P.E.R.C. NO. 82-74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Respondent,

-and- Docket No. CO-81-364-38

F.M.B.A. BRANCH #9 and
ROBERT GARRY,

Charging Parties.

## SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint issued on a charge which the FMBA Branch #9 and Robert Garry, its president, filed against the City of Elizabeth ("City"). The charge alleged that the City violated subsections N.J.S.A. 34:13A-5.4(a)(1), (3), (4), (5) and (7) of the New Jersey Employer-Employee Relations Act when it required Garry to submit a report verifying his sickness on May 16 and 17, 1981.

The Commission, reviewing a record consisting of the parties' stipulations and exhibits, holds that the Charging Parties did not meet their burden of proof since the record does not establish a change in the parties' practice concerning sick leave reports.

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Appearances:
For the Respondent, Raymond T. Bolanowski, Esq.
Assistant City Counsel

For the Charging Parties, Goldberger, Siegel & Finn, Esqs.
(Howard A. Goldberger, of Counsel)

DECISION AND ORDER

On June 3, 1981, an Unfair Practice Charge was filed with the Public Employment Relations Commission by Firemen's Mutual Benevolent Association, Branch No. 9 and Robert Garry, President ("Charging Parties"), alleging that the City of Elizabeth ("City") violated the New Jersey Employer-Employee Relations Act, as amended. Specifically, the charge alleged that the City violated N.J.S.A. 34:13A-5.4(a)(1),(3),(4), (5) and (7)[1/] when it required

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; (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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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; and (7) Violating any of the rules and regulations established by the commission."

Garry, who was absent from work on May 16 and 17, 1981, to submit a report verifying his sickness. It appearing that the allegations of the charge, if true, might constitute unfair practices within the meaning of the above-cited subsections, a Complaint and Notice of Hearing was issued by the Commission's Director of Unfair Practices on October 9, 1981.

On November 19, 1981, the parties appeared before Commission Hearing Examiner Alan R. Howe and entered into a complete Stipulation of the Facts relevant to the unfair practice charge. The parties agreed to waive the issuance of a Hearing Examiner's Recommended Report and Decision, preferring that the matter be decided by the Commission on the basis of the stipulated record, the exhibits admitted into evidence, and the parties' legal arguments. Counsel for the Charging Parties incorporated his legal argument into the transcript of the stipulated record, instead of submitting a brief. The City filed a letter memorandum stating its position. The matter is now properly before the Commission for determination.

The stipulated facts show that on May 16, 1981, Garry, prior to the commencement of his shift at 6:00 p.m., reported that he would be off sick. Mr. Garry did not report for work on either May 16 or May 17, dates on which he was scheduled to work a shift. Mr. Garry remained out of work on May 18, 19 and 20, which were days that he had no scheduled shift. On May 19, 1981 at about 1:30 p.m., Mr. Garry called in, stating that he would be available for work on his next scheduled shift which was to be on May 21, 1981.

When Garry reported for work on May 21, 1981, he was asked to provide a sick disability report. Garry refused. On the same day, Joseph P. Sullivan, the Fire Director, who had had a conversation with Garry regarding the subject matter, issued the following memo to all members of the Department:

> For some unknown reason some members of the Fire Department are not submitting sick (disability) reports following sick leave.
>
> The sick leave section of the contract reads "no sick reports, however, shall be required for the first two (2) days."
>
> This does not say working days.
>
> If anyone, on sick leave, does not report for duty at the end of the two (2) calendar days off a sick (disability) report will be submitted.

Mr. Garry never submitted a sick disability report and, as of the date of the hearing, the City had not taken any action against him or anyone else in the unit for failing to do so.

The Charging Parties alleged that the City's action violated Article XXVI of the contract which reads:

> The present sick leave plan pertaining to non-occupational injuries and illness shall continue in effect for the duration of this agreement. No sick reports, however, shall be required for the first two days.

The Charging Parties alleged that the issuance of the memo, in addition to constituting a unilateral alteration in the terms and conditions of employment, was intended to harass Garry and the Association in violation of the Act.

Initially, we dismiss those aspects of the complaint alleging a violation of subsections (a)(4) and (7). The Charging Parties have not referred us to any proceeding which predated the employer's action, in which Mr. Garry had signed or filed an affidavit, petition or complaint or given any information or testimony under the Act. Thus, no violation of subsection (a)(4) has been proved. Similarly, with respect to subsection (a)(7), we have not been cited to any specific rule or regulation which the Respondent has allegedly violated and therefore no proof of a violation of this subsection has been presented to us.

Turning next to the alleged violation of subsection (a)(3), we note that nothing in the record indicates that any action has been taken against Garry or any other members of the unit as a result of their failing to submit sick reports or that the Fire Director was motivated by anti-union animus when he issued the disputed memo. Moreover, other than Mr. Garry's status as the President of the Union, there is no direct or indirect evidence of protected activity or employer retaliation for such activity. Thus, this record establishes no basis for finding that subsection (a)(3) has been violated.

We now consider the alleged violation of subsection (a)(5). Preliminarily, we note that the City has consistently taken the position that the instant dispute could be referred to binding arbitration under the Commission's deferral policy; the City would be willing to waive any procedural defenses it might

otherwise have to arbitration in order to permit this result. See, In re East Windsor Board of Education, E.D. No. 76-6, 1 NJPER 59 (1975). While we note that the Commission's deferral to arbitration policy does not normally apply where a violation of subsection (a)(3) of the Act is charged,[2/] given this stipulated record, we believe that the gravamen of this grievance would have been appropriate for arbitration.[3/] However, at this stage of the case's processing, it would not be efficient to defer the matter. Therefore, we will determine all issues.

Our authority to decide cases which present primarily questions of contract interpretation and violations of past practice stems from the fact that such alleged breaches may also constitute unilateral changes in terms and conditions of employment, In re Piscataway Twp. Bd. of Education, P.E.R.C. No. 77-65, 3 NJPER 169 (1977), aff'd 164 N.J. Super. 98 (App. Div. 1978); and could therefore violate N.J.S.A. 34:13A-5.4(a)(5) and derivatively N.J.S.A. 34:13A-5.4(a)(1). However, in adjudicating such charges, we must adhere to the procedures and principles applicable to the

2/ This explains why this matter was not deferred at the pre-Complaint stage.

3/ We recently held that an employer has a managerial right, and perhaps responsibility, to use reasonable means to verify that sick leave is not being abused, such as the use of sick leave to extend one's time off when the employee is not truly ill. In re Piscataway Twp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER ___ (¶_____ 1982). However, we also held that since the subject of the dispute is sick leave, a term and condition of employment, an employee or the employee's representative may contest the application of the employer's attempts at verification to him or her by pursuing a grievance over the employer's action to binding arbitration.

litigation of an unfair practice charge. Thus, for example, the Charging Party must bear the burden of proof on the allegations of the Complaint by a preponderance of the evidence. N.J.A.C. 19:14-6.8.

In the instant case, the only evidence which concerns a subsection (a)(5) violation is the language of Article XXVI of the contract, and the May 21, 1981 directive of the Fire Director, interpreting the contractual clause to mean that a firefighter must report his availability for work after two days sick leave, not just the next scheduled work day. While counsel for the Charging Parties argued on the record that a longstanding past practice supported their view of the contractual clause, we cannot regard counsel's arguments as record evidence. There is no testimony, documentary evidence, or stipulation which would establish that the City's actions departed from the parties' past practice with respect to the interpretation and application of this clause. Without such evidence, we find that the Charging Parties have not sustained the required burden of proof necessary to establish a violation of subsection (a)(5),[4/] particularly where no action has been taken against the individual employee involved.

Finally, the stipulated record provides no basis for concluding that either an independent or derivative violation of subsection (a)(1) has occurred.

4/ In making this finding, we do not decide whether the City's interpretation is correct or incorrect, nor which interpretation comports more closely with the words of the clause. These are matters more appropriately resolved by an arbitrator. The only question before us, in this case, is whether the Director's memo unilaterally changed a term and condition of employment. Given the stipulated facts we cannot make that finding.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the Complaint in this matter is hereby dismissed in its entirety.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

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