

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WATCHUNG BOROUGH,

Respondent,

-and-

Docket No. CO-79-182-131

WATCHUNG PBA #193,

Charging Party.

SYNOPSIS

The Commission, in a decision and order in an unfair practice proceeding, orders that the Respondent Borough pay all unit members holiday pay for Martin Luther King's birthday which was granted to other Borough employees because the collective negotiations agreement between the parties provided holiday payment under such circumstances. The Commission did not find the clause to reach the level of an illegal parity clause because it only provided payment to employees if the employer designated any additional holidays and the employees to whom an additional holiday was granted were unrepresented employees.

The Commission dismissed the section of the complaint concerning nonpayment of holiday pay to officers on disability because they found the Borough's practice to have been not to grant additional holiday pay for officers on disability leave and further, based on a recent court decision, found that computation of pay for someone on paid leave should not include credits for administrative leave, holiday leave, vacation, etc. because such was predicated upon work performed when someone would otherwise be on paid leave.

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Appearances:

For the Respondent, Harold G. Pierson, Esquire

For the Charging Party, McDonough, Murray & Korn, Esqs.
(Stephen J. Tafaro, Esquire)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on January 17, 1979 by the Watchung PBA #193 (the "PBA") alleging that Watchung Borough (the "Borough") engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act").

Specifically, the PBA alleges that unit members on leave of absence for duty-connected injury were improperly denied holiday pay as provided in the collective negotiations agreement between the parties. They also allege that all unit members were improperly denied holiday pay for Martin Luther King's birthday which was granted other borough employees. They allege these both to be ^{1/} violations of N.J.S.A. 34:13A-5.4

1/ Further allegations contained in the charge were resolved by the parties and the charging party withdrew the remainder of the charge on August 29, 1980.

(a) (3), (5) and (7). ^{2/}

It appearing that the allegations, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing were issued on June 26, 1980. The parties met with Commission Hearing Examiner Alan R. Howe on August 29, 1980 and the parties, pursuant to N.J.A.C. 19:14-6.7, agreed to a stipulation of facts in the matter and waived a Hearing Examiner's Recommended Report and Decision. A timetable for the submission of briefs was established and this matter was thereafter transferred to the Commission. The Borough submitted a brief on October 14, 1980 and the PBA submitted a memoranda of law on November 6, 1980.

The parties have stipulated as follows:

Since at least 1960 the Borough has followed the following policy for disability leave:

"Where any employee sustains an injury or disability while in the course of employment and said injury or disability results in the employee being physically unfit for duty and the injury or disability is evidenced by a certificate of a physician designated by the Governing Body to examine said employee, then, by resolution, a leave of absence with such remuneration as may be determined to be adequate by the Governing Body may be granted not to exceed one (1) year commencing on the date of such injury or disability." ^{3/}

^{2/} These subsections prohibit public employers, their representatives or agents from: "(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 the majority representative. (7) Violating any of the rules and regulations established by the commission."

^{3/} Stipulation p.9.

The parties also stipulate that when an officer goes on a job or duty related disability leave approved by the Borough, the Borough pays the disabled officer the difference between monies received from Worker's Compensation and annual regular salary which policy does not allow for lump sum payment of holidays as provided in Article XII, Section B of the collective negotiations agreement. Article XII B. of the agreement provides that:

"All holidays shall be paid in one lump sum on November 15, except Thanksgiving and Christmas, which shall be paid during December." 4/

The Hearing Examiner received information into the stipulated record that in 1973 Officer Jeffrey H. Battis received holiday pay while on a disability leave. This information was received by a letter from Battis dated April 9, 1980 to the President of the PBA noting that if Battis was called as a witness in this proceeding he would so testify. According to the stipulated record, the Borough checked the Borough records and could neither confirm nor disprove such payment and if such payment was made, the Borough's position was that it was made in error.

The unfair practice charge also alleges that Martin Luther King's birthday was a legal holiday in the State of

4/ Holiday pay is in addition to regular pay given the officers in the regular pay period and is given to officers whether or not an officer is on duty on a holiday or observing a sick day other than a disability leave described above.

New Jersey which was observed by Borough employees and not paid to members of the PBA in 1978 as Article XII Section A of the agreement provides. That section provides:

"The PBA shall be entitled to be paid under the current system of payment for all legal holidays enjoyed by any other Borough employees."

Prior to 1978, Martin Luther King's birthday on January 15 had never been observed as a legal holiday by any Borough employee. In 1978, the municipal court judge was given notice to close the court on January 15. Ten municipal clerical employees were given off on that day, two of whom were employed on the municipal court staff.^{5/} On that same day five road department employees worked and one employee in the Administrator's office worked.

The PBA, in support of its charge, argues that since the lump sum holiday pay is given to officers whether or not they work on a given holiday that officers on disability leave are included in the contract provision for holiday pay which, they argue, is part of the total compensation negotiated between the parties. Nonpayment to officers on leave, therefore, is unilaterally reducing compensation and a violation of the Act. The PBA also points to the officer on leave who was paid, while acknowledging the Borough's position that while they cannot confirm payment, such payment would have been in error, and asks the Commission to consider this payment as a

^{5/} Also, two of the ten employees were employed in the service section of the police department.

past practice.^{6/}

As to the Martin Luther King birthday charge, the PBA argues that while the Administration Office at the Courts ordered the municipal court closed, the holiday in question was observed by "the overwhelming number of Borough employees." They argue the contract clause is clear and the PBA unit members are entitled to the holiday pay.

The Borough argues that their policy of pay for officers on temporary disability leave does not provide for holiday pay. The disability pay is an additional payment, which by the terms of the policy, is within the total discretion of the Borough. It notes that the one case of holiday pay for an officer on leave cannot be confirmed by Borough records and, if paid, was an isolated incident and was done so in error, and therefore does not constitute a past practice. The Borough also argues that the Martin Luther King holiday was a State but not a Borough legal holiday under their code and the Borough gave certain unrepresented employees a benefit. They also argue that the holiday clause in the PBA contract is an illegal and unenforceable parity clause.

Payment of the difference between Worker's Compensation and full salary when an employee is on work-related disability leave is a term and condition of employment as would be the method of computing such payments. County of Morris and Morris Council No. 6, NJCSA, P.E.R.C. No. 79-2, 4 NJPER 304 (¶4153 1978), aff'd App. Div. Docket No. A-194-78 (11/2/79). Based on the

^{6/} Article V of the contract is a "Retention of Benefits" provision.

stipulated facts, it appears that the contract is silent on this specific issue of remuneration for disabled officers. Rather, the PBA relies only on the contract clauses which pertain to holiday pay for all employees. This does not appear to be the relevant clause where the receipt of the supplemental pay is based on the past practice created by the 1960 Borough policy set forth in stipulation 9, supra. This policy sets forth in specific language that the amount of remuneration shall be determined by the Borough. It is further stipulated that in applying this policy the Borough has not included lump sum payments for holidays.

Therefore it appears that the Borough's conduct is consistent with the past practice and the language of the policy which establishes the benefit. See Jamesburg Education Assn and Jamesburg Board of Education, P.E.R.C. No. 80-56, 5 NJPER 496 (¶10253 1979), aff'd App. Div. Docket No. A-775-79 (12/9/80).^{7/} We do not find that the payment of this holiday pay to one officer in 1973, which was stipulated to be inconsistent with Borough policy since at least 1960, to be a past practice under

^{7/} The PBA as the Charging Party bears the burden of proof of each and every allegation of the complaint. N.J.A.C. 19:14-6.8. Therefore they must satisfy the Commission that not only is the subject a term and condition of employment but that the Borough has unilaterally altered that term and condition without prior negotiations, N.J.S.A. 34:13A-5.3, regardless of whether the existence of the particular term derives from the contract or past practice. If the existing term and condition gives the employer total discretion over that particular item, then a unilateral change may not constitute an unfair practice. See Jamesburg, supra.

the Maintenance of Benefits clause of the contract. Based on this record, we find that the Borough did not violate subsections N.J.S.A. 34:13A-5.4(a)(3), (5) or (7) by not paying additional holiday pay to PBA unit members on leave of absence for duty connected injury.

The Appellate Division has recently examined the method of computation of a back pay award by the Civil Service Commission. James v. N.J. Dept. of Corrections, 176 N.J. Super. 207 (App. Div. 1980). The Court held that the employee was not entitled to additional pay for vacation, administrative leave, holiday leave or allowance in lieu of overtime because such compensation is predicated upon work performed when someone would otherwise be on paid leave. Thus, making a pay award for leave periods is double compensation because the employee was already on leave and did not work. The Civil Service award was a back pay award so it is not directly on point to this case, but we do find the reasoning to be supportive of the Borough's position since it is based on the employee's eligibility for additional leave pay while not working which is analogous to the situation herein.

Turning to the issue of the denial of holiday pay for Martin Luther King's birthday, we find the holiday clause to be clear in that it provides that the PBA shall be paid for "all legal" holidays enjoyed by any other Borough employees." (Emphasis added) It was a legal holiday declared such by the State of New Jersey and the Borough gave a majority of their employees off. Under the circumstances, we find the Borough should pay the PBA members holiday pay for that day.

We do not find the clause to be an illegal parity clause. We have found general parity clauses that prevent other negotiations units from reaching different agreements on any contractual matter to be illegal (City of Plainfield and PBA Local 19, P.E.R.C. No. 78-87, 4 NJPER 255 (¶4130 1978) because they interfere with negotiations between the employer and other groups and we have found clauses that automatically provide for one unit any benefit negotiated by another unit ("me too clause") (In the Matter of Jersey City and Jersey City Firefighters, IAFF, Local 1066, P.E.R.C. No. 80-55, 5 NJPER 495 (¶10252 1979) because this type clause also interferes with negotiations. The instant matter is not a general parity clause. The parties have fully negotiated an agreement which does not inhibit negotiations between the employer and other units. The disputed clause is part of a negotiated holiday clause that does not reach the level of a parity clause. It merely provides that when the employer designates a holiday for municipal employees, the PBA members who have to work the day shall be paid for such holiday.^{8/}

We find therefor that the Borough violated N.J.S.A. 34:13A-5.4(a) (5) by refusing to pay the PBA holiday pay for Martin Luther King's birthday.

The Charging Party did not introduce any evidence of violations of either N.J.S.A. 34:13A-5.4(a) (3) or (a) (7) and therefore the Commission dismisses the charges of those violations.

^{8/} The municipal employees herein are not represented by an exclusive employee representative nor covered by a collectively negotiated agreement. Accordingly, the PBA contract clause is distinguishable from the prior clause found illegal in City of Plainfield and PBA Local 19, P.E.R.C. No. 78-87, 4 NJPER 255 (¶10252 1979).

ORDER

For the foregoing reasons, and upon the entire record,
IT IS HEREBY ORDERED:

A. That the Respondent Borough cease and desist from

1. refusing to negotiate in good faith concerning terms and conditions of employment with the Watchung PBA #193 by refusing to pay unit members contractually agreed on holiday benefits.

B. That the Respondent Board take the following affirmative action:

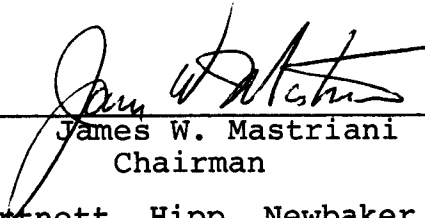
1. Forthwith make payment to all PBA members eligible for holiday pay one day's pay for Martin Luther King's birthday (January 15, 1978) which should have been paid on November 15, 1978.

2. 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 receipt thereof, after being signed by the Respondent's authorized representative, and shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by other material.

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

IT IS FURTHER ORDERED that the section of the Complaint alleging that the Borough of Watchung has engaged in violation arising under N.J.S.A. 34:13A-5.4(a)(3) or (7) with regard to either nonpayment of holiday pay to officers on disability leave or nonpayment of holiday pay for Martin Luther King's birthday be dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Hipp, Newbaker and Parcells voted in favor of this decision. None opposed. Commissioner Graves was not present.

DATED: Trenton, New Jersey
January 20, 1981
ISSUED: January 21, 1981

"APPENDIX A"

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 cease and desist from refusing to negotiate in good faith concerning terms and conditions of employment with the Watchung PBA #193 by refusing to pay unit members contractually agreed on holiday benefits.

WE WILL forthwith make payment to all PBA unit members eligible for holiday pay in 1978 one day's pay for Martin Luther King's birthday.

WATCHUNG BOROUGH

(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.