SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2786-20

IN THE MATTER OF CITY OF EAST ORANGE AND EAST ORANGE SUPERIOR OFFICERS' ASSOCIATION, FRATERNAL ORDER OF POLICE, LODGE NO. 188 a/w FOP NEW JERSEY LABOR COUNCIL

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Submitted April 6, 2022 – Decided May 4, 2022

Before Judges Whipple, Geiger and Susswein.

On appeal from the New Jersey Public Employment Relations Commission, PERC No. 2021-50.

Eric M. Bernstein & Associates, LLC, attorneys for appellant City of East Orange (Brian M. Hak on the briefs).

Markowitz and Richman, attorneys for respondent East Orange Superior Officers' Association, Fraternal Order of Police, Lodge No. 188 a/w FOP New Jersey Labor Council (Matthew D. Areman, on the brief).

Christine Lucarelli, General Counsel, attorney for New Jersey Public Employment Relations Commission (Ramiro A. Perez, Deputy General Counsel, on the statement in lieu of brief).

PER CURIAM

Appellant City of East Orange (the City or East Orange) appeals from a final decision and order of the Public Employment Relations Commission (PERC) that it violated two sections of the New Jersey Employer-Employee Relations Act (the Act), N.J.S.A. 34:13A-1 to -64, specifically N.J.S.A. 34:13A-5.4(a)(1) and (5), by unilaterally implementing a sick leave policy (the Policy) without negotiating with respondent Fraternal Order of Police, Lodge No. Local 188 (FOP).

We take the following facts from the record. On December 6, 2018, East Orange unilaterally implemented Revised General Order 6:27 (RGO 6:27) that required superior officers of the East Orange Police Department (EOPD) to use paid leave concurrently with leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 to -2654, and/or the New Jersey Family Leave Act (NJFLA), N.J.S.A. 34:11B-1 to -16, and that such paid leave must be taken in a specified sequence. RGO 6:27 was unilaterally implemented by the City while the parties were engaged in negotiations for a successor contract.

In May 2019, FOP filed an unfair practice charge and amended charge that alleged the City's unilateral implementation of RGO 6:27 violated N.J.S.A. 34:13A-5.4(a)(1) and (5). In February 2020, the Director of Unfair Practices issued a complaint against the City and assigned the matter to a hearing

examiner. In its answer, the City denied violating N.J.S.A. 34:13A-5.4(a)(1) and (5) and asserted certain affirmative defenses.

The parties cross-moved for summary judgment pursuant to N.J.A.C. 19:14-4.8. PERC referred the motions to a hearing examiner for decision. The hearing examiner made the following findings of fact:

> 1. East Orange and FOP are, respectively, public employer and public employee representative within the meaning of the Act.
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> 2. FOP is the exclusive majority representative for all sergeants, lieutenants and captains employed by East Orange.
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> 3. FOP and East Orange are parties to a collective negotiations agreement (CNA), effective July 1, 2013 through December 31, 2017.
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> 4. Upon expiration of the CNA, the parties engaged in negotiations for a successor agreement until August 28, 2019, when the parties entered into a Memorandum of Agreement, effective January 1, 2018 through December 31, 2022.
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> 5. Article IX of the parties' expired CNA, entitled "Vacation and Vacation Pay," outlines the manner in which employees may earn and use vacation time.
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> 6. Article X of the parties' expired CNA, entitled "Sick Leave Incentive Program and Retirement Benefit," outlines an incentive program through which employees may receive additional vacation days for non-use of sick leave.
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> 7. Neither Article IX nor Article X address FMLA or NJFLA leave in any way.

8. On December 6, 2018, during negotiations for a successor agreement, East Orange implemented [RGO] 6:27, amending certain provisions of the sick leave policy as it relates to leave taken under the FMLA and/or NJFLA.

9. Specifically, [RGO] 6:27 requires that employees use their paid leave entitlements concurrently with any FMLA and/or NJFLA leave, and further requires that such paid leave must be taken in a specific sequence as set forth in the Order. Section II, Part E of [RGO] 6:27 provides in pertinent part:

> Employees of this agency are required to use paid leave concurrently with FMLA leave in the following sequence, which is subject to change at the Chief' s discretion:
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> 1. Vacation leave (including contract vacation days, sick leave incentive days and "in lieu" days) accrued in the current year; then
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> 2. If applicable, accumulated vacation leave (including contract vacation days, sick leave incentive days and "in lieu" days) carried over from prior years with the Chief's approval; then,
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> 3. Personal leave; then,
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> 4. Excused days off (applicable only to employees with a 5/2 work schedule); then,
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> 5. Compensatory time; then,
>
> 6. Accumulated sick leave.
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> FMLA leave taken after all other paid leaves are exhausted shall be unpaid.

> If an employee's vacation leave is already scheduled in accordance with the agency's policy on vacation selection under General Order 2:25 (Vacation Selection), but he/she takes FMLA leave prior to that vacation leave, the number of days (or hours) taken for FMLA leave will be deducted from the employee's scheduled vacation leave in the order it falls on the calendar.
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> 10. Section III, Part E of [RGO] 6:27 includes the same requirements and language as Section II, Part E above, but with regard to NJFLA leave instead of FMLA leave.
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> 11. As provided above in [RGO] 6:27, if an employee takes FMLA and/or NJFLA leave prior to "already scheduled" vacation leave, the employee may have the amount of FMLA and/or NJFLA leave taken deducted from the "already scheduled" vacation leave.
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> 12. There were no negotiations between East Orange and FOP regarding these new requirements that paid leave must be used to run concurrently with FMLA and/or NJFLA leave, and that concurrent paid leave must be taken in a specific sequence prior to East Orange's implementation of [RGO] 6:27.

The hearing examiner noted that the parties agreed that the City implemented RGO 6:27 without prior negotiations. Accordingly, the hearing examiner found there was no genuine issue of material fact that would require a plenary hearing.

The hearing examiner found that the City's unilateral, unnegotiated implementation of RGO Order 6:27 violated N.J.S.A. 34:13A-5.4(a)(1) and (5). She issued a recommended order that granted FOP's motion for summary

judgment, denied East Orange's cross-motion for summary judgment, and ordered East Orange to cease and desist from:

> 1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by implementing [RGO] 6:27, which requires paid leave time to be used concurrently with FMLA and/or NJFLA leave and in a specific sequence, without prior negotiations.
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> 2. Refusing to negotiate in good faith with FOP concerning terms and conditions of employment of employees in its unit, particularly by implementing [RGO] 6:27, which requires paid leave time to be used concurrently with FMLA and/or NJFLA leave and in a specific sequence, without prior negotiations.

The hearing examiner ordered East Orange to undertake the following actions:

> 1. Restore the status quo ante with respect to the policy prior to the issuance of [RGO] 6:27, implemented in December 2018.
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> 2. Negotiate in good faith with FOP over any proposed changes by East Orange to General Order 6:27, and maintain the status quo during negotiations.

East Orange filed exceptions to the hearing examiner's recommended decision. It contended the hearing examiner failed to give appropriate consideration to the emergency measures it was forced to take to address abuse of sick leave by some EOPD members that resulted in forty or more officers being on FMLA leave at the same time. East Orange also contended that the

policy it implemented, including the specific sequence in which paid leave must be used, was not mandatorily negotiable.

PERC adopted the hearing examiner's findings of fact. PERC noted that in her certification in support of the City's cross-motion for summary judgment, Chief of Police Phyllis Bindi stated:

> 3. Prior to the enactment of the Policy, the Police Department was experiencing a huge abuse of leave time by certain members of the department. At the time, the Department consisted of approximately two hundred and two (202) sworn officers, fifty-eight (58) of which were patrol officers. However, at times, there were anywhere between (40) and (50) officers out on FMLA and/or intermittent FMLA leave at the same time.
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> 4. With so many officers out on FMLA and/or intermittent FMLA leave at the same time, there was a tremendous negative impact on the abilities of the Department to carry out its responsibilities. Such manpower issues resulted in significant overtime payments by the City and in "forced" overtime for officers who were not out on leave and who were required to work double shifts on a regular basis.
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> 5. The above circumstances created a domino effect when the officers who were being forced into overtime and working double shifts began to "burn-out" resulting in them taking leave as well.
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> 6. The clear abuse of leave time by some members of the Department necessitated the enactment of the Policy in which paid leaves are required to be used concurrently with FMLA/NJFLA leave in the sequence provided for in the Policy.

> 7. Since the enactment of the Policy, the Department has seen a significant reduction in the abuse of leave time taken by its officers.

Excepting as modified, PERC affirmed and adopted the hearing examiner's decision and order:

> We agree with the Hearing Examiner's conclusion that the City was required to negotiate with the FOP before implementing the Policy, but arrive at that conclusion for different reasons and find it necessary to apply the Local 195[1] test to fully consider the City's exceptions and leave abuse claims. The first and second prongs of the Local 195 test are not at issue before us. The City' s arguments on appeal turn on the third prong of the Local 195 test – whether negotiations over the implementation of the Policy would significantly interfere with the determination of governmental policy. We find that the answer to that question is no.
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> The City alleges that the leave abuse by officers taking FMLA and NJFLA caused increased overtime, forced burnout for working officers, and interfered with the Department's ability to carry out its responsibilities. Aside from the Chief's certification that a high number of officers were out on FMLA or NJFLA, the City does not document or explain the underlying details or causes of alleged abuses of leave. However, we view the City's factual assertion in the most favorable light – that it unilaterally implemented the Policy because of its interests in curbing leave abuse. We also recognize that FOP members have strong interests in maintaining paid and unpaid leaves of absences, issues that have consistently been found to be mandatorily negotiable.

[1] In re Local 195, IFPTE, 88 N.J. 393, 404-405 (1982).

A public employer has a managerial prerogative to verify that sick leave is not being abused, which includes the prerogative to verify sick leave at any time regardless of the amount of days used. Therefore, the City's interests in curbing leave abuse could have been addressed through the implementation of practices commonly used by employers to curb leave abuse (increased monitoring or documentation for leaves, issuing nondisciplinary counseling memoranda, home checks etc.) rather than unilaterally implementing the Policy over paid and unpaid leaves, which are generally mandatorily negotiable terms and conditions of employment. Moreover, any policy negotiated with the FOP could have included measures to curb the alleged abuse. Thus, the City had a managerial prerogative to unilaterally implement measures to verify leave at any time, and/or could have negotiated other measures with the FOP. The unilateral implementation of the Policy without negotiating with the FOP was the most invasive measure available to the City to address the alleged abuse, and foreclosed its use of other less invasive measures that would not have infringed upon mandatorily negotiable terms and conditions of employment.

Accordingly, we agree with the Hearing Examiner's decision that the City's unilateral implementation of the Policy violated [N.J.S.A. 5.4(a)(l) and (5)], but arrive at the conclusion after fully considering the City's allegations of leave abuse and applying the Local 195 test. The Policy made changes to negotiable terms and conditions of employment during pending contract negotiations, and such unilateral changes are destabilizing to the employment relationship and contrary to the principles of our Act. Further, such unilateral changes create a chilling effect on negotiations for a successor contract and constitute a refusal to negotiate. We find that the City was required to negotiate with the FOP about the Policy

> before its implementation, and thus, we affirm the Hearing Examiner's decision, as modified herein.
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> [(citations omitted).]

This appeal followed. East Orange argues:

> PERC'S DECISION THAT THE IMPLEMENTATION OF THE CITY'S POLICY REQUIRING EMPLOYEES TO USE PAID LEAVE CONCURRENTLY WITH FMLA AND/OR NJFLA LEAVE IN A CERTAIN SPECIFIED SEQUENCE IS MANDATORILY NEGOTIABLE WAS IN ERROR.

We are guided by the following legal principles. Motions for summary judgment in administrative proceedings are governed by N.J.A.C. 19:14-4.8(e), which provides:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross motion for summary judgment may be granted and the requested relief may be ordered.

In considering a summary judgment motion, all favorable inferences must be granted to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995). The motion must be denied if material factual issues exist. N.J.A.C. 19:14-4.8(e). Upon granting summary judgment resolving all issues in the complaint, the hearing examiner prepares a report and recommended decision in accordance with N.J.A.C. 19:14-7.1 and transfers the case back to

PERC. N.J.A.C. 19:14-4.8(f). In turn, PERC then considers any written exceptions filed by the parties, and reviews the hearing examiner's decision and recommended order in accordance with N.J.S.A. 52:14B-10(c), which provides:

> The head of the agency, upon a review of the record submitted by the [hearing examiner], shall adopt, reject or modify the recommended report and decision . . . after receipt of such recommendations. In reviewing the decision . . . , the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so. . . . In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

"[The Commission] has primary jurisdiction to determine in the first instance whether a matter in dispute is within the scope of collective negotiations." In re New Brunswick Mun. Emps. Ass'n, 453 N.J. Super. 408, 413 (App. Div. 2018) (citing N.J.S.A. 34:13A-5.4(d)). Our scope of review is limited. "PERC's interpretation of the Act is entitled to substantial deference . . . unless its interpretations are plainly unreasonable, contrary to the language of the Act, or subversive to the Legislature's intent[.]" N.J. Tpk. Auth. v. AFSCME Council 73, 150 N.J. 331, 352 (1997) (citations omitted). PERC decisions will not be disturbed unless the decision "is clearly demonstrated to be arbitrary and capricious." City of Jersey City v. Jersey City Police Officers Police Officers

Benevolent Ass'n, 154 N.J. 555, 568 (1998) (citing In re Hunterdon Cnty. Bd. of Chosen Freeholders, 116 N.J. 322, 329 (1989)).

> The judicial role when reviewing an action of an administrative agency is generally restricted to three inquiries:
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> > (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law;
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> > (2) whether the record contains substantial evidence to support the findings on which the agency bases its action; and
> >
> > (3) whether, in applying the legislative policy to the facts, the agency erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> In the absence of constitutional concerns or countervailing expressions of legislative intent, we apply a deferential standard of review to determinations made by [the Commission].
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> [Id. at 567 (quoting In re Musick, 143 N.J. 206, 216 (1996)).]

Nonetheless, "when an agency's decision is based on the 'agency's interpretation of a statute or its determination of a strictly legal issue,' we are not bound by the agency's interpretation." Saccone v. Bd. of Trs., PFRS, 219 N.J. 369, 380 (2014) (quoting Russo v. Bd. of Trs., PFRS, 206 N.J. 14, 27 (2011)). Instead, we review the legal determination de novo. Ibid.

We affirm PERC's final decision and order substantially for the reasons it expressed in its final decision. We add the following comments.

N.J.S.A. 34:13A-5.3 requires that: "the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment." "[U]nilateral imposition of working conditions is the antithesis of [the Legislature's] goal that the terms and conditions of public employment be established through bilateral negotiation." In re Atlantic Cnty., 230 N.J. 237, 252 (2017) (quoting Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n, 78 N.J. 25, 48 (1978).

Public employers are prohibited from "[r]efusing 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[.]" N.J.S.A. 34:13A-5.4(a)(5). Public employers are also prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act." N.J.S.A. 34:13A-5.4(a)(l).

A subject is mandatorily negotiable when:

> (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated

> agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees working conditions.
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> [Local 195, 88 N.J. at 404-05.]

As noted, the parties agreed that the City implemented RGO 6:27 without prior negotiations. However, the City claimed that FOP had acknowledged that the City had a past practice of requiring employees to use paid leave concurrently with FMLA and/or NJFLA leave. The City contended that the sole legal issue involved the requirement that such paid leave must be taken in a specific sequence. FOP denied that it only challenged the leave use sequence requirement. FOP argued there was no evidence in the record to support the City's past practice claim or the FOP's acknowledgement of same.

The City relied on the certification of Chief Bindi, which stated that prior to the implementation of RGO 6:27, "the Police Department was experiencing a huge abuse of leave time by certain members of the Department." Bindi certified that the abuse of leave time "necessitated the enactment" of RGO 6:27.

The hearing examiner found Bindi's statements "undermine[d] East Orange's assertion that it has a past practice of requiring that employees use paid leave concurrently with FMLA and/or NJFLA leave." The hearing examiner

noted that Bindi's certification "include[d] no mention of East Orange's alleged past practice, and East Orange has failed to provide any other factual support for this allegation." The hearing officer rejected the City's factually unsupported argument, which amounted to nothing more than "bald assertions in its brief . . . ."

The hearing officer and PERC determined that the legal issue was whether the implementation of the requirements imposed by RGO 6:27 was "mandatorily negotiable." We concur.

In general, paid, and unpaid leaves of absence intimately and directly affect employee work and welfare and do not significantly interfere with the determination of governmental policy. Burlington Cnty. Coll. Fac. Ass'n v. Bd. of Trs., 64 N.J. 10, 14 (1973); Piscataway Twp. Bd. of Educ. v. Piscataway Maint. & Custodial Ass'n, 152 N.J. Super. 235, 243-44 (App. Div. 1977). Negotiations are preempted, however, if contract language conflicts with a statute or regulation that "fixes a term and condition of employment 'expressly, specifically and comprehensively.'" Bethlehem Twp. Bd. of Educ. v. Bethlehem Twp. Educ. Ass'n, 91 N.J. 38, 44 (1982) (quoting Council of N.J. State Coll. Locals, etc. v. State Bd. of Higher Educ., 91 N.J. 18, 30 (1982)); accord In re Morris Sch. Dist. Bd. of Educ., 310 N.J. Super. 332, 341-342 (App. Div. 1998). In order to preempt negotiations, the legislative provision must "speak in the

imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Emps. Ass'n, 78 N.J. 54, 80 (1978).

The FMLA and NJFLA provide eligible employees with twelve weeks of unpaid leave per year for specified family or medical reasons. See Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 405 (2005) (citing 29 U.S.C. § 2612(a)(1)(A) and N.J.S.A. 34:11B-4). The City argues that both the FMLA and the NJFLA provide that an employer may require the substitution of accrued paid leave for an part of FMLA or NJFLA leave, citing 29 CFR § 825.207(a) and N.J.A.C. 13:14-1.7, respectively. 29 C.F.R. § 825.207(a) provides:

> [T]he employer may require the employee to substitute accrued paid leave for unpaid FMLA leave. The term substitute means that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave. . . . An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. . . .

Similarly, N.J.A.C. 13:14-1.7 provides: "If an employer has had a past practice or policy of requiring its employees to exhaust all accrued paid leave during a leave of absence, the employer may require employees to do so during a family leave."

Our courts and PERC have consistently found that statutes and regulations that provide an employer "may" undertake a particular action are not imperative but confer discretion which may be exercised through collective negotiations.

See e.g., Hunterdon Cnty., 116 N.J. at 331 (statutes providing employers "may" establish awards programs are not preemptive because they authorize employers "to exercise discretion in choosing to institute" them); Local 195, 88 N.J. at 406 (regulation providing an authority "may" lay off an employee does not preempt because it "grants considerable discretion" and does not speak "in the imperative"); In re Cnty. of Union, P.E.R.C. No. 2021-57, 48 N.J.P.E.R. ¶12, 2021 N.J. PERC LEXIS 68 at 10 (2021) (finding the term "may" in N.J.A.C. 13:14-1.7 "confers discretion for such NJFLA leave to be paid or unpaid; the issue has not been definitively set and is therefore not preempted"); In re Lumberton Ed. Ass'n, P.E.R.C. No. 2002-13, 27 N.J.P.E.R. ¶32136, 2001 N.J. PERC LEXIS 102 at 12 (2021) ) (same as to 29 U.S.C. § 2612(d)), aff'd, Lumberton Educ. Ass'n v. Lumberton Bd. of Educ., No. A-1328-01 (App. Div. Oct. 8, 2002).

FOP contended: (1) RGO 6:27 directly affected negotiable terms and conditions of employment by modifying the manner and sequence in which paid leave will run while an employee is on FMLA and/or NJFLA leave; (2) the "unilateral change specifically repudiate[d] Article IX, Vacation and Vacation Pay and Article X, Sick Leave and Incentive Pay of the parties' most current CNA"; and (3) the unilateral change violated N.J.S.A. 34:13A-5.4(a)(1) and (5)

because it was implemented while the parties were engaged in negotiations for a successor CNA.

The City contended: (1) the newly implemented provisions of RGO 6:27 are consistent with the statutory framework of the FMLA and NJFLA; (2) its ability to determine governmental policy would be restricted if it was required to negotiate concurrent leave and the sequence of its use; (3) it had a significant interest in curbing leave time abuse committed by members of the EOPD; and (4) its right to modify its leave policy cannot be negotiated away.

The City's reliance on Jersey City and Morris Cnty. Sheriff's Off. v. Morris Cnty. Policemen's Benevolent Ass'n, 418 N.J. Super. 64 (App. Div. 2011), is misplaced. In Jersey City, the employer was found to have a non-negotiable, managerial prerogative to assign civilians to perform nonpolice work formerly performed by police officers primarily to "augment the City's ability to combat crime by increasing the number of police officers in field positions." 154 N.J. at 573. In Morris Cnty., the employer was found to have a non-negotiable, managerial prerogative to reduce unnecessary overtime by eliminating holiday pay for employees whose posts had no function on holidays. 418 N.J. Super. at 77. Both cases are distinguishable; neither case involved employees' use of sick leave.

PERC has consistently found that implementation of a policy requiring employees to use paid leave concurrently with FMLA and/or NJFLA leave is mandatorily negotiable, as is the specific sequence in which paid leave must be used. Therefore, the East Orange should have negotiated this issue with FOP before its implementation of RGO 6:27.

Changes in negotiable terms and conditions of employment must be addressed through the collective negotiations process. The unilateral implementation of RGO 6:27 during contract negotiations was destabilizing to the employment relationship and contrary to the principles of the Act. Atlantic Cnty., 230 N.J. at 252. "Thus, employers are barred from 'unilaterally altering . . . mandatory bargaining topics, whether established by expired contract or by past practice, without first bargaining to impasse.'" Ibid. (alteration in original) (quoting Bd. of Educ. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16, 22 (1996)).

The hearing examiner's findings of fact, which were adopted by PERC, are amply supported by the record. PERC's legal analysis and ruling is consonant with the Act and interpretive caselaw. We find no abuse of discretion or other basis to disturb PERC's final decision and order.

The City did not satisfy the third prong of the Local 195 test—whether negotiations over the implementation of RGO 6:27 would significantly interfere with the determination of governmental policy. The City's unilateral,

unnegotiated implementation of RGO 6:27 violated N.J.S.A. 34:13A-5.4(a)(1) and (5). Accordingly, summary judgment was properly granted to FOP.

Affirmed.