

P.E.R.C. NO. 2001-17

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ORANGE TOWNSHIP,

Respondent,

-and-

Docket No. CO-2000-311

ORANGE POLICE DEPARTMENT SUPERIOR
OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the City of Orange Township's motion for reconsideration of I.R. No. 2000-16. In that decision, a Commission designee restrained the City from unilaterally eliminating the right of employees represented by the Orange Police Department Superior Officers Association to accrue negative sick leave balances pending a final Commission order. Specifically, the City was restrained from recouping sick leave and was ordered to return to the status quo ante by returning any recouped sick leave to affected employees. The Commission concludes that there are no extraordinary circumstances for reconsidering the designee's belief that negotiations were required before such unilateral actions were taken. Accordingly, the City's motion is denied.

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, McCormack & Matthews, attorneys
(Joseph M. Wenzel, on the motion)

For the Charging Party, Loccke & Correia, attorneys
(Joseph Licata, on the response)

DECISION

On July 7, 2000, the City of Orange Township moved for reconsideration of I.R. No. 2000-16, 26 NJPER 326 (¶31131 2000). In that decision, a Commission designee restrained the City from unilaterally eliminating the right of employees represented by the Orange Police Department Superior Officers Association to accrue negative sick leave balances pending a final Commission order. Specifically, the City was restrained from recouping sick leave and was ordered to return to the status quo ante by returning any recouped sick leave to affected employees.^{1/}

On July 19, 2000, the SOA filed a response opposing reconsideration.

^{1/} We deny the City's request for oral argument.

According to the designee, since 1981, the City has permitted unit members to carry a negative sick leave balance until such time as the member earns sick time to offset the negative balance or, apparently, until the member leaves employment and the paid sick leave is recouped. On February 25, 2000, the police director issued a memorandum to a unit member informing him that he was carrying a negative balance of 48 sick days and giving him until March 13 to inform the City how he would clear the negative balance. The City gave the employee three options: paying the City; paying back with sick time, compensatory time or vacation time; or having current pay docked. At about the same time, the City informed the SOA that it was eliminating employees' ability to accrue any negative sick leave balances.

The City argues that the designee erroneously decided that negative sick leave balances are not specifically disallowed by N.J.A.C. 4A:6-1.3(e). That regulation provides that:

An employee who exhausts all paid sick days in any one year shall not be credited with additional paid sick leave until the beginning of the next calendar year.

The designee found that the regulation does not govern this dispute because sick leave policies for police offices are governed by a different statutory and regulatory scheme. N.J.A.C. 4A:6.1.1(a)(4) provides that:

Vacation and sick leaves for police officers and firefighters are established by local ordinance. See N.J.S.A. 40A:14-7 and 40A:14-118.

N.J.A.C. 4A:6-1.1(e) provides:

Where leave procedures are not set by this subchapter, appointing authorities shall establish such procedures subject to applicable negotiations requirements.

N.J.S.A. 11A:6-9 provides:

Leaves of absence for police officer and fire fighter titles shall be governed by the applicable provisions of Title 40A of the New Jersey Statutes and N.J.S. 11A:6-10.

And N.J.S.A. 40A:14-137 provides:

The governing body of any municipality, by ordinance, may provide for granting leaves of absence with pay not exceeding one year, to members and officers of its police department and force who shall be injured, ill or disabled from any cause, provided that the examining physician appointed by said governing body, shall certify to such injury, illness or disability.

Under that separate scheme, the designee found no prohibition against a police officer's ability to accrue negative sick leave balances subject to future recapture. The City has not presented any extraordinary circumstances for reviewing his determination.

The City next argues that the designee did not address N.J.S.A. 2C:20-9, a criminal statute dealing with theft by failure to make a required disposition of property received. The statute applies to government employees who obtain or retain property subject to a legal obligation to make a payment or other disposition and who deal with the property as their own and fail to make the required payment or disposition. The benefit in dispute is sick leave advanced to employees who are expected to later earn the leave

time and offset the negative balances. The benefit does not involve an unlawful failure to make a required disposition of property received.

The City next argues that the designee erroneously decided that negative sick leave balances are not a gift of public monies disallowed by Article 8, section 3, paragraph 2 of the New Jersey Constitution. That paragraph provides:

No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become security for, or be directly or indirectly the owner of, any stock or bond of any association or corporation.

The City contends that negative balances are a loan of sick days in contravention of this constitutional provision.

The designee found that since sick leave is generally a mandatory subject of negotiations, allowing employees to accrue a negative sick leave balance appears to be more in the nature of paid compensation than a gift, and is not a loan of the City's money or credit. He relied on Maywood Ed. Ass'n Inc., v. Maywood Bd. of Ed., 131 N.J. Super. 551 (Ch. Div. 1974), in which the Court stated:

It is fair to say that our Courts generally have adopted the view that compensation paid to public employees, whatever the label, is not a gift so long as it is included within the conditions of employment either by statutory direction or contract negotiation [Id. at 557.]

Maywood was cited with approval in Neptune Tp. Bd. of Ed. v. Neptune Tp. Ed. Ass'n, 293 N.J. Super. 1 (App. Div. 1996). That case found

constitutional a method of paying over employee salary deductions for credit union and annuity plans. Employee credit union and annuity contributions were forwarded by the employer on the 15th day of the month for services to be performed by employees during the balance of the month. To the extent such employees had entered into a binding contractual obligation to render services to the district during that period, the employer's payments, unlike a gift, were supported by valuable legal consideration. Id. at 7. The City has not presented any extraordinary circumstances warranting reconsideration of the designee's determination.

The City next argues that the designee erroneously decided that negative sick leave balances are a term and condition of employment and qualify as a past practice. Neither party disputes that the contract is silent on accrual of negative sick leave balances. Nor does the City dispute that the prior police administration knowingly allowed such accrual and that the present administration knew about the practice when it stopped it. Under these circumstances, there are no extraordinary circumstances warranting review of the designee's determination that the SOA has a substantial likelihood of prevailing on its factual and legal allegations.

Finally, the City argues that the designee erroneously decided that unit members would suffer irreparable harm if interim relief were not granted. The City focuses on potential harm to individual employees and asserts that it has attempted to be flexible.

The designee did not focus on financial harm to individual employees but instead found that a unilateral change in terms and conditions of employment during any stage of the negotiations process has a chilling effect on employee rights, undermines labor stability, and constitutes irreparable harm. He further noted that N.J.S.A. 34:13A-21 prohibits changes in terms and conditions of employment during interest arbitration proceedings. The City has not presented any extraordinary circumstances for reconsidering that determination.

The law contemplates some advance accruals of paid sick leave. Employees commonly are credited sick leave at the beginning of the calendar year. The employee may use the accrued sick leave at the beginning of the year rather than have to first earn each day pro rata. By virtue of a statute, regulation, contract provision, or past practice, the employer may be entitled to recoupment should the employee leave employment before the end of the year. The designee specifically noted that his decision did not affect the City's ability to recoup negative sick leave balances before an employee separates from City employment.

We will assume that there may be some limits on how many days an employee can accrue in advance. For non-police officers and firefighters, the limit appears to be one year's worth. N.J.A.C. 4A:6-1.3(e). For police officers and firefighters, there is no statutory limit. This employer has taken the position that no advance payment beyond one year's worth will be permitted and that

the one employee in question must restore his negative balance or face having his pay docked. The designee concluded that the employer was probably not privileged to decide unilaterally either that there could be no negative balances beyond the one year cap placed on employees besides police officers and firefighters or that employees must reduce negative balances by choosing options affecting such otherwise negotiable subjects as paybacks, vacations, and docking of pay. Compare East Brunswick Bd. of Ed., P.E.R.C. No. 82-76, 8 NJPER 124, 126 (¶13054 1982) (although board had prerogative to close school for six days, it could not dictate options for changing employment conditions). We do not believe that there are extraordinary circumstances for reconsidering the designee's belief that negotiations were required before such unilateral actions were taken. Accordingly, the City's motion is denied.

ORDER

Reconsideration is denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Madonna, Muscato, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner McGlynn abstained from consideration. Commissioner Buchanan was not present.

DATED: September 28, 2000
Trenton, New Jersey
ISSUED: September 29, 2000