I.R. NO. 2023-11

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MERCER,

Respondent,

-and-

Docket Nos. CO-2023-140
CO-2023-146

POLICEMEN'S BENEVOLENT ASSOCIATION,
LOCAL 167 AND 167A,

Charging Parties.

SYNOPSIS

A Commission Designee grants an interim relief application based on consolidated unfair practice charges filed by Policemen's Benevolent Association Local No. 167 and Local No. 167A ("PBA") against the County of Mercer ("County"). The charges alleged that the County violated sections 5.4a(1), (2), (5) and (7) of the Act by unilaterally issuing an order precluding PBA members from utilizing accrued sick leave and approved FMLA leave. The designee determined that, based on relevant precedent and the leave at issue, the PBA demonstrated a reasonable likelihood of success on its legal and factual claims, and irreparable harm will result absent the granting of interim relief. The designee further determined that consideration of the relative hardships and the public interest supported granting the PBA's application. The consolidated matter was transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Respondents
Genova Burns, LLC, attorneys
(Joseph M. Hannon, of counsel)

For the Charging Parties
Crivelli & Barbati, LLC, attorneys
(Frank Crivelli, of counsel)

INTERLOCUTORY DECISION

On February 15, 2023, the Policemen's Benevolent Association, Local No. 167 ("Local 167") filed an unfair practice charge accompanied by an application for interim relief against the County of Mercer ("County"). The charge, docketed as CO-2023-140, alleges that the County violated sections 5.4a(1), (2), (5), and (7)[1/ 2/] of the New Jersey Employer-Employee Relations

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"; "(2) Dominating or interfering with the formation, existence or administration of any employee organization;" "(5) Refusing to negotiate in (continued...)

Act, N.J.S.A. 34:13A-1 et seq. ("Act") by issuing a standing order prohibiting Local 167 members from calling out sick, utilizing accrued sick leave, or utilizing approved intermittent Family and Medical Leave Act ("FMLA") leave. Local 167 asserts that the County issued the "blanket" order on or about February 1, 2023, and that as a result, "numerous [Local 167] members have been denied the use of sick leave and intermittent FMLA leave, have been placed in a 'no pay' status, and . . . have been threatened with [discipline]." On February 27, 2023, PBA Local 167A, representing superior officers employed by the County, filed a nearly identical charge as that filed by Local 167, alleging that superior officers are also prohibited from utilizing sick and FMLA leave under the County's order. The matters were consolidated by the Commission.

In support of its application for interim relief, Local 167 submitted a legal brief with exhibits and a certification from

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(...continued)
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;" and "(7) Violating any of the rules and regulations established by the Commission."

2/ I do not consider the 5.4a (2) and (7) claims, as the PBA has not sufficiently developed them in the application for interim relief. The PBA has not set forth facts that would suggest the County dominated or interfered with the formation, existence, or administration of the PBA, nor has the PBA cited a PERC rule or regulation allegedly violated by the County.

Local 167 President Donald Ryland ("Ryland Cert."). In its proposed Order to Show Cause ("OTSC"), the PBA seeks the following interim relief:

1. An order directing the County to cease and desist from unilaterally altering fully bargained for provisions of the parties' collective negotiations agreement ("CNA");

2. An order directing the County to cease and desist from violating the applicable law, namely the FMLA;

3. An order directing the County to permit Local 167 members that have accrued paid sick leave to utilize the same as provided under the terms and conditions of the parties' CNA;

4. An order directing the County to permit officers that have been granted approved, intermittent FMLA leave to utilize thee same as provided under the relevant statutory code and administrative regulations; and

5. Such other relief as the Commission deems equitable, just, or warranted.

On February 16, 2023, I signed an Order to Show Cause ("OTSC") setting a briefing schedule and an oral argument date of March 7, 2023. The OTSC included temporary restraints preventing the County from refusing to allow members to utilize accrued sick or FMLA leave, and from withholding pay from members who use such leave, so long as minimum staffing levels are not jeopardized.

On February 27, 2023, the County filed a brief in opposition to Local 167's application for interim relief, supported by the certifications of Warden Charles Ellis ("Ellis Cert") and Director of Human Resources Raissa Walker ("Walker Cert.").

On February 27, 2023, Local 167A filed an unfair practice charge, docketed as CO-2023-146, with nearly identical allegations as CO-2023-140, alleging that the County's "standing order" also operates to preclude superior officers (represented by Local 167A) from calling out of work sick, using accrued sick leave, and using approved intermittent FMLA leave. The CO-2023-146 charge did not include an application for interim relief. The 167A charge was supported by a certification of 167A President Wilbert Sanchez ("Sanchez Cert.").

On March 1, 2023, the PBA[3/] requested to move for interim relief on the Local 167A charge. Following the PBA's request, the Local 167 and Local 167A charges were consolidated.

On March 1, 2023, I signed an amended OTSC setting a briefing deadline of March 8, 2023 for the PBA to reply to the County's opposition brief, and March 15, 2023 for the County to respond to the PBA's reply brief. Both parties were directed to include any additional facts/arguments pertaining to the Local 167A charge.

3/ As used in this decision, "PBA" refers to Local 167 and Local 167A collectively. Local 167 and Local 167A are represented by the same Counsel.

On March 8, 2023, the PBA filed a reply brief responding to the County's opposition. On March 15, 2023, the County filed a brief in response to the PBA's reply, supported by another certification of Warden Ellis ("Ellis Cert. 2").

Oral argument on the consolidated application was held on March 16, 2023 by teleconference at which time both parties appeared and had a full opportunity to argue their positions.

Based on the parties' submissions, the following facts appear:

Local 167 is the majority representative of all rank-and-file correctional officers employed by the County Department of Corrections, and Local 167A is the majority representative of all superior officers employed by the County Department of Corrections. Local 167 and the County are parties to a CNA that expired on December 31, 2022.[4/] The parties are in negotiations for a successor CNA.

In 2022, Local 167 filed a grievance contesting the County's alleged refusal to accept sick and FMLA "call offs" for unit members. The parties exchanged correspondence in an effort to resolve the grievance. On November 1, 2022, the County denied the grievance, and the matter is currently proceeding to arbitration.(Ryland Cert., at ¶¶ 5-12, Ex. E).

4/ The parties did not submit a CNA between the County and Local 167A.

Since the County's denial of the grievance, President Ryland certifies that ". . . the County has been inconsistent in that it has permitted [PBA] members to utilize accrued sick leave and FMLA in certain circumstances, but not in others." (Id. at ¶13).

In January of 2023, the County instituted a "standing order" precluding members from utilizing accrued intermittent FMLA or sick leave. In response, on January 17, 2023, the PBA sent correspondence to the County demanding that the policy be rescinded and unit members be allowed to utilize accrued FMLA and sick time. (Id. at ¶14, Ex. F.).

President Ryland certifies that, as a result of the standing order, numerous Local 167 members have been denied the use of accrued FMLA and sick time. Specifically, the PBA alleges that CO Jodi Webb was denied sick leave following a death in the family, and CO Antonio Page was denied sick time to attend a doctor's appointment that allegedly took two months to schedule. Members attempting to utilize accrued time have been placed in "no pay" status and threatened with discipline by administration. (Id. at ¶16, Ex. H). Similarly, President Sanchez certifies that members of Local 167A have been denied the use of sick time and placed in "no pay" status as a result of the County's order. (Sanchez Cert., at ¶¶8-13).

The County's order has resulted in members with accrued time being forced to report to work ill in order to avoid discipline,

placing the health of other correctional personnel and inmates at risk. (Ryland Cert., at ¶¶18-19; Sanchez Cert., at ¶14).

Warden Ellis certifies that the Mercer County Correctional Center ("MCCC") utilizes minimum staffing policies. Specifically, Standards and Operating Procedure ("SOP") 570 governs minimum staffing requirements for correctional officers, and SOP 571 governs minimum staffing requirements for superior officers. (Ellis Cert., at ¶¶5-6, Exs. A-B).

Additionally, SOP 950 ("Employee Work Stoppage or Slow Down") sets forth ". . . the absolute minimum requirements" for the facility to operate. "SOP 950 is in place to provide the MCCC with a plan to function in cases of extreme emergency, i.e., when it is not possible to even maintain minimum staffing." Warden Ellis certifies that, in the instances cited by the PBA, the MCCC ". . . has been at below minimum staffing requirements . . . and is operating within the confines of SOP 950 . . . ." Id. at ¶¶8, 11-12, Ex. C).

Warden Ellis certifies that the County only issues the order for "no more call-offs" when MCCC is at or below minimum staffing, and all other means of obtaining additional staffing are exhausted. Warden Ellis further certifies as to the process used by the County to fill a staffing vacancy. (Id. at ¶¶13-20).

For example, two instances of the denial of leave referenced in the Local 167 charge (concerning correctional officers Page

and Webb) occurred on February 13, 2023. On that date, given critical manpower shortages and the exhaustion of all other methods of obtaining additional staffing, Warden Ellis ". . . advised that call-offs had to be halted to ensure officer and inmate safety." (Id. at ¶¶21-24). The Warden certifies that ". . . individuals are only denied leave time when it is the only choice of the administration of the MCCC to ensure absolute minimum staffing of the correctional facility." (Id. at 26).

In its March 15, 2023 reply brief, the County denies that it has a "standing order" prohibiting the use of leave time, and instead asserts that leave time is only denied when understaffing reaches a critical level. The County further denies that it prohibited members from using FMLA leave.

ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a reasonable likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmeyer Bros., Inc. v.Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton

State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

Here, the PBA has demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, because under relevant precedent, a public employer may not unilaterally prohibit sick and approved FMLA leave, even if staffing levels are jeopardized.

The New Jersey Supreme Court has determined that ". . . sick leave or other leaves of absence are matters that directly and intimately affect the terms and conditions of employment, and, as such, would ordinarily be a subject of mandatory negotiation between a public employer and the duly authorized representative of its employees." Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance and Custodial Ass'n, 152 N.J. Super. 235, 243 (App. Div. 1977). The employer does have, however, a prerogative to verify that sick leave is not being abused. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-63, 8 NJPER 94 (¶13038 1982). Further, the employer has a prerogative to determine minimum staffing levels. See City of Vineland, P.E.R.C. No. 2013-043, 39 NJPER 250 (¶29242 1998) (granting a request to restrain binding arbitration of a grievance concerning minimum staffing levels).

The County cites to cases supporting the proposition that employers may deny leave requests if granting them would prevent it from deploying a sufficient number of employees on a

particular shift. However, as the County acknowledged during oral argument, none of those cases allows an employer to unilaterally cancel the use of sick and FMLA leave, even where minimum staffing concerns are implicated. See, e.g., Greater Egg Harbor Reg. Bd. of Ed. and Greater Egg Harbor Education Assoc., P.E.R.C. No. 2016-43, 42 NJPER 305 (¶88 2015) (restraining arbitration regarding the Board's right to determine school calendar, and denying to restrain arbitration regarding the Board's denial of personal leave requests for rescheduled school days); Township of Livingston, P.E.R.C. No. 90-30, 15 NJPER 607 (¶20252 1989) (restraining arbitration to the extent the union's grievance alleged the Township was required to grant personal leave whenever an officer gave adequate notice, regardless of minimum staffing levels); Teaneck Tp., P.E.R.C. No. 89-12, 14 NJPER 535 (¶19228 1988) (granting a request to restrain binding arbitration of a union's demand to unilaterally arrange the work schedule for work rescheduled due to weekend military leave and tour switches, but denying the request to restrain arbitration concerning negotiated leave time and the allocation of overtime); Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14 (¶12006 1980) (finding proposals, including those concerning union release time, procedures for obtaining vacation, and seniority for overtime purposes are mandatorily negotiable, but certain proposals regarding vacation assignments, which might affect

manpower requirements, are negotiable subject to manpower restrictions).

The Commission's decision in Town of Kearny is instructive in the instant case. In that matter, the employer argued it had the prerogative to determine issues related to union leave time, because such matters ". . . have a direct adverse effect on [the Town's] right to assign police officers to various duties." In finding certain leave time issues to be negotiable, the Commission noted that, "[f]ollowing the logic of the Town, such matters as vacations, holidays, sick leave, personal leave, etc. would be non-negotiable because they invariably effect the Town's assignment of personnel to cover certain duties in a patrolman's absence." 7 NJPER at 16.

Here, as in Town of Kearney, while employee absenteeism for sick or FMLA purposes certainly impacts manpower on a given shift, an employer may not unilaterally prohibit the use of such leave without negotiation. While some cases suggest that a public employer may deny personal or vacation leave when critically understaffed, the County acknowledged in oral argument that it did not seek to cancel or call back any members out on personal and/or vacation leave prior to issuing the order prohibiting the use of sick and FMLA leave.

Further, the New Jersey Supreme Court has determined that unilateral changes to terms and conditions of employment

disturbing the "status quo" while parties are actively in negotiations for a successor CNA are unlawful because they frustrate the statutory objective of establishing terms and conditions of employment through bargaining. Galloway Tp. Bd. of Ed. v. Galloway Tp. Educ. Assoc., 78 N.J. 25, 48 (1978). Here, the County's order was instituted in January of 2023, the month after the parties CNA expired and while the PBA contends the parties were in negotiations.

The County has disputed the existence of a "standing order," and asserts that leave time is only denied when the facility is critically understaffed and other methods for obtaining staffing have been exhausted. However, I find that regardless of whether the County's order is classified as a "standing order," it is undisputed that it operated to prohibit PBA members from utilizing sick leave as permitted under the CNA, and it is further undisputed that the policy will continue to the extent the facility remains understaffed in the future.

Section 5.4a(5) of the Act prohibits public employers from "[r]efusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment . . . ." The New Jersey Supreme Court has found that a public employer commits an unfair practice in violation of section 5.4a(5) when it unilaterally alters a mandatorily negotiable term or condition of employment

without first providing an opportunity for the exclusive bargaining representative of the affected employees to negotiate with the employer over that change. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 1 (1978).

Section 5.4a(1) prohibits public employers from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by the Act. Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary - the tendency to interfere is sufficient. Mine Hill Tp. P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986).

For the reasons asserted above, I find that the PBA has shown a reasonable likelihood of success in its claim that the County violated sections 5.4a(1) and (5) of the Act by issuing an order forbidding the use of sick leave and approved intermittent FMLA leave.

Having found that the PBA has shown a reasonable likelihood of success on its claims, the next factor is whether irreparable harm will occur if the interim relief is not granted.

The Commission has determined that leave opportunities wrongfully withheld are lost forever, supporting a finding of irreparable harm. See, North Bergen Tp., 23 NJPER 249, 250 (¶28119 1997) ("The Commission has previously held that leaves not taken are lost forever . . . . On balance, I find that the harm here is irreparable.); Essex Cty., 15 NJPER 459 (¶20188

1989) ("For the employees, the time/vacation opportunities are lost forever. Thus, I conclude that unit employees will experience irreparable harm in the absence of an interim relief order."). Here, if the County applies its policy prohibiting the use of sick and/or FMLA leave, the rights of employees to use that leave consistent with the CNA and applicable law will be lost forever. Since sick/FMLA leave is not typically planned, members cannot reschedule a sick day to a date in the future when the County's staffing emergency has been corrected (even if such a date were determinable). Given Commission precedent and the leave at issue in this matter, I find that the PBA has established that irreparable harm will result absent an interim relief order.

Turning to a consideration of the relative hardships, I find that the balance weighs in favor of granting the PBA's application for interim relief. Granting the PBA's interim relief order will take the parties back to the status quo ante, before the January 2023 order was put into effect. Even accepting the PBA's evidence concerning a critical manpower shortage, there is no basis for essentially eliminating sick leave benefits provided under the CNA (or FMLA leave provided under federal law) especially where other methods of obtaining additional staffing (including revoking personal or vacation leave) have not been pursued.

Finally, there is no evidence to suggest that the public will be injured by a granting of interim relief. As noted above, granting the PBA's application will return the parties to the status quo ante prior to the issuance of the County's order in January of 2023. While allowing a PBA member to take off sick may result in one less employee being present on a given shift, requiring an employee to report to work ill (or face discipline) could easily risk the health of many other correctional staff and inmates.

Accordingly, I grant the application as set forth in the order below. This case will be transferred to the Director of Unfair Practices for further processing.

ORDER

The Association's application for interim relief is granted. The County is directed to rescind the January 2023 order to the extent it prohibits unit members from utilizing accrued sick leave and approved FMLA leave[5/]. The County shall allow PBA members to utilize sick and approved FMLA leave as permitted under the terms of the CNA and applicable law pending final agency decision or until the parties negotiate a resolution.

/s/ James R. Glowacki
James R. Glowacki
Commission Designee

DATED: March 22, 2023
Trenton, New Jersey

5/ In its reply brief, the County denies that any members have been precluded from utilizing FMLA leave. However, both President Ryland and President Sanchez have certified, without contradiction, that numerous members have been told they are unable to use approved intermittent FMLA leave under the County's order. (Ryland Cert., at¶16, Sanchez Cert., at ¶13).