

P.E.R.C. NO. 88-93

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ATLANTIC CITY,

Respondent,

-and-

Docket No. CO-87-231-114

POLICEMEN'S BENEVOLENT  
ASSOCIATION, LOCAL NO. 24,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, finds that the City of Atlantic City violated the New Jersey Employer-Employee Relations Act when it unilaterally terminated maternity and paternity pregnancy leave benefits for employees represented by the Policemen's Benevolent Association, Local No. 24.

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Charging Party.

Appearances:

For the Respondent, Patino-Treat and Rosen, Esqs.  
(Louis C. Rosen, of counsel)

For the Charging Party, Kirschner, Walters and Willig, Esqs.  
(Sidney H. Lehmann, of counsel)

DECISION AND ORDER

On February 19, 1987, the Policemen's Benevolent Association, Local No. 24 ("PBA") filed an unfair practice charge against the City of Atlantic City ("City"). The charge alleges the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3) and (5), when it unilaterally terminated maternity and paternity pregnancy benefits.<sup>1/</sup>

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<sup>1/</sup> The PBA also applied for interim relief. On March 5, 1987, this application was denied by a Commission designee. I.R. No. 87-18, 13 NJPER 250 (¶18100 1987).

On March 9, 1987, a Complaint and Notice of Hearing issued. On March 23, 1987, the City filed its Answer. It admits terminating the pregnancy benefits, but denies violating the Act. It contends that the order establishing the benefits was not ratified by the Mayor and Council; the Police Chief lacked authority to bind the City; and that the benefits were not negotiated and conflicted with the collective negotiations agreement.

On June 15 and 26, September 21 and 22, and October 15, 1987, Hearing Examiner Mark A. Rosenbaum conducted hearings. The parties examined witnesses, introduced exhibits and argued orally. They also filed post-hearing briefs.

On March 22, 1988, the Hearing Examiner issued his recommended decision. H.E. No. 88-46, 14 NJPER \_\_\_\_ (¶ 1988). He concluded that the City violated the Act, specifically subsection 5.4(a)(1) and (5), when it unilaterally discontinued maternity and paternity leave benefits. He found that the benefits were a product of an agreement between the parties; that the benefits constituted a binding past practice which could only be changed by negotiations, and that the PBA was entitled to rely upon the City's representatives' apparent authority to bind the City. As a remedy, he recommended that the City reinstate the benefits, make affected employees whole, negotiate before changing benefits and post a notice of the violation.

The Hearing Examiner served his report on the parties and informed them that exceptions were due on or before April 5, 1988. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-9) are accurate. I adopt and incorporate them here. Acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I agree with the Hearing Examiner's conclusions of law and recommended remedy.

ORDER

The City of Atlantic City is ordered to:

I. Cease and desist from:

A. Interfering with, restraining or coercing employees in the exercise of rights guaranteed by the Act, particularly, by unilaterally eliminating maternity and paternity benefits for PBA Local No. 24 unit members.

B. Refusing to negotiate in good faith with PBA Local No. 24 over elimination of maternity and paternity benefits.

II. Take the following affirmative actions:

A. Reinstate General Order 26 retroactive to and including February 11, 1987.

B. Make whole any employees adversely affected by the revocation of General Order 26 from February 11, 1987 to the present.

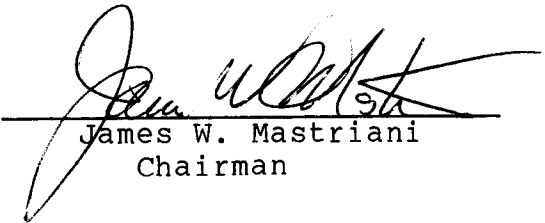
C. Negotiate in good faith with PBA Local No. 24 over any proposed changes in maternity and paternity benefits.

D. Post in 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 and,

after being signed by the Respondent's authorized representative, shall be 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.

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

BY ORDER OF THE COMMISSION



James W. Mastriani  
Chairman

DATED: Trenton, New Jersey  
April 19, 1988

**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 interfering with, restraining or coercing employees in the exercise of rights guaranteed by the Act, particularly, by unilaterally eliminating maternity and paternity benefits for PBA Local No. 24 unit members.

WE WILL cease and desist from refusing to negotiate in good faith with PBA Local No. 24 over elimination of maternity and paternity benefits.

WE WILL reinstate General Order 26 retroactive to and including February 11, 1987.

WE WILL make whole any employees adversely affected by the revocation of General Order 26 from February 11, 1987 to the present.

WE WILL negotiate in good faith with PBA Local No. 24 over any proposed changes in maternity and paternity benefits.

Docket No. CO-87-231-114CITY OF ATLANTIC CITY

(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, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 88-46

STATE OF NEW JERSEY  
BEFORE A HEARING EXAMINER OF THE  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ATLANTIC CITY,

Respondent,

-and-

Docket No. CO-87-231-114

POLICEMEN'S BENEVOLENT  
ASSOCIATION, LOCAL NO. 24,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the City of Atlantic City violated subsection 5.4(a)(5) and, derivatively, 5.4(a)(1) of the New Jersey Employer-Employee Relations Act by unilaterally terminating maternity and paternity benefits previously enjoyed by PBA Local No. 24 unit members. The Hearing Examiner finds that the benefits had been negotiated by the parties, or at a minimum, were a binding past practice. He recommends that the Commission order the City to reinstate the benefits, make whole adversely affected employees retroactive to the City's unilateral act, and negotiate in good faith over any proposed changes in maternity/paternity benefits.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 88-46

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(Louis C. Rosen, of counsel)

For the Charging Party, Kirschner, Walters and Willig, Esqs.  
(Sidney H. Lehmann, of counsel)

HEARING EXAMINER'S RECOMMENDED  
REPORT AND DECISION

On February 19, 1987, Policemen's Benevolent Association, Local No. 24 (PBA or Charging Party) filed an Unfair Labor Practice Charge with the Public Employment Relations Commission (Commission) alleging that the City of Atlantic City (City or Respondent) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). Charging Party alleged that the Respondent unilaterally discontinued maternity and paternity leave benefits for



unit members represented by the PBA, in violation of subsections 5.4(a)(1), (2), (3) and (5) of the Act.<sup>1/</sup>

On March 9, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing.<sup>2/</sup> On March 23, 1987, the Respondent filed an Answer, denying that maternity/paternity leave benefits were negotiated by the PBA and the City, and asserting the following affirmative defenses: 1) The general order establishing maternity/paternity leave benefits was void ab initio because it was never ratified by the Mayor and Council of the City of Atlantic City. 2) The author of the general order, the Chief of Police, lacked authority to bind the City regarding terms and conditions of employment, and 3) The general order "contravenes express and

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<sup>1/</sup> 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; (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 the majority representative."

<sup>2/</sup> Prior to the issuance of the Complaint, PBA's application for interim relief was denied by a Commission designee for failure to demonstrate irreparable harm if the relief were not granted. The ruling was grounded on the City's representation "on the record that the employees who would suffer harm by virtue of the denial of paternity leave would be entitled to use their available vacation or sick leave." I.R. No. 87-18, 13 NJPER 250, 251 (¶18100 1987).

unambiguous contract language and must, therefore, fail when contradicted by Order of the employer."

On June 15 and 26, September 21 and 22, and October 15, 1987, I conducted hearings in Atlantic City, New Jersey, where the parties had opportunities to examine and cross-examine witnesses, present documentary evidence and argue orally. On September 21, 1987, I granted the Respondent's motion to dismiss with respect to the alleged violations of subsections 5.4(a)(2) and (3) (TC132-133).<sup>3/</sup> Both parties filed post-hearing briefs by March 3, 1988.

Based on the entire record I make the following:

FINDINGS OF FACT

1. The City of Atlantic City is an employer within the meaning of the New Jersey Employer-Employee Relations Act.
2. Policemen's Benevolent Association, Local No. 24 is an employee organization within the meaning of the New Jersey Employer-Employee Relations Act.
3. The PBA and the City have negotiated collective agreements since at least 1980 setting forth terms and conditions of employment for "all uniform police, detectives, and other special police units, excluding Chief, Deputy Chief, Inspectors and all other employees employed by the City." City Council approves

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<sup>3/</sup> TA refers to the transcript of June 15, 1987; TB--June 26, 1987; TC--September 21, 1987; TD--September 22, 1987; and TE--October 13, 1987.

collective agreements between the City and the PBA. (Exhibits J-1, CP-10 and CP-11; TD165-166).

4. In 1982, the form of government in the City of Atlantic City changed from a commissioner form to a mayor and council form (See, generally, N.J.S.A. 40:69A-1 et seq. -- the Optional Municipal Charters Law). On July 1, 1982, a newly elected Mayor (Michael Matthews) and City Council took office. From July 1, 1982 through the end of October 1982, the Mayor and Council operated without a code for administration of government. A code was adopted on October 28, 1982 (TD145-153; R-2).

Before adopting the code, and during the months that followed, the Mayor and Council often disputed their respective powers; several of the disputes were resolved through litigation between the Mayor and Council. Among the disputed areas was the control of the Police Department. In 1983, the Mayor acted in the capacity of Director of Police, to whom the Chief of Police would report. Council was aware of this action, and felt that the vacancy in the Director of Police should be filled by the Business Administrator pursuant to Sec. 4-35 of the Atlantic City Code of Administration of Government (Exhibit R-2, page 427; TD197-198, 217-218 and 234-237). However, Council did not take legal action to dispute the Director of Police issue (TE67-68). The conflicts between the Mayor and Council during Matthews' term of office (July 1982 through March 14, 1984) occurred in the context of a mayoral recall campaign, in which members of Council were declared supporters or opponents of Mayor Matthews (TD185-186 and 200-201).

5. From June 1982 through June 1984, John Mooney was the President of the PBA. In late 1982/early 1983, two female members of the negotiations unit represented by the PBA asked Mooney about maternity/paternity benefits. Mooney raised the issue with the Medical Review Board (Board) established since at least 1980 in contracts between the City and the PBA "for the purpose of examining all matters pertaining to sick and/or injured members of the Atlantic City Police Department." (See J-1 and CP-10, Article 29). The Board routinely renders decisions which are not binding on the Chief but which have never been reversed by any Chief. The Board (Police Chief or designee, Police Surgeon or designee, PBA President or designee, and a Superior Officer selected by the PBA membership) considered the issue at a meeting of June 9, 1983, in the context of a particular female officer who was on sick leave due to pregnancy. The Board directed Mooney to contact other police departments about their policies and report back to the Board. On June 28, 1983, the Board met, with City Administrator Maltsby attending as an observer, and discussed the maternity leave issue. A policy was resolved and approved by the Board. On July 7, 1983, Mooney submitted to Inspector Nicholas Riffice, the Police Chief's designated representative on the Board, a suggested general order which reflected the discussions of the Board meeting of June 28, 1983. On August 29, 1983, Police Chief Allmond issued General Order 26 which, with the exception of nonsubstantive changes in punctuation and capitalization, replicated Mooney's July 7, 1983 memorandum. Chief

Allmond signed the general order in the presence of Mooney and Riffice. (TB3-5, 9-10, 56, and 174; J-2, CP-13 and CP-16).

6. General Order 26 provides that female officers who become pregnant must notify the Police Surgeon or the Chief's office; will then be assigned "suitable duty in plain clothes so that she is not subject to unnecessary risk or injury"; "will continue to work in the [suitable] duty assignment...until approximately six (6) weeks before the due date of birth..."; and "shall be placed on sick leave and continue on sick leave until approximately ten (10) weeks after the birth of the child."<sup>4/</sup> The order states that the "these time periods are approximate and may be modified by the Police Surgeon upon consultation with the officer's physician and the Medical Review Board." The original General Order 26 also provided "male police officers shall be eligible to use sick leave after the birth of a child, up to ten (10) weeks...." The last paragraph of General Order 26 states: "Any changes or modifications of this Policy shall be made by the Police Medical Review Board with the approval of the Chief of Police and the Director of Police." The general order was modified on October 6, 1983, to limit paternity leave to "child care purposes or when the mother of the child is physically unable to care for the child." (J-2).

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<sup>4/</sup> In practice, officers exhausted their annual sick leave allotments of 15 days, then began extended sick leave (TA149-150; TB75).

7. While Mooney told his father, an Atlantic City Councilman, of General Order 26, City Council neither discussed nor approved that general order. Several City Councilmen testified credibly that they were unfamiliar with General Order 26 until 1987, and that personnel matters rarely come before City Council. Nor is there any evidence, beyond hearsay, that Michael Matthews either as Mayor or as Acting Police Director, ever formally approved General Order 26. General orders are routinely issued by the Chief of Police without prior or later approval by City Council or the Mayor of Atlantic City. The general orders are issued to all police staff, and are available to all Council members, as well as the Business Administrator and the Mayor (TA161; TB11, 158, 206, 228; TD78; TE64, 74 and 105-106).

8. General Order 26 was in effect for over three years and at least eight unit members took advantage of the benefit during that period: Donna Hurley, Gail Allen, Joseph Bell, Daniel Loen, Gregory Anderson, Mitchell Levin, Wayne Neuderman and Raymond O'Neil. Minutes of the Medical Review Board include approvals of maternity or paternity leave under the terms of General Order 26 in 1983, 1984 and 1986. The minutes record that Police Chief Joseph Pasquale, who also served as Director of Police, attended several meetings where maternity or paternity leaves were discussed (meetings of March 15, 1984, June 2, July 24, August 18, and September 5, 1986) and sent letters to those who received maternity/paternity leave (Exhibits CP-16; TA90-91 and 104-105).

9. In March 1984, the voters of the City of Atlantic City elected to recall Mayor Michael Matthews and install James Usry as Mayor. Usry took office on March 14, 1984, appointed Carl Briscoe, Sr., as Business Administrator and later appointed the Police Chief as Police Director by submitting a letter to City Council. Briscoe's contact with the Police Director was limited to discussions about problems as they came to Briscoe's attention. Briscoe did not receive a set of the standing general orders of the Police Department when he became Business Administrator, nor did he begin to keep those orders until 1987 (TD51, 61 and 63-64).

In the fall of 1986, Briscoe, for the first time, became aware of the existence of maternity and paternity leave benefits for police officers. From discussions with City Personnel Director Ralph Head and City Solicitor Matthew Powals, Briscoe learned that the maternity/paternity benefits were not specifically referenced in the contract between the City and the PBA. Briscoe then contacted Acting Chief of Police Neil Kane, who confirmed that his predecessor had issued a general order providing for maternity and paternity benefits for police officers. Briscoe obtained the general order and showed it to City Solicitor Powals. Powals studied the order, then told Briscoe, "This type of general order really wasn't effective and this type of a changing of the contract couldn't be done in the way this was done."

Based on his investigation, Briscoe instructed Kane to revoke the general order. On February 11, 1987, Kane issued a

general order to the Police Department revoking General Order 26 (TD56-60, 64; TE32-33; CP-9 and CP-14).

11. Requests for paternity leave which were pending at the time of the revocation of General Order 26, and subsequent applications, were denied and/or, by agreement of the parties, deferred until the resolution of this matter. (See Footnote 2; TA13, 21-22 and 77-78.)

12. The Police Department has its own personnel office, which prepares payroll information for approval by the Business Administrator or his designee. Grievances filed by employees represented by the PBA are processed by the Police Chief or Director in accordance with the collective agreement between the PBA and the City. Grievances and proposed settlements of grievances do not come before City Council. While the City has been represented by a labor relations consultant or attorney in recent labor negotiations, the collective agreements have been implemented by the Chief. If not in conflict with the collective agreement or past practices, the City's Personnel Manual also establishes terms and conditions of employment for employees represented by the PBA. The Personnel Manual was not reviewed or adopted by City Council (TC164; TD66, 78, 181-182, 203-204, 216 and 230; TE72-74 and 184-186).

#### ANALYSIS

The parties do not dispute that in February, 1987, the City unilaterally discontinued maternity and paternity leave benefits enjoyed by PBA unit members since the issuance of General Order 26



on August 29, 1983. Nor do the parties dispute that maternity/paternity leave is a mandatory subject of negotiations. See Ocean Tp. Bd. of Ed., P.E.R.C. No. 86-60, 11 NJPER 717 (¶16250 1985). However, the parties dispute whether General Order 26 was the result of negotiations between the parties, or, alternatively, whether maternity/paternity leaves granted pursuant to General Order 26 establish a past practice which could not be unilaterally disturbed.

Turning first to the negotiations issue, I find that the PBA has established that General Order 26 was the result of negotiations between its representatives and those of the City. The record reveals that the parties established, by contract, a Medical Review Board charged with "examining all matters pertaining to sick and/or injured members of the Atlantic City Police Department." The Board routinely resolves sick leave requests and disputes in the department; while its decisions do not bind the Chief, the decisions have never been reversed (see Finding of Fact Number 5). In this context, the Board must be viewed as a labor/management committee with a continuing responsibility to negotiate and, subject to the Chief's veto power, resolve disputes over sick and injury leave for PBA unit members. Maternity/paternity leave certainly falls within

the Board's charge,<sup>5/</sup> and the record reveals that the Board thoroughly researched, discussed and resolved the issue. The result of the process was a recommended memorandum, which, but for non-substantive changes in punctuation and capitalization, was published as a general order by the Chief of Police. This process is a microcosm of negotiations: an issue is presented by one side, researched and discussed by the parties, resolved and implemented.

The City claims that the above process was not negotiations for three reasons: First, because it did not occur with the knowledge and participation of the City's labor negotiator; second, because the process did not occur with the knowledge and approval of the City Council; and third, if General Order 26 was an agreement between the City and the PBA, it was void ab initio because it was never affirmed by City Council in violation of N.J.S.A. 40A:9-10.

None of these arguments are persuasive. While it is true that contractual negotiations between the City and the PBA had previously involved the City's labor negotiator, it does not follow that any discussions concerning terms and conditions of employment which took place without the labor negotiator could not constitute negotiations. Indeed, the record shows involvement of the labor

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<sup>5/</sup> The City argues that paternity leave was outside the Board's charge since it concerned disability of women who were not employed by the City. In view of the advisory function of the Board, and the fact that the Chief ultimately implemented its recommendations in the form of General Order 26, I find that the parties, by their actions, determined to include paternity leave within the Board's charge.

negotiator in successor contract negotiations, but no labor negotiator involvement in the contract administration process, such as grievances and the Medical and Accident Review Boards. Further, the Act guarantees parties the right to representatives of their own choosing (see Salem County, P.E.R.C. No. 87-122, 13 NJPER 294 (¶18124 1987)); the PBA could not require the labor negotiator's presence in contract administration processes, nor could it contest that presence. Since the City could assign anyone it wished to negotiate with the PBA concerning maternity/paternity leave, the City cannot be heard to deny commitments made by its representative on the ground that only the "labor negotiator" can speak for the City.

I also reject the contention that General Order 26 was not negotiated and binding on the City because City Council neither knew of nor approved the document. While the record confirms that most City Council members were unaware of General Order 26 until early 1987, the PBA cannot be held accountable for that. Instead, the City, like the PBA, is responsible for its own internal workings. When the Medical Review Board considered maternity/paternity leave, the Mayor and City Council were litigating disputes over their respective powers and did not agree on a Police Director (see Finding of Fact Number 4). Assuming, as the City argues, that these disputes caused chaos in City government, I find that the PBA was still entitled to rely upon the representations of the City's Medical Review Board members and, ultimately, the general order

issued by the Chief. Notwithstanding the conflicts between the Mayor and City Council in 1982-3, the Medical Review Board, which was created by contracts approved by City Council, operated during that time as it did before and after: it considered and resolved sick leave issues under the contract, with final approval reserved to the Chief. While the maternity/paternity leave discussion had broad impact, it was discussed in the presence of the City Administrator and implemented by the Chief of Police. Under these facts, and in the absence of oral or written qualifying statements by the Chief, I believe that the PBA was entitled to rely upon the apparent authority of the Chief of Police to bind the City on maternity/paternity leave issues. City of Orange Tp., P.E.R.C. No. 87-78, 13 NJPER 71 (¶18031 1986). See also E. Brunswick Bd. of Ed., P.E.R.C. No. 77-6, 2 NJPER 279, 282 (1976), mot. for recon. den., P.E.R.C. No. 77-26, 3 NJPER 16 (1977):

...the authority of an agent to do certain acts on behalf of his principal may be inferred from the continuance of the acts themselves over such a period of time and the doing of them in such a manner that the principal would naturally have become cognizant of them and would have forbidden them if unauthorized.  
[footnote omitted]

The City also argues that even if General Order 26 is a written agreement between the PBA and the City, such agreement was void ab initio because it was not affirmed by City Council. The City argues that N.J.S.A. 40A:9-10 requires Council approval of General Order 26 for that agreement to bind the City: "The governing body of the municipality shall fix the amount of salary,

wages or other compensation to be paid to...municipal officers and employees...."

I reject this contention. The cited statute does not preclude delegation of responsibilities by a governing body to an agent, nor, when read together with the Act, should the statute be construed to prevent a majority representative from relying upon the credible representations of an agent. See, generally, Bergenfield Bd. of Education, P.E.R.C. No. 90, 1 NJPER 44 (1975). Here, the PBA and the City negotiated a contractual provision establishing a Medical Review Board with representatives from both parties. For at least six years, the Board resolved sick leave issues, and granted or rejected extended sick leave requests. The Chief or his designee always attended the meetings and the determinations of the Board were always implemented. Further, general orders issued by the Chief never required or received approval by City Council (Finding of Fact Number 7). In this context, the PBA was entitled to rely upon the maternity/paternity leave policy developed and voted upon by the Board and later implemented by the Chief as General Order 26. Even assuming that the cited statute requires City Council to pass an ordinance to legally effectuate the commitment made by the Chief, the failure of City Council to do so would not absolve the City of the commitment. Instead, the City would be ordered to pass the appropriate ordinance as a remedy to this charge. See Bergenfield at 1 NJPER 46.

Accordingly, I conclude that the parties did negotiate maternity/paternity leave benefits. When the City, unilaterally and without negotiations, rescinded the General Order establishing those benefits, it violated its obligation to negotiate in good faith. Galloway Tp. Bd. of Ed., 78 N.J. 25, 48-49 (1978). Accordingly, I recommend that the Commission find that the City violated subsection 5.4(a)(5) and, derivatively, subsection 5.4(a)(1) of the Act, and order the City to reinstate the benefit for unit members, make whole adversely affected employees, and negotiate in good faith with the PBA concerning any proposed changes in terms and conditions of employment.

Should the Commission find that the parties did not negotiate maternity/paternity benefits, it would have to determine whether or not a binding past practice of maternity/paternity leave benefits existed which could not be unilaterally changed by the City without negotiations with the PBA. The Commission has held that, unless contrary to clear contract language, "a past practice which defines terms and conditions of employment is entitled to the same status as a term and condition of employment defined by statute or by the provisions of a collective agreement." County of Sussex, P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982). See also New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), mot. for recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd App. Div. Dkt. No. 2450-77 (4/2/79) and South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd App. Div. Dkt. No. A-5176-85T6 (3/10/87).

The City argues that General Order 26, as applied, does not rise to the level of a binding past practice because "the order was not exercised with sufficient frequency and did not exist over sufficient period of time to constitute a uniform and constant response to a recurring set of circumstances." (Brief at p. 8) The record does not support this contention. General Order 26 was in effect for over three years before it was revoked. At least eight unit members took advantage of the benefit during that period, with leave benefits enjoyed in 1983, 1984 and 1986. By the terms of General Order 26 and in application, the number of paid leave days granted to these eight individuals was consistent and significant. (See Finding of Fact Numbers 6 and 8.)

The City also argues that it "could not be deemed to have asserted" to any past practice of maternity/paternity leave because of the "chaos in City government" in 1983. (Brief at pp. 10-11). I have already addressed this argument, which was offered as a defense to the allegation that General Order 26 was the product of collective negotiations. The argument must also fail as a defense to the past practice claim, and for the same reason: the PBA cannot be held responsible for the City's confusion or inefficiencies. Instead, the PBA may rely upon benefits established by, at a minimum, the order of the Chief of Police. The Chief is a managerial executive whose orders and conduct within the scope of his authority, irrespective of management knowledge or endorsement, are attributable to management. See N.J.S.A. 40:14-118; Gauntt v. Mayor and Council of the City of Bridgeton, 194 N.J. Super. 468

(App. Div. 1984) and Commercial Tp. Bd. of Ed., P.E.R.C. No, 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83). Accordingly, I find that a past practice of maternity/paternity benefits existed for PBA unit members based on General Order 26 and its application for over three years.

As noted above, a past practice will not be binding on the parties if it is contrary to clear contract language. The City argues that if a past practice existed, as embodied in General Order 26, the past practice is not binding because it conflicts with Article XXX(3) and (4) of the parties' collective agreement:<sup>6/</sup>

3. In the event the illness or injury is not service connected, said employee shall have his or her injury or illness reviewed by the Medical Review Board for the purpose of determining the injury or illness to be major and thereby render the employee eligible for sick leave compensation in excess of either the yearly one year twenty (120) hours or accumulated sick leave which he or she may have exhausted. The sick leave shall not exceed one (1) year. In such event, said employee shall not have any accumulated sick time deducted....
4. In order for an employee to be eligible for the benefits described in Section 3.a, he shall be a policeman commencing his fourth (4th) year employment.

The cited contractual provisions concern the discretionary authority of the Medical Review Board to grant extended sick leave of up to one year to sick or injured PBA unit members. The language

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<sup>6/</sup> The City also argues that the Medical Review Board went beyond its charge in Article XXIX by considering and recommending a new term and condition of employment, especially because the recommendation considered sickness/disability of non-unit members. These arguments were considered and rejected above (see Footnote 5 and accompanying text).



neither authorizes nor prohibits maternity/paternity leave. Similarly, General Order 26 makes no reference to Article XXX. Given the silence in the parties' collective agreement as to maternity/paternity leave, and the silence in General Order 26 as to the collective agreement, I conclude that General Order 26, and the past practice of its application, is not contrary to cited provisions of the collective agreement.

Indeed, the contract supports the PBA's entitlement to the maternity/paternity benefits. Article XVII of the 1984-1986 collective agreement between the parties (Exhibit J-2) is entitled "Continuation of Benefits Not Covered by This Agreement." It provides:

All conditions not covered by this Agreement shall continue to be governed, controlled, and interpreted by reference to the City Charter, Ordinances and Rules and Regulations of the Police Department of the City. Any and all present benefits which are enjoyed by employees covered by this Agreement, that have not been included in the contract shall be continued.

Since the 1984-86 agreement was implemented after the issuance of General Order 26, the past practice of maternity/paternity benefits for PBA unit members is consistent with and protected by the collective agreement.

In sum, I find that General Order 26, in application, is a binding past practice between the City and the PBA. Accordingly, I recommend that the Commission find that the City failed to negotiate in good faith when, unilaterally and without negotiations, it revoked General Order 26. I further recommend that the Commission

order the City to reinstate General Order 26, make whole adversely affected employees, and negotiate in good faith with the PBA concerning any proposed changes in terms and conditions of employment.<sup>7/</sup>

RECOMMENDED ORDER

I recommend that the Commission ORDER the City of Atlantic City to:

I. Cease and desist from:

A. Interfering with, restraining or coercing employees in the exercise of rights guaranteed by the Act, particularly, by unilaterally eliminating maternity and paternity benefits for PBA Local No. 24 unit members.

B. Refusing to negotiate in good faith with PBA Local No. 24 over elimination of maternity and paternity benefits.

II. Take the following affirmative actions:

A. Reinstate General Order 26 retroactive to and including February 11, 1987.

B. Make whole any employees adversely affected by the revocation of General Order 26 from February 11, 1987 to the present.


C. Negotiate in good faith with PBA Local No. 24 over any proposed changes in maternity and paternity benefits.

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<sup>7/</sup> The PBA also argues that the City's actions violate a Federal statute and guidelines prohibiting sex discrimination (Brief at 35-38). In view of the above recommendations, I believe the Commission need not reach that issue.

D. Post in 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 and, after being signed by the Respondent's authorized representative, shall be 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.

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



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Mark A. Rosenbaum  
Hearing Examiner

Dated: March 22, 1988  
Trenton, New Jersey

# 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 interfering with, restraining or coercing employees in the exercise of rights guaranteed by the Act, particularly, by unilaterally eliminating maternity and paternity benefits for PBA Local No. 24 unit members.

WE WILL cease and desist from refusing to negotiate in good faith with PBA Local No. 24 over elimination of maternity and paternity benefits.

WE WILL reinstate General Order 26 retroactive to and including February 11, 1987.

WE WILL make whole any employees adversely affected by the revocation of General Order 26 from February 11, 1987 to the present.

WE WILL negotiate in good faith with PBA Local No. 24 over any proposed changes in maternity and paternity benefits.

Docket No. CO-87-231-114 CITY OF ATLANTIC CITY  
(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, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.