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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

HINMAN STRAUB PC

In the Matter of

LOCKPORT PROFESSIONAL FIREFIGHTERS
ASSOCIATION, LOCAL 963, AFL-CIO,

Charging Party,

CASE NO. U-26888

- and -

CITY OF LOCKPORT,

Respondent.

BERNARD E. STACK, ESQ. and HINMAN STRAUB P.C. (JOHN F. BLACK of
counsel), for Charging Party

DAVID E. BLACKLEY, ESQ., for Respondent

DECISION OF ADMINISTRATIVE LAW JUDGE

On July 3, 2006, the Lockport Professional Firefighters Association, Local 963, AFL-CIO (Local 963) filed an improper practice charge alleging that the City of Lockport (City) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed the past practice of paying firefighters receiving benefits pursuant to General Municipal Law (GML) §207-a full health insurance, longevity and EMT pay. The City filed an answer in which it denied the existence of a past practice.¹

¹The City's answer also raised various affirmative defenses, i.e., timeliness, that it was privileged to make the unilateral change complained of and that at all times the City has bargained in good faith. No jurisdictional defense was raised in the answer. Local 963 has, however, filed a grievance regarding the City's change in benefits paid to firefighters receiving GML §207-a benefits. The Administrative Law Judge who conducted the conference ruled that the City asserted objections to arbitrability and thus deferral was not appropriate. That ruling is hereby confirmed.

A hearing was held on January 10, 2007, at which both parties were present and represented. Both parties filed briefs.

FACTS

At the start of the hearing the parties stipulated to the following:

1. Firefighter Jeffery Saraf has been on GML §207-a status for approximately five years, and during that period he continued to received health insurance benefits and longevity pay, in the same manner as prior to his date of injury;
2. Firefighter Daniel Foley has been on GML §207-a status for approximately two years, and during that period he continued to receive health insurance benefits, longevity pay and EMT pay as he had received prior to his date of injury;
3. On June 8, 2006, First Deputy Corporation Counsel David Blackley, upon directive from Mayor Michael Tucker, issued letters to Firefighters Saraf and Foley advising that such health insurance benefits, longevity pay and EMT pay would be terminated effective June 30, 2006. The City of Lockport in fact did cancel such benefits effective June 20, 2006;
4. The City did not negotiate the change with the Local 963, which represents Saraf and Foley;
5. Firefighters Saraf and Foley are currently the only firefighters in the department on GML §207-a status; and
6. Bernard E. Stack, Counsel to Local 963 sent two letters to the City's Mayor on June 30, 2006, requesting that the City reinstate such benefits.

Samuel Oakes, a firefighter for ten years and current President of Local 963 testified that for the entire time he has worked for the City, individuals receiving GML §207-a benefits also received full contract benefits. Oakes testified further that the Fire Chief prepares the payroll for all active duty firefighters and firefighters receiving GML §207-a benefits, and in addition, handles the paperwork for related injury claims.

Charles J. Morello, current President of the New York State Professional Firefighters Association, was employed as a City firefighter from June 1965 to February

1998. An officer of Local 963 during his tenure, Morello testified that while employed by the City he knew of as many as seven firefighters who received GML §207-a benefits along with health insurance, longevity and EMT pay during their entire period of disability. Morello was injured on the job in 1996 and received GML §207-a benefits and, in addition, health insurance, longevity and EMT pay. Morello's testimony² with regard to benefits and payments made by the City to firefighters on GML §207-a status was unrefuted.

Michael W. Tucker, Mayor of the City, testified that he assumed office on January 1, 2004. In April or May of 2006, according to Tucker, he asked the First Deputy Corporation Counsel to review the benefits paid to City employees. In response, Tucker was told that firefighters receiving GML §207-a benefits were also receiving health insurance paid for by the City,³ as well as longevity, and EMT pay. Tucker denied directly authorizing the additional benefits and payments made to injured firefighters. He further testified that he could not find any evidence that the additional benefits were authorized by any prior administration. When asked on cross-examination the point at which he became aware that Saraf and Foley were receiving health insurance, longevity and EMT pay, Tucker testified that he thought it was when he asked for a clarification of benefits paid to City employees. Tucker later admitted, however, that he was aware of the additional benefits in 2005.

²Morello's testimony was somewhat disjointed because Counsel for the City interrupted and/or raised objections approximately 20 times during direct examination where a total of approximately 35 questions were asked. In fact, Counsel for the City raised a total of approximately 60 objections during the course of Local 963's direct case or questions posed by the Local's counsel on cross-examination.

³There was no evidence introduced regarding the benefit packages of employees other than firefighters on GML §207-a status.

Richard P. Mullaney, the City Clerk/Budget Director since 1985, testified that he was not aware of any action taken by the Common Council authorizing additional payments and benefits to firefighters on GML §207-a status. When asked if he was aware that Saraf and Foley were not working, Mullaney testified that he knew “because Lockport is a small municipality, I know that they’re off; but not as a result of me signing the payroll. I know that they’re off because we’re a very small workforce; and I’m in a position to know who’s not working by virtue of my position.”⁴

Thomas J. Passuite, the Fire Chief for almost 13 years, testified that when a firefighter fills out an internal accident form, it is turned over to him along with supporting medical documentation. Passuite then generates Workers’ Compensation forms and submits the information to the administrator of the City’s self-insured plan. After it has been determined that a firefighter has suffered a compensable injury, Passuite notes in the departmental payroll that a firefighter is “on Workers’ Comp.”⁵ As to his knowledge of the additional benefits paid, Passuite was asked if he “was familiar with the situation with Mr. Foley and Mr. Saraf” to which he responded “yes”.⁶ During the course of Passuite’s direct examination, the parties stipulated that he did not have the authority to place firefighters on GML §207-a status.⁷ Passuite testified that he was unaware of any distinction between GML §207-a benefits and benefits paid under Workers’ Compensation until he received a handbook from the New York State Career Chiefs

⁴Transcript, p. 75.

⁵Transcript, p. 86.

⁶Transcript, p. 84.

⁷Transcript, p. 90.

Association some time in 2006.⁸

DISCUSSION

To establish the existence of a past practice that may not be unilaterally changed, a charging party must demonstrate that “the practice alleged was unequivocal, existed substantially unchanged for a significant period of time prior to the alleged unilateral change and was reasonably expected by bargaining unit members to continue unchanged.”⁹ Further, the practice must concern a mandatory subject of bargaining. Health insurance benefits, longevity and EMT pay are all a form of compensation and clearly terms and conditions of employment.¹⁰

Morello testified, without contradiction, that as far back as 1965 and at least from the point that he received GML §207-a benefits in 1996, firefighters suffering work related injuries were provided health insurance and received longevity and EMT pay. That the practice was open and notorious is evidenced by the fact that not one witness testified that they were unaware of the payment of additional benefits,¹¹ only that they either did not themselves authorize them or that they lacked knowledge that the payment of said benefits were authorized by an agent of the City or by the Common Council. Tucker provided evidence as to when he became aware of the fact that the

⁸See, transcript pp. 87 and 89.

⁹*County of Saratoga and Saratoga County Sheriff*, 37 PERB ¶¶3024, *affg* 37 PERB ¶¶4525 (2004).

¹⁰See *Bridge and Tunnel Officers Benevolent Assn*, 27 PERB ¶¶3076 (1994); *Town of Haverstraw v. Newman*, 75 AD2d 874 (2d Dept 1980), 13 PERB ¶¶7006.

¹¹*Town of Vestal*, 35 PERB ¶¶4600 (2002).

injured firefighters were receiving the at-issue additional benefits.¹² When first asked to identify the point in time that he learned that Foley and Saraf were receiving benefits while not working, Tucker testified that it was when he asked the Corporation Council to investigate the benefit package for City employees; April or May of 2006. He later testified, however, that he knew of the payment of the benefits in 2005. Tucker did not direct that the payments cease until June 20, 2006.

Relying upon Morello's unrefuted testimony, it appears that the practice of paying additional benefits to firefighters on GML §207-a status began as early as 1965, or at least from the time he was on GML §207-a status in 1996. Further, Tucker allowed it to continue after he assumed office for a period sufficient to establish a binding practice.¹³ On these facts it is clear that Tucker was aware of the practice, condoned or acquiesced thereto.¹⁴

Acquiescence or evidence that an activity has been condoned is established where an employer knows of and fails to act upon that knowledge for a period of time sufficient under the circumstances to establish a practice. The Board has frequently used the terms "condone or acquiesce", and with the exception of *County of Saratoga*

¹²As with Morello's testimony described earlier as disjointed, Counsel for the City interposed twenty seven objections and/or comments during the Mayor's cross examination. As a result there were frequent gaps between the question asked and the response given.

¹³*County of Nassau*, 24 PERB ¶¶3029, *affg* 24 PERB ¶¶4523 (1991), citing at note 3 to *City of Rochester*, 21 PERB ¶¶3045 (1988), *confd* 155 AD2d 1003, (4th Dept 1989), 22 PERB ¶¶7035 (period of 13 months sufficient under circumstances to establish exclusivity over certain work).

¹⁴*County of Saratoga and Saratoga County Sheriff*, 37 PERB ¶¶3024 (2004).

and Saratoga County Sheriff,¹⁵ it has more often been used when finding that the charging party has failed to establish employer knowledge.¹⁶ By clear implication, where an employer can be shown to have condoned or acquiesced in a practice, as here, approval or agreement to the existence of the practice is, therefore, established.

The City is thus found to have violated the Act when it unilaterally ceased the practice of paying firefighters on GML §207-a status, health insurance, longevity and EMT pay, unless its defenses are found to have merit.

The City argues that the alleged practice is not of unit-wide concern, but only limited to a subset of members, specifically those who are injured on the job. As Local 963 represents firefighters only and as all firefighters in the course of their work are exposed to the potential of suffering an on the job injury, the practice is clearly of unit wide concern. The City also argues that the alleged practice was not unequivocal as there is no record testimony that the City approved the additional benefits. On this record, approval has been established through Tucker's knowledge of the practice for a sufficient period of time prior to directing that the benefits cease.

Based upon the foregoing, I find that the City violated §209-a.1(d) of the Act when it ceased paying Firefighters Saraf and Foley benefits in addition to those paid under GML §207-a.

THEREFORE, the City is hereby ordered to:

1. Cease and desist from unilaterally stopping the payment of health

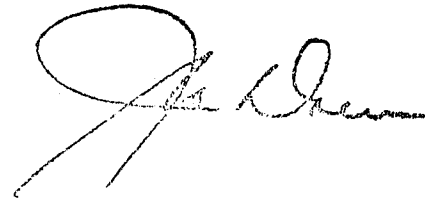
¹⁵*Id.*

¹⁶See *County of Nassau*, 38 PERB ¶¶3005 (2005); *County of Nassau*, 37 PERB ¶¶3014 (2004); *Sherburne-Earlville Cent Sch Dist*, 36 PERB ¶¶3011 (2003).

insurance benefits, longevity and EMT pay to those firefighters on GML §207-a status;

2. Make whole the affected firefighters for any losses incurred by the unilateral change in the payment of benefits with interest at the maximum legal rate; and
3. Sign and post the attached notice at all locations customarily used to post notices to unit employees.

Dated at Buffalo, New York,
this 19th day of June, 2007

A handwritten signature in black ink, appearing to read 'Jean Doerr', written over a horizontal line.

Jean Doerr
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the City of the City of Lockport represented by the Lockport Professional Firefighters Association, Local 963, AFL-CIO, that the City of Lockport will:

1. Not stop the payment of health insurance benefits, longevity and EMT pay to those firefighters on GML §207-a status; and will
2. Make whole the affected firefighters for any losses incurred by the unilateral change in the payment of benefits, with interest at the maximum legal rate.

Dated

By
(Representative) (Title)

City of Lockport
.....

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.