H.E. NO. 2015-002

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

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Respondent,

-and- Docket No. CO-2010-343

POLICE BENEVOLENT ASSOCIATION
LOCAL 105,

Charging Party,

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Respondent,

-and- Docket No. CO-2010-360

NEW JERSEY LAW ENFORCEMENT
SUPERVISORS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission denies the State's motion for summary judgment and also the cross-motions for summary judgment filed by the charging parties. The Hearing Examiner determined that the impact of sick leave verification procedures and associated discipline have been considered mandatorily negotiable. The undisputed facts do not fully explain whether there was a past practice regarding the application of sick leave policy, and, whether, given all of the circumstances, the State acted reasonably within its managerial prerogative to verify sick leave. Material facts are still at issue and the Hearing Examiner cannot rule, as matter of law, that any of the parties are entitled to a dismissal of the charges.

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SUPERVISORS ASSOCIATION,

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Appearances:

For the Respondent,
John Jay Hoffman, Acting Attorney General
(Lisa Ruch, Deputy Attorney General)

For the Police Benevolent Association Local 105,
Zazzalii, Fagella, Nowak, Kleinbaum and Friedman,
attorneys
(Colin Lynch, of counsel)

For New Jersey Law Enforcement Supervisors Association
Pellettieri, Rabstein and Altman, attorneys
(Frank M. Crivelli, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

On March 5, and 29, 2010, respectively, Police Benevolent Association, Local 105 (PBA) filed an unfair practice charge and an amended charge with the Commission against the State of New Jersey, Department of Corrections (State or DOC). On March 29, 2010, the New Jersey Law Enforcement Supervisors' Association (NJLESA) also filed an unfair practice charge against the State of New Jersey, Department of Corrections (State or DOC). Charging Parties allege that DOC violated subsections 5.4a(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) in February 2010. During that month there were three snow storms during which the State declared emergencies and closed its offices and facilities. The Charging Parties allege that the State violated the Act by unilaterally imposing new sick leave verification procedures and disciplining several hundred unit members, after the members called in sick

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1/ 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. (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."

during two of the storms but did not produce doctors' notes verifying their illnesses. The employees at issue are corrections officers and corrections sergeants who are "essential" and thus required to work during emergency storm closures. The charges allege the State's actions - requiring medical certifications of illness of all officers who called out sick and imposing disciplinary fines on those who failed to produce them - were prohibited by their collective negotiation agreements, the State's policies incorporated into the collective negotiations agreements, past practices, and civil service regulations.

DOC denies having violated the Act and asserts that it acted within its managerial prerogative and within civil service statutes and rules, which permit it to require doctor's notes certifying illness when it suspects sick leave abuse and the imposition of fines as discipline. Alternately, the State asserts that this dispute should be deferred to grievance arbitration and/or the decisions of the Civil Service Commission, as it does not implicate the policies of the Act.

On June 28, 2012, the Director of Unfair Practices issued a Complaint and Notice of Hearing, and an Order consolidating the charges. The Charging Parties applied for interim relief, along with their charges. On August 20, 2010, a Commission designee denied the applications, finding the harm economic in nature and

not irreparable (I.R. No. 2011-013, 36 NJPER 333 (¶130 2010). On August 13, 2012, the DOC filed a motion to dismiss, challenging the Director's issuance of a complaint; by September 6, 2013, Charging Parties filed responses. On October 7, 2013, I denied the State's motion.

On August 3, 2012, the State filed an Answer.

On November 21, 2013, the State filed a Motion for Summary Judgment together with the certification of Kenneth Green, Director of the Office of Employee Relations in DOC, twenty-one (21) joint exhibits, and a letter brief. On November 22, 2013, PBA Local 105 filed a Cross-Motion for Summary Judgment with the aforementioned joint exhibits and a letter brief.[2/] On November 22, 2013, NJLESA filed a Cross- Motion for Summary Judgment, together with a memorandum of law and the certifications of NJLESA Attorney Frank Crivelli, Esq., and NJLESA President Eric Holliday, and exhibits A through J. By December 11, 2013, the State filed a statement opposing the Union's Motions and the Unions filed statements opposing the State's Motion. On February 26, 2014, the Commission referred the Cross-Motions to me.

* * * * * * *

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter

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2/ The State and PBA Local 105 Joint exhibits are referred to as J-1 through J-22.

of law. In considering a motion for summary judgment, all inferences are drawn against the moving party and in favor of the party opposing the motion. No credibility determinations may be made, and the motion must be denied if material factual issues exist. N.J.A.C. 19:14-4.8(e); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 73-75 (1954). The summary judgment motion is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div 1981); UMDNJ, P.E.R.C. No. 2006-051, 32 NJPER 12 (¶6 2006).

Applying these standards and relying on the parties' submissions, I make the following undisputed:

FINDINGS OF FACT

1. PBA Local 105 is the majority representative of all corrections officers employed by the DOC. At the time of the events leading to this unfair practice charge, the State and PBA Local 105 were parties to a collective negotiations agreement effective from July 1, 2007 through June 30, 2011 (J-4). NJLESA is the majority representative of approximately 6,000 corrections sergeants employed by the DOC. At the time of the events leading to this unfair practice charge, the State and NJLESA were parties to a collective negotiations agreement effective from July 1, 2007 through June 30, 2011 (Exhibit I).

Relevant Contractual Provisions and Policies

2. Both Charging Parties' collective negotiation agreements contain similar maintenance of benefits articles. J-4, Article XLIII B provides, in relevant part:

> Other substantial benefits, not within the meaning of paragraph A above, currently enjoyed by an employee or group of employees which are not in contradiction to current State policy and which are not in contradiction with other provisions of this Agreement shall remain in effect during the term of this Agreement and the continuation of the employee in his present assignment, provided that the continuance of such substantial benefit is not unreasonable under all of the circumstances and provided that if the State changes or intends to make changes which have the effect of substantial modification or elimination of such substantial benefits, the State will notify PBA Local 105 and, if requested by PBA Local 105 within ten (10) days of such notice or within ten (10) days of the date on which the change would reasonably have become known to the employees affected, the State shall within twenty (20) days of such request enter negotiations with PBA Local 105 on the matter involved providing the matter is within the scope of issues which are mandatorily negotiable under the Employee-Employer Relations Act as amended [J-4].

NJLESA's agreement has a substantially similar provision at Exhibit I, Article XL B. "Maintenance of Benefits".

3. NJLESA's agreement also provides at Article XX "Sick Leave",

> B. . . In addition, when the duration of the employee's absence is three or more consecutive work days, the employee shall be required to substantiate

> the basis for the sick leave by providing a personal physician's certificate, which must be provided to management within three days following the employee's return to work, not including the employee's regular days off.

Human Resources Bulletin, 84-17 Disciplinary Action Policy

4. The DOC's Human Resources Bulletin, 84-17 Disciplinary Action Policy (J-3 or HRB 84-17) sets forth the department's progressive discipline policy, including a schedule of offenses, and the associated penalties/disciplinary actions.

5. HRB 84-17 provides, in relevant part,

> This bulletin delineates the Department's policy regarding types of offenses and penalties for both minor and major disciplinary actions. The purpose of this policy is to foster progressive discipline, with an increasing range of penalties for a specific type of offense.
>
> The penalty imposed must be within the range of sanctions set forth in this bulletin for the particular type of offense, unless consideration of mitigating or aggravating factors would cause it to be deemed inappropriate. Mitigating or aggravating factors that may be considered are length of service, total employment record and/or other legitimate circumstances.
>
> In any disciplinary matter, reference must always be made to the collective bargaining agreement covering the disciplined employees, relevant Department of Personnel Rules, appropriate Department bulletins and memoranda, the Handbook of Information and Rules for New Jersey Department of Corrections, and/or the Law Enforcement Personnel Rules and Regulations.

6. Under HRB 84-17, Table of Offenses and Penalties, paragraph A(1) defines attendance offenses and prescribes the penalty for each successive infraction. Unsatisfactory attendance includes

absence from work as scheduled without permission and/or without giving proper notice of intended absence; chronic or excessive absenteeism, failure to follow call off or call-on procedures, and abuse of sick leave (J-3). For the first infraction the penalty is an official written reprimand, for the second, a 3-day suspension, for the third, a 5-day suspension, for the fourth, a 15-day suspension and removal for the fifth attendance infraction. Attendance offenses also include violation of the Attendance Verification Policy - for Essential Personnel. The prescribed penalty for the first infraction is an official written reprimand, for the second, a 5-day suspension, for the third a 15-day suspension and removal for the fourth infraction. In this section, there is no reference to the imposition of fines.

7. "General offenses," paragraph E(1), specifies that a violation of a rule, regulation, policy, procedure, order or administrative decision is an offense for which the penalties range from official written reprimand to removal for the first infraction, 5-day suspension to removal for the second infraction and removal for the third infraction. There is no reference to the imposition of fines for this type of infraction.

8. Abuse of sick leave is defined as sick leave for any purpose not provided by Civil Service regulation N.J.A.C. 4A:6-1.3(g): inability to work because of personal illness, accident, exposure

to contagious disease, care of a seriously ill member of the immediate family for a reasonable period of time or for short periods of time due to death in the immediate family.

9. Note 14 of J-3, NJLESA'a agreement, provides that: "To insure that sick leave privileges are not misused, the following shall constitute the sick leave verification procedure for essential services employees who *utilize more than five sick days in a calendar year. . . .*"

The Events of February 2010

10. The DOC is responsible for the care and custody of over 21,500 inmates, 24 hours a day, 7 days a week. There must always be a requisite number of employees on duty to ensure the safety and security of operations. The employees in PBA Local 105's and NJLESA's negotiations units are essential employees.

11. On the weekend of February 6 and 7, 2010, New Jersey experienced a major snowstorm. The DOC reviewed the sick leave call-out information for that weekend and discovered an unusually high amount of sick leave that resulted in overtime expenditures of several hundred thousand dollars. The DOC believed sick leave had been abused.

12. A few days later, on February 9, 2010, at approximately 9:00 a.m., the DOC learned that there would be another major snowstorm on about February 10, 2010. It believed that sick leave would again be abused during the projected storm closing. To deter

frivolous sick leave call-offs and decrease the projected overtime costs, the State decided to require that all essential employees calling out sick during the storm closure submit a doctor's note certifying illness upon their return to work (J-7). On February 9, 2010, Kenneth Green, Director of the DOC's Office of Employee Relations telephoned PBA Local 105 Executive Vice President, Brian Renshaw at 10:00 a.m. to advise him of the doctor's note requirement, but added that employees could alternatively use administrative leave ("AL").

13. Green then sent a letter, via fax, to all Union presidents informing them of the directive (J-8, Exhibit A). Green wrote:

> In accordance with past practice, effective today, February 9, 2010, please be advised that for the following date any essential employee who utilizes sick time shall be required to provide a doctor's note upon return to work:
>
> February 9, 2010 - 10 p.m. to 6 a.m. (duty date February 10, 2010)
> February 10, 2010 - 6 a.m. to 2 p.m.
> February 10, 2010 - 2 p.m. to 10 p.m.
> (J-8)

14. Green also sent a similar letter to all administrators and directors of custody operations, adding the reminder of their duties to advise employees and to enforce the directive (J-9).

15. In the evening of February 9, 2010, Green received a letter from PBA Attorney, Robert Fagella, objecting to the order and offering to discuss the related issues. Fagella wrote, in relevant part:

> Please be advised that we strongly disagree with your position. First, there is no "past practice" to this effect. To the contrary, officers have historically been permitted to utilize available sick time without a requirement that they obtain doctors notes in the absence of any suspicion of fraud or abuse.
>
> Second, as a practical matter, this requirement imposes a hardship on the officers. It is my understanding, for example, that many officers participating in HMOs would not be able to obtain an appointment with their doctor in order to return to work on short notice. Conversely, requiring officers who are sick to leave home to be seen by a doctor may be counterproductive. (J-10)

Fagella requested the memo be rescinded and offered to meet and discuss other approaches for the future.

16. On February 10, 2010, Green responded in a letter faxed to Fagella, in relevant part:

> Please be advised that the Department has, with my personal participation, on multiple occasions during reasonably suspected attendance events, required proof of illness as permitted under Title 4A. Further,. . . PBA members have recently negotiated an extremely lenient emergency AL day provision and PBA 105 has been advised that emergency AL will be honored for the current inclement weather - as such there is no hardship to any PBA 105 member. Finally, the hardship during the most recent weather event was borne by the Department via the flagrant abuse of sick time which occurred at various institutions (J-12).

Green offered to discuss the matter with Fagella, but stated the Department would not tolerate sick leave abuse (J-12).

17. On February 10, 2010, Green advised administrators and directors of custody operations that the doctor's note would also apply to the 10 p.m. to 6 a.m. shift on February 10, 2010, and the 6 a.m. to 2 p.m. shift on February 11, 2010 (J-11, Exhibit B).

18. On February 11, 2010, Green wrote to all unions advising that, due to an upcoming holiday weekend employees would be given seven (7) days to produce doctors' notes for the February 9 - February 11 weather closings. He also permitted the AL time employees used during the storm to be converted to vacation or compensatory time, if the employees requested that change by February 19, 2010 (J-13).

Green asserted in the letter that this was "a significant benefit given to the PBA" because the PBA Local 105 contract does not give employees the right to use vacation or AL time during inclement weather, and because vacation and compensatory time must be scheduled in advance (J-7).

19. On approximately February 24, 2010, DOC again anticipated severe weather conditions for the evening of February 24, 2010, into February 25, 2010. On February 24 and 25, 2010, the DOC announced it would again require doctor's notes of all essential employees calling out sick during certain shifts between February 24 and February 26, 2010 (J-14, J-15).

20. On February 26, 2010, the DOC sent a memo to all union presidents again extending the time period for the submission of the doctor's notes to seven (7) days, stating that employees on certain shifts who called out using AL would not be permitted to change their AL days to vacation or compensatory time, that employees who had called out on AL on certain shifts would be permitted to change their AL days to vacation or compensatory time if the AL day was called out/used within 72 hours of the shift or duty date. The DOC also said that change requests were due by March 5, 2010, and that no employee should be permitted to change a sick call into AL. Finally, the DOC required that employees claiming FMLA leave comply with the doctor's note requirement (J-16).

21. On February 25, 2010, PBA Attorney Fagella again wrote to Green objecting to the required doctors' notes (J-17), and on February 26, 2010, Green responded to Fagella reasserting that there had been "multiple occasions during reasonably suspected attendance events" over "at least half a decade" where proof of illness had been required (J-18).

22. In total, approximately 1552 sick leave calls occurred and the 1552 employees who called out sick led to the DOC having to fill those positions by overtime to other employees. Approximately 650 employees failed to provide notes or switch

their sick leave to other leave. Another 900 employees switched their sick leave to AL or provided doctors' notes.

23. In March 2010, DOC imposed disciplinary fines on several hundred unit members of PBA Local 105 and NJLESA. On March 31, 2010, DOC wrote to NJLESA to offer to resolve the snow day disciplines through voluntary settlement terms (J-21).

24. On May 19, 2011, the Civil Service Commission issued two decisions denying the appeals of minor discipline (fines) filed by or on behalf of over a hundred PBA Local 105 and NJLESA members (J-5, J-6).

ANALYSIS

The cross-motions raise the issues of whether the State's requirement of doctors' notes of all employees out on sick leave during two snow-related closures and its imposition of disciplinary fines on non-compliant employees constituted unilateral changes in the past practices of unit members of NJLESA and PBA Local 105. If the State acted within its managerial prerogative to verify the basis for sick leave, negotiations were not required. Also at issue is whether the State had a duty to negotiate with the unions over any mandatorily negotiable impacts before implementing the doctor's note requirement and discipline, and whether it fulfilled this duty. Finally, at issue is whether the decisions of the Civil Service Commission affect the disposition of the unfair practice

charges.

The State contends that this matter primarily concerns discipline and should be deferred to the parties' contractual grievance and arbitration procedures. It asserts that the Civil Service Commission has already upheld the imposition of the fines and that this disposes of this dispute. The State argues that the DOC acted within its managerial prerogative to control sick leave abuse by verifying, through medical certification, the validity of the sick leave use. The State asserts it had required doctors' notes in similar circumstances in the past and thus, the procedures imposed in February 2010 were not "new." It denies repudiating the contracts and violating the Act. Finally, the State asserts it acted in good faith at all times, particularly by offering to discuss the procedures and by accommodating the unions by permitting sick leave to be converted to administrative leave, vacation leave and/or compensatory time, upon the employees' requests.

Charging Parties argue that the State imposed new procedures for sick leave use during inclement weather, without negotiations. It contends that the requirement of doctors' notes and imposition of disciplinary fines for every employee calling out sick during the two snow storms had never been imposed before; it argues the State's single example where fines were imposed is distinguishable, and does not constitute a past

practice. While acknowledging that the State has a managerial right to verify sick leave, the unions argue that the State failed to negotiate over certain procedural aspects of sick leave use and verification before imposing the new rules, such as who pays for the visits to doctors to obtain the notes and how much time officers have to obtain and submit them. The Charging Parties also assert that fines are not contemplated for sick leave abuse offenses in the DOC's Human Resources Bulletin that outlines in detail the penalties for various offenses. They assert the Bulletin is incorporated into their collective negotiations agreements and object to the State's disregard for the principle of progressive discipline inherent in its new policy.

Charging Parties also assert the State's accommodations and post-implementation discussions with them did not fulfill its duty to negotiate in good faith before implementing new rules because the discussions do not equate to negotiations, were not timely and should have occurred before the DOC implemented the new policy.

The unions contend the Civil Service Commission lacks jurisdiction over the policies of the Act and its decisions do not dispose of the unfair practice issues raised here, and are not relevant to this dispute.

N.J.S.A. 34:13A-5.3 entitles majority representatives to

negotiate on behalf of their unit members over their terms and conditions of employment. Section 5.3 defines employers' duty to negotiate before changing working conditions:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

The State also argues that regardless of the past practice issue, the specific contract language or the terms of HRB 84-17, its actions fall within its managerial prerogative because it reasonably believed sick leave would be abused, and in that case sick leave verification is a prerogative. The procedural aspects of sick leave verification are mandatorily negotiable. County of Hudson, P.E.R.C. No. 93-108, 19 NJPER 274 (¶24138 1993). Here, the State may have modified those procedures. Further, the impacts of any new procedures are also mandatorily negotiable. Ibid.

The scope of negotiations for police officers is broader than other public employees because N.J.S.A. 34:13-16 provides for a permissive as well as mandatory category of negotiations. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981) ("Paterson"). Town of West New York, P.E.R.C. No. 82-34 7 NJPER 594 (¶12265 1981). Paterson set standards for determining whether a subject is mandatorily negotiable:

> First it must be determined whether the particular item in dispute is controlled by a

> specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n., 78 N.J. 54, 81 (1978)] If an item is not mandated by statute or regulation but is within the general discretionary powers of the public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable.
> [87 N.J. at 92-93; citations omitted]

Generally, public employers have a policy interest in verifying that employees who claim to be sick are, in fact, sick and have a managerial prerogative to use reasonable means to verify the proper use of sick leave. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982), City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988), Borough of Spring Lake, P.E.R.C. No. 88-150, 14 NJPER 475 (¶19201 1988) Livingston Tp., P.E.R.C. No. 2008-11, 33 NJPER 218 (¶81 2007) suggests that an employer's right to verify sick leave does not require a prior finding of sick leave abuse.

The Commission has also held that employees may contest the application of a sick leave policy if it was allegedly conducted for improper reasons or constituted an egregious and unjustifiable violation of an employee's privacy. Borough of

Dumont, P.E.R.C. No. 2003-7, 28 NJPER 337 (¶33118 2002); Borough of Belmar, P.E.R.C. No. 2003-63, 29 NJPER 104 (¶32 2003). Both Dumont and Belmar involved unusual situations where the employer's conduct went beyond routine application of a verification policy. This case also represents a unique circumstance and is inappropriate for summary judgment.

Here, there was an established attendance and sick leave abuse policy in HRB 84-17 that embodied certain terms and conditions of employment, including a defined schedule of penalties and progressive discipline. The impacts of sick leave verification procedures and associated discipline have been considered mandatorily negotiable. Piscataway.[3/]

The undisputed facts do not fully explain whether there was a past practice, whether, given all the circumstances, the State acted reasonably, within its managerial prerogative, in requiring

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3/ See also, Tp. of Maplewood, P.E.R.C. No. 2011-022, 36 NJPER 350 (¶135 2010) (grievance arbitration restrained over employer's conduct of home visit to verify an injury); County of Monmouth, P.E.R.C. No. 2010-058, 36 NJPER 42 (¶19 2010) (proposed provision which would preclude discipline for pattern of sick leave use is negotiable, but employer cannot be prevented from initiating discipline for sick leave abuse); Tp. of Montclair, P.E.R.C. No. 2000-107, 26 NJPER 310 (¶31126 2000) (grievance not legally arbitrable if employer prevented from initiating discipline for sick leave abuse unless employee had exhausted annual allotment of sick leave); Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1985) (employer may monitor whether sick leave is being properly used by requiring conferences after a certain amount of sick leave is used, even though employees have not exhausted annual sick leave allotments).

all 1500 who called out sick during the storms and whether the State negotiated in good faith. Therefore, summary judgment is not appropriate.

CONCLUSION

Accordingly, the cross-motions are denied and a full plenary hearing is ordered.

Daisy Barreto
Hearing Examiner

DATED: August 11, 2014
Trenton, New Jersey

For Summary Judgement

Pursuant to N.J.A.C. 19:14-4.8(e) this ruling may only be appealed to the Commission by special permission in accordance with N.J.A.C. 19:14-4.6(b).

Any request for special permission to appeal is due by August 18,2014.