotiate “[p]roposed new rules or modifications of existing rules governing working conditions . . . with the majority representative before they are established.” N.J.S.A. 34:13A-5.3. (Emphasis added). “[E]mployers are barred from ‘unilaterally altering . . . mandatory bargaining topics, whether established by expired contract or by past practice, without first bargaining to impasse.’” County. of Atlantic, 230 N.J. 237, 252 (2017), quoting Bd. of Educ. v. Neptune Twp. Educ.

Ass'n, 144 N.J. 16, 22 (1996); accord Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n, 78 N.J. 25, 48 (1978).

It is well-settled that terminal leave, i.e. compensation for unused leave allowances through lump sum payments or regular pay, is a mandatorily negotiable term and condition of employment. Hackensack Bd. of Ed., P.E.R.C. No. 2016-18, 42 NJPER 187 (¶49 2015); see also, Caponegro v. State Operated Sch. Dist. of City of Newark, Essex Cty., 330 N.J. Super. 148, 156, (App. Div. 2000) ("a contractual right to compensable accumulated leave is. . . deferred compensation . . . [that] is not subject to unilateral divestment by the employer"). Moreover, ordinances which pertain to terms and conditions of employment are mandatorily negotiable. Borough of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178 1985).

The City's exceptions numbered 1, 2, 4, 6 and 7 are all variations on a common theme which, stated succinctly, is that the Hearing Examiner erred in rejecting the City's proffered interpretation of the meaning and purpose of the following section of the ordinance:

At the expiration of the current collective bargaining agreements, or December 31, 2020, whichever is later, unless already agreed to in an existing Collective Bargaining Agreement, the terms of this Ordinance must apply as follows: there will be no terminal leave payout for accumulated unused sick days.

For the reasons set forth below, we reject these exceptions.

The Hearing Examiner found that the ordinance "eliminate[s] the payment of terminal leave to PBA officers, effective December 31, 2020 unless the parties reach a successor CNA providing for terminal leave"; and the "plainly stated purpose" of the ordinance is "to discontinue terminal leave until a new agreement is in place". H.E. at 14, 16, 18. The Hearing Examiner reasoned that this interpretation:

. . . gives effect and meaning to each word in the above-quoted portion of the Ordinance. The "current collective bargaining agreement" is the 2010-2020 CNA, which is set to expire on December 31, 2020 and provides for terminal leave. The Ordinance clearly eliminates the payment of terminal leave by providing "there will be no terminal leave payout for accumulated unused sick leave," unless "an existing Collective Bargaining Agreement" has been reached. The language, "existing Collective Bargaining Agreement" must refer to a successor CNA to the 2010-2020 CNA that would provide for terminal leave.

[H.E. at 17.]

The City contends that the Hearing Examiner should have accepted the City's representations that the ordinance expressly carves out an exception for union members for the discontinuance of terminal leave and states that collective bargaining agreements - either the current agreement or a future one will control. The City insists that the correct interpretation of the ordinance is that "at the expiration of the current 2010-2020 CNA

(which may or may not be later than December 31, 2020) there will be no terminal leave payout for accumulated unused sick leave, unless the parties have agreed to terminal leave in the next CNA." City's Brief at 4.

Both the Hearing Examiner's and the City's interpretation of the ordinance results in a finding of a violation of the Act. The Hearing Examiner's interpretation that terminal leave benefits will be discontinued on December 31, 2020, unless the parties have reached a successor agreement providing otherwise, envisions that the City could unilaterally discontinue terminal leave, a mandatorily negotiable term and condition of employment, if the parties do not reach mutual agreement on the issue. Hackensack Bd. of Ed., supra. As the Hearing Examiner correctly noted, "A public employer cannot, by ordinance, '. . . unilaterally preempt a negotiable term and condition of employment. . . .' H.E. at 15, quoting Hopewell Tp., P.E.R.C. No. 2010-10, 35 NJPER 295, 297 (¶103 2009).

The City's interpretation of the ordinance, that terminal leave benefits could not actually be discontinued until the expiration of the current CNA, even if it is later than December 31, 2020,^{2/} and would not be discontinued if the parties agree

^{2/} Article XXXVI (2) of the CNA states that "[t]his agreement shall remain in full force and effect beyond the date set forth herein during collective bargaining negotiations between the parties."

otherwise in a successor CNA, also results in a violation of the Act. In operation, the ordinance violates the Act by imposing conditions on the City's duty to negotiate mandatorily negotiable issues. In other words, the ordinance contemplates that if those conditions (however the City defines them) do not occur, negotiation over the discontinuance of terminal leave will not take place. This violates the Act. N.J.S.A. 34:13A-5.3; see also County of Atlantic, supra. The City's interpretation invokes an announcement of a change in an existing mandatorily negotiable term and condition of employment. The announcement undercuts what should be accomplished only through mutual agreement during the bilateral process of collective negotiations. H.E. at 13, citing Borough of Palisades Park, I.R. No. 98-24, 24 NJPER 239 (¶29113 1998); City of Linwood, H.E. No. 98-16, 24 NJPER 133 (¶29068 1997) (city violated Act by announcing, via ordinance, that it would unilaterally discontinue health benefits coverage to dependents of otherwise eligible unit employees, upon retirement, who were hired after a certain date); Riverside Tp., P.E.R.C. No. 95-7, 20 NJPER 325 (¶25167 1994) (township's ordinance unilaterally modified negotiable past practice of making supplemental payments to police officers' workers' compensation benefits, noting, "In the collective negotiations arena, the parties are considered equals; just as the Association may only seek changes through the negotiations

process (not by acting unilaterally), so must the Township. . . . Both the announcement, as well as the implementation, of a unilateral change in a term or condition of employment constitute unfair practices").

In City of Linwood, supra, the employer argued that "unit employees' terms and conditions of employment are controlled by the collective agreement and not by . . . [the city's general personnel policies and procedures] or ordinances. Thus, . . . by enacting [the ordinance at issue]. . . , there has been no change in the Association's terms and conditions of employment", and further that the ordinance had no actual impact on the unit, since no retirements of unit employees had yet occurred. 24 NJPER at 137. Rejecting this argument, the hearing examiner found that the ordinance "acted as the City's announcement of a change in the existing terms and conditions of employment . . . [and that this was] an operative event for . . . identifying when an unfair practice occurred." Id. Likewise, here the City insists that its ordinance discontinuing terminal leave benefits "only applies after the expiration of the current CNA . . . and unless provided for in a future CNA . . . [and that] the City has neither rescinded the terminal leave benefit nor refused to negotiate the issue." City's Brief at 12. Even if true, however, this does not alter the ordinance's effect as an

"announcement of a change in the existing terms and conditions of employment." City of Linwood, supra.

The City's position that the ordinance "constitutes a statement and codification of City policy . . . [which] will guide negotiations . . . when current CBAs expire," does not change our finding that it violated the Act by enacting an ordinance announcing a change in a negotiable term and condition of employment, regardless of whether the Hearing Examiner's or the City's interpretation is followed regarding when the change would take place. Riverside Tp., supra; see also, City of Millville, P.E.R.C. No. 2018-4, 44 NJPER 77 (¶24 2017) (by unilaterally reducing, via ordinance, salary ranges for titles included within negotiations unit, City repudiated parties' CNA and violated subsection 5.4a(5), and derivatively 5.4a(1), of Act).

Next, we address the City's contention, in exception number 5, that the ordinance's \$12,000 terminal leave cap and decedent-estate provisions were not meant to apply to PBA members. Both the ordinance's title and its stated purpose declare that the announced amendments to the City's personnel policies and procedures regarding unused sick leave and terminal leave apply to the City's "Police, Fire and Non-Uniformed Workers," making no distinction between union and non-union employees. For this reason, and because we also reject, as discussed supra, the

City's other exceptions to the Hearing Examiner's findings, we reject exception number 5.

Finally, for the foregoing reasons, we also reject the City's exception number 3.

Accordingly, we adopt the Hearing Examiner's recommended conclusions of law.

ORDER

The City of Orange Township 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 this Act, particularly by adopting an ordinance that unilaterally changes the status quo for negotiating a successor collective negotiations agreement concerning terminal leave for PBA Local 89 unit officers.

2. Refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by adopting an ordinance that modifies the payment of terminal leave, effective December 31, 2020.

B. Take the following action:

1. Refrain from applying Ordinance No. 63-2017 to PBA Local 89 unit officers and continue, upon expiration of the 2010-2020 CNA, to maintain the terms and condition of employment set forth in the CNA, including but not limited to the payment of

terminal leave under Articles V and XVII of the CNA, upon expiration of the 2010-2020 CNA and during the period of collective negotiations with PBA Local 89 for a successor CNA.

2. Negotiate in good faith with PBA Local 89 over any proposed changes by the City to the payment of terminal leave.

3. 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.

4. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this ORDER.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau, Jones and Voos voted in favor of this decision. None opposed. Commissioner Papero recused himself.

ISSUED: April 25, 2019

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 this Act, particularly by adopting an ordinance that unilaterally changes the status quo for negotiating a successor collective negotiations agreement concerning terminal leave for PBA Local 89 unit officers.

WE WILL cease and desist from refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by adopting an ordinance that modifies the payment of terminal leave, effective December 31, 2020.

WE WILL refrain from applying Ordinance No. 63-2017 to PBA Local 89 unit officers and continue to maintain the terms and condition of employment set forth in the CNA, including but not limited to the payment of terminal leave under Articles V and XVII of the CNA, upon expiration of the 2010-2020 CNA and during the period of collective negotiations with PBA Local 89 for a successor CNA.

WE WILL negotiate in good faith with PBA Local 89 over any proposed changes by the City to the payment of terminal leave.

Docket No. CO-2018-162

CITY OF ORANGE 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, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830