P.E.R.C. NO. 81-146

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF DENVILLE,

Respondent,

-and-

Docket Nos. CO-80-378-21
SN-80-155

DENVILLE PBA LOCAL 142,

Charging Party.

SYNOPSIS

In a combined unfair practice and scope of negotiations proceeding, the Commission determines that the Township of Denville violated N.J.S.A. 34:13A-5.4(a)(5) by unilaterally changing a past practice of at least ten years standing concerning benefits paid to officers who were on leaves of absence due to work related injuries. Pursuant to the past practice, officers on work related injury leave received their full salary from the Township provided that any workman's compensation checks received by the officers were endorsed over to the Township. The Township unilaterally altered this practice by deducting from the officers accumulated sick leave the number of days necessary to make up the difference between workman's compensation payments received by the officer and the salary payments given the officer during the period of time the officer was on injury leave. The Commission, in accordance with one of its prior decisions, which had been affirmed by the Appellate Division, finds that the payment of full salary to officers on leave for work related injuries up to a period of one year is a mandatorily negotiable term and condition of employment and conforms to the requirements of N.J.S.A. 40A:14-137. The Commission reverses the determination of its Hearing Examiner who had concluded that the Township was without authority to make such payments to officers on injury leave without first having adopted an ordinance to that effect. The Commission concludes that the charge filed by PBA Local 142 was within the six month limitation period contained in N.J.S.A. 34:13A-5.4(c), as the PBA did not receive notice of the Township's change in the work related injury leave policy until January of 1980. The Commission orders the Township to adhere to the past practice which had been in effect prior to the Township's change in the work related injury policy and also to restore any sick days lost by officers while they were on leave of absences due to work related injury.

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Appearances:
For the Respondent, Villoresi & Buzak, Esqs.
(John P. Jansen, of Counsel)

For the Charging Party, Fullerton, Porfido & Wronko, Esqs. (Eugene J. Porfido, of Counsel)

DECISION AND ORDER

An Unfair Practice Charge and a Scope of Negotiations Petition were filed with the Public Employment Relations Commission on June 26, 1980 by the Denville PBA Local 142 (the "Charging Party" or the "PBA") alleging that the Township of Denville (the "Respondent" or the "Township") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). The PBA alleged that the Respondent, contrary to a past practice of at least ten years, had charged absences from work due to job-related injuries as of 1980, against accumulated sick days and had thereby unilaterally altered the working conditions of employees represented by the Charging Party without collective negotiation, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(5) of the Act. 1/

1/ This subsection prohibits public employers, their agents or representatives from: "(5) Refusing to negotiate in good faith (Continued)

It appearing that the allegations of the Unfair Practice Charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 19, 1980, and was consolidated with the Scope of Negotiations Petition. Pursuant to the Complaint and Notice of Hearing, a hearing was held on March 9, 1981 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally.

On March 23, 1981, the Hearing Examiner, Alan R. Howe, issued his Recommended Report and Decision, H.E. No. 81-33, 7 NJPER ____ (¶_____ 1981), a copy of which is attached hereto and made a part hereof. In that decision, the Hearing Examiner recommended that the Complaint be dismissed in its entirety. He construed N.J.S.A. 40A:14-137, which authorizes a municipality to grant leaves of absence with pay for a period up to one year in duration to police who become ill, injured or disabled for any cause, to be operable only where a municipality has adopted an ordinance to such effect. He thus found that the Respondent, which had no such ordinance on its books, was without authority to grant such leaves of absence without deducting days from an officer's accumulated sick leave in sufficient quantity to cover the difference

1/ (Continued) 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."

The job-related injury policy dispute is listed in the unfair practice charge as Count II of a charge containing three counts. Count I was resolved by the parties prior to the hearing and the Director of Unfair Practices refused to issue a Complaint with respect to Count III. No appeal was taken from the Director's action.

between the full salary received by the officer on leave and temporary disability and/or Worker's Compensation payments which officers routinely endorsed over to the Respondent.

Exceptions to the Hearing Examiner's report and a brief in support thereof were filed by the Charging Party on April 27, 1981. An answering brief was filed by the Respondent on April 30, 1981. The matter is now properly before the Commission for determination.

Upon review of the entire record in this matter, we disagree with the recommended decision and order made by the Hearing Examiner specifically his construction of N.J.S.A. 40A:14-137 which is contrary to our construction of a statute identical to the one involved herein, which construction has been affirmed by the Appellate Divison. See N.J.S.A. 40A:9-7, construed in In re County of Morris and Morris Council No. 6, P.E.R.C. No. 79-2, 4 NJPER 304 (¶4153 1978), affirmed App. Div. Docket No. A-194-78, (11/2/79). In that case, we found that N.J.S.A. 40A:9-7, which provides the identical type of leaves for ill, injured or disabled county and municipal employees as are available to police under N.J.S.A. 40A:14-137, did not preempt negotiations of disability leaves with full pay up to one year in length and the matter was a mandatorily negotiable term and condition of employment.

While it is true that a municipality acts through ordinance, it is also specifically empowered to enter into binding and enforceable contracts with its employees by virtue of the New Jersey Employer-Employee Relations Act. Indeed, an employer is prevented by the Act from taking unilateral action with respect to

terms and conditions of employment, such as a leave with pay for officers injured or disabled in the course of their employment, the matter in dispute herein. Cf. Galloway Tp. Bd. of Ed. v Galloway Tp. Ed. Ass'n., 78 N.J. 25, 48-49 (1978). Moreover, the Appellate Division, in a case affirming our determination that the establishment of a salary holdback period was mandatorily negotiable, has commented:

> Axiomatically, the City could not, by passage of a local ordinance, unilaterally preempt the area of negotiable terms and conditions of employment; only a specific state statute or regulation could do so. 2/
> In re Paterson v. AFSCME Council 52, App. Div. Docket No. A-1318-79 (2/10/81) Slip opinion at p. 2

Conversely, by failing to enact an ordinance, a municipality cannot evade its responsibility not to unilaterally alter terms and conditions of employment which it had agreed upon through negotiations, or as herein, has been an established practice of longstanding duration. 3/ See In re Bergenfield Bd. of Ed., P.E.R.C. No. 90, 1 NJPER 44 (1975).

In the instant case, the record establishes that the Respondent, apparently without any ordinance on the books, routinely paid ill, injured or disabled officers full salary, without deducting sick leave, where such officers endorsed compensation payments over to the Respondent for a period of at least ten years. It was only after Thomas Grady became administrator and Patrolmen Hopler's case arose that it found the problem to exist. Under such

2/ As previously noted above, the Appellate Division in Morris, supra., found that a statute which is the "twin" to the one involved herein, did not specifically preempt negotiations.

3/ The obvious solution is to enact the appropriate ordinance, not unilaterally cancel the benefit.

circumstances we also believe the Respondent should be deemed estopped from asserting its ultra vires claim.

The facts constituting the unfair practice are fairly clear and not in dispute, except for the issue of when the Charging Party received notice of the Respondent's unilateral change in policy.[4/] We agree with the Hearing Examiner's determination that the PBA first had reason to be aware of the change in policy with the posting on the bulletin board of police sick leave balances which occurred in January of 1980. Hence, the charge filed June 26, 1980 was within six months of the period that the Charging Party was no longer prevented from filing a charge concerning the change in policy notwithstanding that the change had actually been implemented some time earlier. We do not believe that the letter to Officer Hobler, whether actually received by the officer or not, constituted notice of the change, since the officer was merely a rank and file PBA member and did not hold union office.

Moreover, the Act requires negotiation of proposed new rules governing working conditions, prior to their establishment. N.J.S.A. 34:13A-5.3. The Respondent did not meet this statutorily imposed obligation and accordingly violated N.J.S.A. 34:13A-5.4(a)(5).[5/] We will remedy the unfair practice by directing the Respondent to restore to all officers represented by the Charging Party any sick days lost as a result of the unilateral change in the policy concerning work related injury made by the Respondent,

4/ The issue of notice was the subject of two Motions to Dismiss made by the Respondent at the hearing and denied both times by the Hearing Examiner.

5/ The charge did not allege any violation of N.J.S.A. 34:13A-5.4(a)(1).

and to also restore the status quo by reverting to the old policy. This may require the adoption of an implementing ordinance if the Township deems it necessary. That determination is left to the Township.

ORDER

Respondent, Township of Denville, shall:

A. Cease and desist from refusing to negotiate with Denville PBA Local 142 by making unilateral changes in the policy governing leaves of absence for work related injuries;

B. Take the following affirmative action:

1. Immediately restore the status quo ante concerning leaves of absence for work-related injury by leaving intact the amount of accumulated sick leave held by any Denville officer who receives a leave of absence due to job-related injuries.

2. Restore to the total accumulated sick leave of all officers who had sick leave days deducted during the period they were on work-related injury leave, the number of sick leave days which had been lost thereby.

3. 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 the receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for a period of sixty (60) consecutive days. 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.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
June 9, 1981
ISSUED: June 10, 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 NOT refuse to negotiate with Denville PBA Local 142 by making unilateral changes in the policy governing leaves of absence for work related injuries.

WE WILL immediately restore the status quo ante concerning leaves of absence for work-related injury by leaving intact the amount of accumulated sick leave held by any Denville officer who receives a leave of absence due to job-related injuries.

WE WILL restore to the total accumulated sick leave of all officers who had sick leave days deducted during the period they were on work-related injury leave, the number of sick leave days which had been lost thereby.

TOWNSHIP OF DENVILLE
(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.

81-146

H. E. No. 81-33

STATE OF NEW JERSEY
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-and-

Docket Nos. CO-80-378-21
SN-80-155

DENVILLE PBA LOCAL 142,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Township did not violate Subsection 5.4 (a)(5) of the New Jersey Employer-Employee Relations Act when without notice to or negotiations with the PBA it unilaterally adopted a policy on March 1, 1976, the effect of which was to charge employees with accumulated sick days for time lost from work due to job-related injuries to the extent not covered by Workmen's Compensation Disability payments.

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. 81-33

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Appearances:

For the Township of Denville
Villoresi & Bazak, Esqs.
(John P. Jansen, Esq.)

For the Denville PBA Local 142
Fullerton, Porfido & Wronko, Esqs.
(Eugene J. Porfido, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge and a Scope of Negotiations Petition were filed with the Public Employment Relations Commission (hereinafter the "Commission") on June 26, 1980 by the Denville PBA Local 142 (hereinafter the "Charging Party" or the "PBA") alleging that the Township of Denville (hereinafter the "Respondent" or the "Township") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent, contrary to a past practice of at least ten years, had charged accumulated sick days to absence from work due to job-related injuries as of 1980 and has thereby unilaterally altered the working conditions of employees represented by the Charging

Party without collective negotiations, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4 (a)(5) of the Act. 1/

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 19, 1980, which was consolidated with the Scope of Negotiations Petition. Pursuant to the Complaint and Notice of Hearing, a hearing was held on March 9, 1981 2/ in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. 3/ Both parties argued orally and waived the filing of post-hearing briefs.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the oral argument of the parties the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Township of Denville is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

1/ This Subsection prohibits public employers, their agents or representatives from:
"(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."

2/ The hearing was originally scheduled to commence on November 5, 1980. However, at the request of the parties and due to the intervening illness of the Hearing Examiner the hearing was rescheduled to December 23, 1980. The matter was then adjourned without date on the basis of a representation of settlement, which when not consummated resulted in the hearing being rescheduled to March 9, 1981.

3/ At the hearing both parties agreed to the submission of post-hearing affidavits with respect to one area not concluded at the hearing. The record was deemed closed with the receipt of these affidavits on March 23, 1981.

2. The Denville PBA Local 142 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Russell Allaman has been a Patrolmen with the Township since 1968. He was President of the PBA for two years from 1973 through 1975. Since 1975 he has been a PBA State Delegate. He has been on the PBA's Negotiations Committee since 1973.

4. Allaman testified without contradiction, based upon his personal experience and his knowledge from a fellow employee, Douglas Erwine, that the policy of the Township regarding work-connected injuries since 1971 was that injured employees would receive their full-time salary for time lost and would not be charged with accumulated sick days, providing the employee remitted any Workmen's Compensation disability payments to the Township Treasurer. Thus, an employee incurring a work-connected injury would be made whole by the Township for work time lost, notwithstanding that his Workmen's Compensation disability payments were insufficient to reimburse the Township fully for the full-time salary received.

5. Thomas J. Grady became the Township Administrator on March 1, 1976. Grady testified credibly that from the time he became Administrator the Township's policy with respect to work-connected injuries was that any employee who was injured on the job had a choice of receiving Workmen's Compensation directly, or being paid at his regular full-time salary by the Township and remitting to the Township any Workmen's Compensation disability payments received, with the result that the injured employee would have charged against his sick days the amount required to make up the deficiency between his full-time salary and the Workmen's Compensation disability payment remittance.

6. Grady testified credibly that the foregoing policy was not reduced to writing nor was it incorporated into the Township's rules and regulations nor

into any ordinance enacted by the Township. Grady testified further that the first writing setting forth the Township's policy on work-connected injuries was in a letter sent to Patrolman Wayne Hopler under date of June 9, 1977 (R-1). 4/ Allaman testified that Hopler, who was out of work for 16 days, told Allaman that he lost sick days pro-rated during his period of disability, but that Allaman did not learn of this until January 1980.

7. Allaman suffered a work-connected injury in 1978 and was out of work for 38 days. He was told by Chief of Police King that he would not be charged with sick days. Allaman remitted his Workmen's Compensation disability payments to the Township. In November 1979 a Lieutenant Bell advised Allaman that he was "short on sick days," being one day overdrawn. Allaman's request for an accounting elicted no response, either from Lieutenant Bell or Police Chief King. Allaman only learned officially of his sick leave status in or around January 1, 1980 when a memorandum was posted on the bulletin board, which set forth all of the sick days available for each member of the Police Department.

8. Grady and Allaman testified that the matter of the sick leave policy vis-a-vis work-connected injuries had never been the subject of collective negotiations between the parties and Grady acknowledged that the PBA had never been given notice of the work-connected sick leave policy from the date that he became Administrator on March 1, 1976.

9. Allaman testified without contradiction that his first knowledge of the sick leave policy vis-a-vis work-connected injury was on August 13, 1980 when he received a copy of a memo from Grady to the Chief of Police, to which were attached memos regarding charges to Allaman of sick leave for his injury in 1978 (CP-2).

4/ Hopler, in a post-hearing Affidavit (CP-3), denies that he ever received R-1. The resolution of this issue is not material to the disposition of the merits of the instant case.

10. The sick leave policy vis-a-vis work-connected injuries applies to all Township employees and not just to employees of the Police Department.

11. N.J.S.A. 40A:14-137 provides, as follows:

> "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." (Emphasis supplied).

THE ISSUE

Did the Respondent Township violate Subsection (a)(5) of the Act when without notification to the PBA it unilaterally adopted a policy of charging accumulated sick days to absence from work due to job-related injuries to the extent that Workmen's Compensation disability payments remitted to the Township failed to offset regular salary received during the period of disability?

DISCUSSION AND ANALYSIS

The Respondent Township Did Not Violate Subsection (a)(5) of The Act By Unilaterally, and Without Notification To the PBA, Adopting A Policy of Charging Accumulated Sick Days To the Absence From Work Due to Job-Related Injuries To The Extent That Workmen's Compensation Disability Payments Remitted To The Township Failed To Offset Regular Salary Received

In oral argument, the Charging Party contended that Grady, in promulgating a change in Township policy with respect to charging accumulated sick days against days lost as a result of job-related injuries, had an obligation to notify the PBA. The PBA argued further that Grady's letter to Hopler (R-1) of June 9, 1977 did not constitute notification to the PBA. The Respondent argued that there had been no new policy since March 1, 1976, that the members of the PBA could have checked their personnel files and, finally, that any prior inconsistent policy was ultra vires by virtue of N.J.S.A. 40A:14-137 (see Finding of Fact No. 11, supra).

The Hearing Examiner finds and concludes that any policy of the

Respondent Township, other than the present policy, which dates back at least to March 1, 1976, would be ultra vires and in contravention of N.J.S.A. 40A:14-137. Municipalities are creatures of statute and have no authority other than that vested in them by the Legislature of the State of New Jersey. By virtue of N.J.S.A. 40A:14-137 it is clear that the instant municipality could only grant leaves of absence with pay for job-connected injuries by having adopted an ordinance to that effect. Any contrary policy of the Respondent Township prior to March 1, 1976 was clearly ultra vires and contrary to statutory authority. Such a conclusion is supported by Midtown Properties, Inc. v. Twp. of Madison, 68 N.J. Super. 197 (1961) where the Court said:

> "...A municipality in exercising the power delegated to it must act within such delegated power and cannot go beyond it. Where the statute sets forth the procedure to be followed, no governing body...had the power to adopt any other method of procedure..." (68 N.J. Super. at 207)

Thus, the issue of notification to the PBA of the instant unilateral change is totally irrelevant. The PBA and the members of its collective negotiations unit did not have and enjoy as a negotiable term or condition of employment the receipt of regular salary to the extent not offset by Workmen's Compensation disability payments during periods of disability due to job-related injuries. The Hearing Examiner will, therefore, recommend that the Complaint be dismissed.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Respondent Township did not violate N.J.S.A. 34:13A-5.4(a)(5) when without notice to the PBA it unilaterally adopted a change in policy

on March 1, 1976 with respect to the charging of sick days against time off from work due to job-related injuries to the extent not covered by Workmen's Compensation disability payments.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

DATED: March 23, 1981
Trenton, New Jersey

Alan R. Howe
Hearing Examiner