

H.E. No. 2013-7

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

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2008-339

FRATERNAL ORDER OF POLICE,  
NEWARK LODGE NO. 12,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the City of Newark violated the New Jersey Employer-Employee Relations Act by refusing to provide FOP Lodge No. 12 with certain sick leave records of unit employees the FOP needed to process the grievances of other unit members. The Hearing Examiner found that HIPAA did not restrict the City from providing the requested information.

The Hearing Examiner recommends that the City is not required to provide the same information for City employees not included in the FOP's unit.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Charging Party.

Appearances:

For the Respondent,  
Anna P. Pereira, Corporation Counsel  
(Alison Brown-Jones, Assistant Corporation Counsel,  
of counsel)

For the Charging Party,  
Markowitz and Richman, attorneys  
(Matthew D. Areman, of counsel)

**HEARING EXAMINER'S REPORT**  
**AND RECOMMENDED DECISION**

On May 6, 2008, the Fraternal Order of Police, Newark Lodge No. 12 (FOP) filed an unfair practice charge against the City of Newark (City). The charge alleges that in or around March, 2008, the City violated 5.4a(1) and (5)<sup>1/</sup> of the New Jersey

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<sup>1/</sup> These provisions 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; and (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  
(continued...)"

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), when it failed to respond completely or timely to numerous information requests made with regard to the processing of grievances.

On October 7, 2008, a Complaint and Notice of Hearing issued (Exhibit C-1).<sup>2/</sup> On October 13, 2008, the City filed its Answer (Exhibit C-2). The City admits that the FOP made numerous requests for information, noting that it supplied some and denying that all of the requested information was needed to process and/or evaluate specific grievances. The City contends that some information was unavailable; some was unrelated to particular grievances; and that some could not be provided because of protections in the Health Insurance Portability and Accountability Act (HIPAA). The City also denies that it failed to provide information in a timely manner. The City argues that arbitrators, not the Commission, have the jurisdiction to grant relief for an alleged failure to provide documents in an arbitration proceeding.

On December 31, 2008, the City filed a motion for summary judgment seeking to dismiss the complaint. The City also filed a request for a stay of the scheduled hearing, which was granted on

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<sup>1/</sup> (...continued)  
refusing to process grievances presented by the majority representative."

<sup>2/</sup> Exhibits are marked respectively "C", "CP" and "R" for Commission, Charging Parties and Respondent. Transcript references to the hearing are "T-".

January 2, 2009.<sup>3/</sup> On January 20, 2009, the FOP filed a response to the City's summary judgment motion, and a cross-motion for summary judgment in support of the Complaint. Each party filed additional submissions in support of their motions.

On August 13, 2009, the Commission issued a decision, City of Newark, P.E.R.C. No. 2010-11, 35 NJPER 298 (¶104 2009), granting the FOP's cross-motion as to two of its requests, but denied the City's motion and the remainder of the FOP's cross-motion. On February 3, 2011, the parties resolved several aspects of the charge.

The remaining issues for this proceeding concern four grievances with a similar issue, and four similarly-related FOP information requests. Each grievance (grievance Nos. 08-05; 08-06; 08-15; and 06-41) concerns the counseling of a unit member for sick leave use. The FOP alleges that the subject officers improperly received sick time counseling on February 8, 2008. In each case, the FOP requested information which would permit comparisons of the grievants' sick leave with similarly situated employees. The FOP specifically seeks: 1) the sick and injured leave records and counseling notices of the grievants; and 2) the sick and injured leave records and counseling notices of all police officers and all superior officers in the same precinct or work unit as the grievant(s). The City provided the requested

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<sup>3/</sup> The FOP did not object to the request for a stay of the hearing.

information for the grievants, but did not provide the requested comparative information.

The FOP asserts that the requested information is necessary to determine if the officers were treated in a discriminatory or unfair manner. The City asserts that the comparative information is irrelevant and unnecessary, and confidential under HIPAA.

In City of Newark, the Commission explained that the FOP is seeking comparative information that would list an officer's past and present medical conditions and describe the medical care they received. The Commission also noted the FOP's contention that redacted copies of medical records would be of no value. Id., 35 NJPER at 299.

The Commission in City of Newark denied the FOP's motion.

It held:

Without more information about why individually identifiable health information is potentially relevant, we are unable to balance the FOP's need for the information against any interests the City and employees may have in maintaining the confidentiality of sensitive health information. See Detroit Edison Co. v. N.L.R.B., 440 U.S. 301, 314-320 (1979); Johns-Manville Sales Corp., 252 NLRB 368 (1980). There may also be privacy concerns triggered by the HIPAA Privacy Rule or the ADA. We note that in City of Trenton, P.E.R.C. No. 2005-20, 30 NJPER 413 (¶135 2004), we found that the employer was not a "covered entity" subject to HIPAA. However, the City claims that it is a covered entity, citing Michelson v. Laddie Wyatt and the City of Plainfield, 379 N.J. Super. 611, 623 (App. Div. 2005), a case that suggests that an employer may be a covered entity when it receives protected health information from

another covered entity. The record does not contain information about how the information in the sick and injured leave records is gathered or whether that information is contained in personnel or employment files, or in separate medical files. Information about how these records are created and kept may be important in determining, among other things, whether the requested comparative information could be considered protected health information under the HIPAA Privacy Rule, or subject to the exclusion for "employment records held by a covered entity in its role as employer." 45 C.F.R. 160.103. [35 NJPER at 299]

This case proceeded to hearing ostensibly to give the FOP the opportunity to produce the information the Commission said was needed to decide whether the FOP's request to the City can be enforced.

After several mutual adjournment requests were granted to give the parties time to develop stipulated facts and prepare joint exhibits, a hearing was held on March 31, 2011, at which the parties examined witnesses and presented exhibits. The briefing schedule was extended due to late receipt of the transcript and due to the parties settlement efforts. Briefs and a reply brief were filed by July 1, 2011. On August 31, 2012, this case was reassigned to me for a decision. Based on the record, I make the following:

#### **FINDINGS OF FACT**

The parties stipulated to the following facts contained in Exhibit J-1.

1. The City of Newark is a public employer within the meaning of the New Jersey Employer-Employee Relations Act ("Act").

2. The Fraternal Order of Police, Lodge No. 12 (the "FOP") is a labor organization representing police officers employed by the City of Newark Police Department ("NPD") for purposes of collective bargaining within the Act, and since October 18, 1994, has been certified as the exclusive representative of all non-supervisory police officers in the Newark Police Department.

3. The FOP's bargaining unit consists of approximately one thousand ten (1,010) police officers.

4. The City and the FOP entered into a collective negotiations agreement ("CNA") covering the period January 1, 2003 through December 31, 2004. Exhibit "A."<sup>4/</sup>

5. On February 1, 2007, a Memorandum of Agreement ("MOA") was entered into between the parties concerning certain issues within the CNA. The MOA, which was still in effect as of the filing of the within Charge in this matter, maintained the terms and conditions of the CNA and incorporated several new and amended provisions. Exhibit "B."

6. The City and the FOP settled a separate unfair practice charge, docketed as CO-2008-008, which they memorialized in a

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<sup>4/</sup> The stipulations (J-1) contained attached Exhibits "A" through "Q." Those Exhibits are not attached to this decision or repeated in the above findings but are included in the record in this case.

Memorandum of Agreement dated December 20, 2007. Exhibit "C." This agreement addressed the City's processing of the FOP's relevant requests for information and required the FOP to set reasonable deadlines for the City to provide information in response to such requests.

7. On or about February 8, 2008, the FOP filed a grievance and requested documents in connection with Grievance No. 08-05 involving Police Officer Nicole Ash Bey-Sattaur ("Bey-Sattaur"), who was assigned to NPD's Fifth Precinct.<sup>5/</sup> Exhibit "D." Specifically, the FOP requested "[t]he Sick & Injured Leave Records of all police officers and superior officers assigned to the Fifth Precinct," as well as "[a]ll sick time counseling forms issued to members of the Fifth Precinct in the past twelve months."

8. By letter dated March 31, 2008, the City provided the Sick and Injured Leave Record for Bey-Sattaur. Exhibit "E." The City informed the FOP that the portion of its request for the Sick Records for all officers assigned to the Fifth Precinct was irrelevant and not necessary for the FOP in order to carry out its obligation to represent the grievant at issue, namely Bey-Sattaur.

9. On or about February 8, 2008, the FOP filed a grievance and requested documents from Captain Coley in connection with

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<sup>5/</sup> A few of the requests were erroneously dated February 2007, instead of February 2008.



Grievance No. 08-06 involving Police Officer Aisha Carroll ("Carroll"), who was assigned to NPD's Fifth Precinct. Exhibit "F." Specifically, the FOP requested "[t]he Sick & Injured Leave Records of all police officers and superior officers assigned to the Fifth Precinct" as well as "[a]ll sick time counseling forms issued to members of the Fifth Precinct in the past twelve months."

10. By letter dated March 31, 2008, the City provided the Sick and Injured Leave Record for Carroll and informed the FOP that the requested documents pertaining to all officers assigned to the Fifth Precinct would not be provided as they were unrelated to Carroll and the grievance at issue. Exhibit "G."

11. On or about February 8, 2008, the FOP requested documents concerning Grievance No. 06-41 involving Police Officer Joseph Darocha ("Darocha"), who was assigned to the NPD's Fourth Precinct. Exhibit "H." Specifically, the FOP requested the following:

1. An up to date Sick & Injured Leave Record for Police Officer Joseph Darocha;
2. Department Sick & Injured Leave Records for all police officers and superior officers assigned to the 4th Precinct;
3. Any department Sick Time Counseling form issued within the 4th Precinct within the past 12 months; and
4. Any other department investigation or record that the department intends to rely on at the arbitration hearing.

12. By letter dated March 31, 2008, the City provided the Sick and Injured Leave Record for Darocha and again informed the FOP that the balance of the requested documents would not be provided as they were unrelated to Darocha and the grievance at issue. Exhibit "I."

13. In separate correspondence dated February 15, 2008, the FOP requested information regarding the City's decisions to order officers to have medical evaluations, including "the identity of the individual who makes the determination as to which department personnel are required to have these evaluations, and the criteria used in the selection process for department ordered medical evaluations." Therein, the FOP also requested disclosure of the names of officers who have been sent by the City for medical evaluations, as well as information regarding those evaluations.

14. In response to that request, by letter dated April 4, 2008, Counsel for the City, Stefani C. Schwartz, Esq. ("Schwartz"), advised the FOP that she was representing the City, and that a response to the February 15, 2008 request would be forthcoming in short order. Exhibit "J."

15. By letter dated April 16, 2008, Schwartz advised the FOP that Captain Ronald Kinder of the NPD's Medical Services Unit determines which officers will be required to undergo evaluations, based upon a variety of factors, including: (1) his own review and analysis of the individual's records; and (2) the

recommendations from the Police Director, Police Chief, Trial Board, or other Superior Officers with interests in the officers returning to duty. Exhibit "K."

16. By letter dated April 30, 2008, the FOP, through its attorneys, advised the City of the FOP's position that the information sought did not implicate HIPAA, and identified additional information which the FOP contended was not provided. See Exhibit "L."

17. On or about February 22, 2008, the FOP filed a grievance and requested from Captain Gregory Meehan of the COMPSTAT Unit of the NPD, documents in connection with Grievance No. 08-15 involving Detective Virginia Marrero ("Marrero"), who was assigned to COMPSTAT Unit. Exhibit "M."

18. By letter dated March 12, 2008, the City provided records in response to the request in connection with Grievance No. 08-15. Exhibit "N."

19. On or about February 25, 2008, the FOP requested documents from Police Director Garry F. McCarthy in connection with Grievance No. 07-38, involving Police Officer Michael Walski ("Walski"), including his "DPI 146," or Transfer Record. Exhibit "O."

20. A DPI 146, or Transfer Record, provides certain information regarding a police officer's assignments. See Exhibit "P."

21. Pursuant to the FOP's request, on May 29, 2008 the City provided the requested Transfer Records for Walski, as well as the Investigation under IOP 07-093/CAP 07-064 relative to the subject of the grievance. Exhibit "Q."

22. The City did not provide the Transfer Records for Captain Richard Cuccolo, who is not a bargaining unit member of the FOP.

23. Pursuant to NPD policy, police officers are entitled to review their own records at their commands, upon request.

24. On or about April 30, 2008, the FOP filed the within Charge with the Public Employment Relations Commission alleging that the City violated the Act by providing limited responses to the FOP's requests for information.<sup>6/</sup>

The following facts were adduced at hearing on March 31, 2011.

25. A sick time counseling begins when a superior officer gives a police officer a counseling form (Exhibit CP-2) and tells the officer he/she is being counseled due to their sick leave record. Management is generally looking for a pattern of time off that may be evidence of sick leave abuse. Sick time counseling is not discipline, but it is an arbitrable matter (T20-T21; Exhibit CP-1). The counseling form, CP-2, explains the reason for the counseling and includes the corrective action

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<sup>6/</sup> The FOP has since withdrawn the aspects of the charge related to Grievance No. 08-15.

taken. A completed sick or injured leave record form (exhibit CP-3) sets forth the nature of any sickness or injury, relative dates and other information.

26. The FOP grieved the Bey-Sattaur, Carroll, Darocha and Marrero counselings because it believed those employees were treated differently than other officers in their command with worse sick leave records (T21-T22). Without receiving the requested documents, the FOP believes it would be impossible to discern if the grievants had legitimate grievances. The FOP asked for the information from superior officers because they have the same leave policy (T21-T22).

27. In a prior grievance, the FOP used the sick leave records of other employees in the same command as the grievant to show that the other employees had worse sick records than the grievant who was counseled (T30). In a 2006 arbitration concerning employee Torres (exhibit CP-4), the FOP used the Sick or Injured Leave Record (DPI-1695) of two police officers (whose names were redacted for this hearing (T35-T36)) to show that those officers had worse leave records than Torres. The arbitrator determined that Torres was treated disparately and should not have been counseled (T31).

In a 2002 arbitration hearing concerning employee Eames (exhibit CP-5), the FOP used the sick leave records of other officers to demonstrate disparate treatment. The arbitrator in that matter sustained the grievance (T32-T33).

28. In both the Bay-Sattaur (08-05) and Carroll (08-06) grievances, the City provided the sick leave records and counseling forms for the respective grievants but did not provide information about other officers in their commands. For the Marrero (08-15) grievance, the City provided the requested information; specifically, the sick leave records of other police officers in Marrero's unit, which included the "Sick or Injured Leave Record" form, and "Individual Absentee Record Profile" forms (one page showing the calendars for each month of a given year) for many employees, but not the sick leave records of superior officers in that unit (exhibit CP-6). The other officer records in CP-6 were not redacted by the City but were redacted when admitted into evidence in this hearing (T35-T36). The City did not raise any confidentiality or sensitivity concerns about the information provided in CP-6, and did not explain why it thought that information was irrelevant for Bay-Sattaur, Carroll and Daricga, but appropriate for Marrero even though the same City official responded to the request in those grievances (T34-T37).

29. The process of an officer calling off sick is known as "booking-off sick." The officer calls the desk lieutenant who records the call: (i.e., the sick information, time and date) in the blotter at the information/referral desk. The blotter is open and available to the superior officers who work the desk. In addition to the blotter, the lieutenant completes a white card

and blue card for the employee (exhibits CP-7 and CP-8, respectively) recording the sick or injury. The white card is immediately sent to medical services. The blue card goes to medical services when the "book-off" is over (T38-T41). The information on the white and blue cards is provided by the affected employee, not a doctor, including the nature of the sickness (T55-T58).

30. The security referral desk is located at 22 Franklin Street in Newark, which is the main repository for any officer booking-off, or booking back into work (T42). According to Article IX of the City's Sick Leave Policy and Procedures (exhibit J-3), the precinct commanding officer, and superior officers working the desk are responsible for monitoring and reviewing the use of sick time by officers. Consequently, the precinct commanding officers have access to all the sick/injured records of officers in the precinct (T42-T43; exhibit J-3, p. 14).

General Order 80-1 (exhibit J-4), concerns command and supervisory responsibilities which include maintaining sick leave records, and it lists the extensive responsibilities desk lieutenants have to maintain officer sick leave information (T41-T47; J-4).

31. The white and blue sick leave cards are sometimes inaccurately or not thoroughly completed. Police Chief memorandum number 80-240 issued in August 1980 (exhibit J-5) and

still in effect, requires all commands, particularly desk lieutenants, to review the cards for accuracy and make sure the cards briefly describe the medical reason for the absence (T47-T48).

Police Director's memorandum 82-204 from September 1983 (Exhibit J-6), concerns "Sick Leave Policy and Control," and includes a sick leave monitoring procedure for booking-off and use of the sick and injured cards. Police Chief memorandum No. 01-1254 from October 2001 (exhibit J-7) requires commanders to confirm that certain an entry is made in the desk blotter and in the phone log when personnel book-off. Police Chief memorandum No. 02-396 from April 2002 (exhibit J-8), requires that all correspondence and medical evaluations for employees on extended sick or injured leave be sent to the officer's command before being sent to Medical Services.

32. Exhibit CP-9 is a photograph showing the easy availability of the desk blotter and the folders containing the sick cards at the front desk in the third precinct (T59-T60). The sick information entered in the blotter must also be entered in the sick leave cards, and entered into an officer's personal sick time record which is usually not located at the desk. Therefore, the card is taken to where the officer's personal records are kept (T61-T62).

Exhibit CP-10 is a photograph of the sick book log kept in the third precinct. It includes the type of sickness (i.e.,



cold, stomach virus, fever, back pain) the officer complained of when booking-off (T63-T64).

Exhibit CP-11 is a photograph of the open desk log book and the white sick cards in the third precinct showing the officer's name and type of sickness that was the reason for booking-off (T65-T66).

Exhibit CP-12 is a photograph of the desk blotter showing the officer's name and medical reason for booking-off. Police officers work the desk where the blotter is kept and the blotter information is readily available to anyone at the desk (T66-T68).

#### ANALYSIS

The Commission has held that an employer's refusal to provide a majority representative with information relevant to contract administration - which includes grievance processing - is a refusal to negotiate in good faith. UMDNJ, P.E.R.C. No. 93-114, 19 NJPER 342 (¶24155 1993); New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 89-127, 15 NJPER 340 (¶20150 1989); State of New Jersey, P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987), recon. den. P.E.R.C. No. 88-45, 13 NJPER 841 (¶18323 1987), aff'd. NJPER Supp.2d 198 (¶177 App. Div. 1988).

Relying upon its decision in Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235, 236 (¶12105 1981), the Commission in City of Newark held that an employer must supply information to a majority representative if there is a probability that the

desired information is relevant and will be useful to the union in carrying out its responsibilities. Id., 35 NJPER at 299.

The Commission in City of Newark also held:

Relevance in this context is determined under a discovery-type standard, not a trial-type standard. State of New Jersey, P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987), recon. den. P.E.R.C. No. 88-45, 13 NJPER 841 (¶18323 1987), relying on NLRB v. Acme Industrial Co., 385 U.S. 432, 437 (1067). Thus "a broad range of potentially useful information should be allowed the union for the purpose of effectuating the bargaining process." Shrewsbury Bd. of Ed., quoting Proctor & Gamble Manufacturing Co. v. NLRB, 603 F.2d 1310, 1315 (8th Cir. 1979). All the circumstances of a case are considered in deciding the extent of an employer's duty to supply information, including an employee's privacy interest, the union's need for the information, and the employer's business reasons for not supplying the requested information. Morris Cty. v. Morris Council No. 6, 371 N.J. Super. 246 (App. Div 2004).

Employers have a duty to respond to relevant requests for information in a timely manner or to adequately explain why the information will not be furnished. Regency Service Carts, Inc and Shopmen's Local Union No. 455, 345 NLRB 671, 673 (2005).<sup>7/</sup> An unfair practice may occur if an employer does not provide the requested information "reasonably" promptly. NLRB v. John S. Swift Co., 277 F.2d 641, 645 (7th Cir. 1960). While a per se rule cannot be defined, a good faith effort on the part of the employer is expected in responding to an information request as promptly as circumstances allow, considering the extent of the information

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<sup>7/</sup> It is appropriate to refer to the experience under the federal Labor-Management Relations Act, 29 U.S.C. 141 et seq., for guidance. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Educational Secretaries, 78 N.J. 1, 9 (1978).

sought, the availability of the information, and any difficulty in retrieving it. West Penn Power Co., 339 NLRB 585, 587 (2003), enf'd in part. part 394 F.3d 233 (4th Cir. 2005). [35 NJPER 299]

A public employer is generally not required to produce documents considered confidential, but the employer must prove their confidentiality. State of New Jersey, P.E.R.C. No. 2000-105, 26 NJPER 306, 307 (¶31124 2000); State of New Jersey, P.E.R.C. No. 97-32, 22 NJPER 372 (¶27196 1996) (investigative report was confidential).

Although the Commission in City of Newark apparently believed that the FOP in this case was seeking information that would list an officer's past and present medical conditions and describe the medical care they received, it appears from the record that the FOP is only seeking - in addition to the counseling forms of other employees - the same sickness or injury information reported by employees to desk officers when they are booking-off sick. That information is a one or two word description of the sickness or injury, such as; back pain, sore throat, toothache, vomiting, eye infection and chest cold. These brief descriptions are recorded in the desk blotter, log book, the white and blue sick leave cards, and is the same information entered on the employee's "Sick or Injured Leave Record" form. That completed form does not provide medical information, doctor notes or diagnoses.

The City provided the FOP with unredacted Sick or Injured Leave Record forms for a number of employees for the Torres grievance (CP-4). The FOP seeks that same information here. Apparently, these forms are kept in employee personnel files, but no facts suggest that they are also kept in medical files.

The City argues in its post-hearing brief that it has complied with all of the FOP information requests it can legally fulfill. It contends the FOP's broad-based requests for documents concerning employees other than the grievants are neither relevant nor necessary for the FOP to represent the grievants. It chiefly argues that the FOP is seeking confidential medical information from other officers which it believes is protected by HIPAA. For that reason, the City seeks dismissal of the Complaint.

Relying on the facts presented and Commission case law, the FOP argues it is entitled to the information sought because it is relevant to the processing of the four grievances. It asserts that the information sought is necessary to evaluate the merits of the grievances; that the City has provided the information in previous grievances; that the information is unsecured and readily accessible to officers in the various precincts and units and not held confidentially; that the HIPAA requirements do not apply to the City; that the information it requests is not "protected health information" covered by HIPAA; and that the

City has already provided the same requested information for the Marrero grievance but denied for the other grievances.

The FOP, relying in part on the City of Trenton, P.E.R.C. No. 2005-20, 30 NJPER 413 (¶135 2004), argues that the City in this case is not a covered entity under HIPAA. In Trenton, the Commission explained that HIPAA regulates health care providers, health plans and health care clearinghouses to protect identifiable health information maintained by a covered entity in its health care capacity. The Commission cautioned:

When an individual gives his or her medical information to a covered entity as the employer, such as when submitting a doctor's statement to document sick leave, that medical information becomes part of an employment record. As such, that information is not protected by HIPAA. [30 NJPER at 416]

Considering the facts, arguments and case law, I find that the FOP is entitled to two sets of documents. They are:

- 1) sick or injured leave records, and
- 2) counseling forms

for unit police officers in the fourth and fifth precincts for the twelve month period prior to the filing of the Bey-Sattaur, Carroll and Darocha grievances. The City has apparently provided that information in the Marrero grievance involving the Compstat unit (CP-6).

The City's argument that this information is neither relevant nor necessary for the FOP's processing of those grievances lacks merit. Both the Torres and Eames arbitrations,

exhibits CP-4 and CP-5, respectively, show the value of that information in processing a grievance over whether an employee should have been counseled. If the FOP had proceeded without the requested information those grievances would likely have not been sustained. The FOP is just as entitled in these four grievances to review the related information to determine their viability as it was for Torres and Eames grievances.

The argument that the requested information is confidential and should not be provided to the FOP is belied by the fact that it is not recorded, handled or stored in a confidential manner; that it is easily accessible from a variety of records; and that it has been provided - unredacted - in the past. The City's primary objection - that the information is protected by HIPAA - is not persuasive for the reason that the Commission cited in City of Trenton, i.e., that the City is not a covered entity under these facts and the information itself is not at the level of identifiable health information covered by HIPAA. Nor can I reconcile the City's objection with the fact that it provided the disputed information in the Marrero grievance. It has not proffered a plausible explanation for the discrepancy. One might infer that the City's objection in the other grievances was motivated by other reasons.

Although the FOP is entitled to the requested information from other officers in its unit, I do not recommend that the City is required to provide the same information for superior officers

or other City employees outside the FOP's unit. Without substantial evidence showing why superior officer sick leave records are particularly necessary to process these grievances, I am concerned that FOP's efforts in that regard is beyond its legal entitlement and burdensome to the City.

Conclusions of Law

1. The City violated 5.4a(5) and (1) of the Act by failing to provide the FOP with certain sick-injury leave information from its unit members in precincts four and five relative to grievances 08-05; 08-06; and 06-41.

2. The City did not violate the Act by failing or refusing to provide the FOP with the requested information from superior officers or anyone outside the FOP's unit.

Recommendations

I recommend that the Commission ORDER:

A. That the City 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 refusing to provide the FOP with certain sick leave information it needed regarding the processing of three grievances.

2. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment, particularly by refusing to

provide the FOP with certain sick leave information it needed regarding the processing of three grievances.

B. That the Respondent take the following affirmative action:

1. Provide the FOP with the following documents:
  - a. Sick or Injured Leave Records
  - b. Counseling Forms

for police officers in the FOP unit in the fourth and fifth precincts for the twelve month period prior to the filing of grievances 08-05, 08-06 and 06-41.<sup>8/</sup>

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix A. Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and 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.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

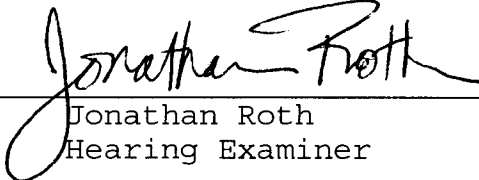
C. That the Complaint be dismissed to the extent that it alleges the City violated the Act by not providing the requested

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<sup>8/</sup> This Recommendation would have included the same information for grievance 08-15 but the City appears to have already provided the information for that grievance.



information for superior officers or other employees not included in the FOP's unit.

  
Jonathan Roth  
Hearing Examiner

DATED: October 3, 2012  
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by October 15, 2012.



# NOTICE TO 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 the rights guaranteed to them by the Act, particularly by refusing to provide the FOP with certain sick leave information it needed regarding the processing of three grievances.

**WE WILL** cease and desist from refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment, particularly by refusing to provide the FOP with certain sick leave information it needed regarding the processing of three grievances.

**WE WILL** provide the FOP with the following documents: a. Sick or Injured Leave Records; and b. Counseling Forms for police officers in the FOP unit in the fourth and fifth precincts for the twelve month period prior to the filing of grievances 08-05, 08-06 and 06-41.

Docket No. CO-2008-339

City of Newark  
(Public Employer)

Date: \_\_\_\_\_

By: \_\_\_\_\_

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 Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372