P.E.R.C. NO. 91-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MATAWAN-ABERDEEN REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-89-352

MATAWAN REGIONAL TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Matawan-Aberdeen Regional School District Board of Education violated the New Jersey Employer-Employee Relations Act when it failed to negotiate with the Matawan Regional Teachers Association over an employee organization reporting requirement in an Employee Attendance Plan. Other allegations concerning implementation of the Plan were dismissed.

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DISTRICT BOARD OF EDUCATION,

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-and- Docket No. CO-H-89-352

MATAWAN REGIONAL TEACHERS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, DeMaio & DeMaio, attorneys
(Vincent C. DeMaio, of counsel)

For the Charging Party, Mark J. Blunda, attorney

DECISION AND ORDER

On May 25, 1989, the Matawan Regional Teachers Association filed an unfair practice charge against the Matawan-Aberdeen Regional School District Board of Education. The Association alleges that the Board violated subsections 5.4(a)(1), (3) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A.

1/ These subsections 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, (3) discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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 refusing to process grievances presented by the majority representative."

34:13A-1 et seq., when it unilaterally adopted and implemented an attendance improvement policy which allegedly changed terms and conditions of employment.

On June 21, 1989, an exploratory conference was held. The charge was then held in abeyance while the parties tried to develop a mutually acceptable policy. These efforts failing, the Board adopted and implemented a revised attendance improvement policy.

On March 29, 1990, the Association amended its charge to challenge that policy as well. The amended charge also alleges that at the exploratory conference the Board agreed to negotiate over a new policy, but negotiated in bad faith afterwards.

On April 24, 1990, a Complaint and Notice of Hearing issued. The Board's Answer admits adopting the attendance improvement policies, but denies committing any unfair practices.

On May 30, 1990, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On December 7, 1990, the Hearing Examiner issued his report. H.E. No. 91-16, 17 NJPER 32 (¶22013 1990). He found that one feature of the revised attendance improvement policy violated the Act -- a unilaterally-imposed requirement that employee organizations report any inconsistent applications of the sick leave policy. He recommended dismissal of all other allegations.

The Board did not file exceptions. It states that it has amended its policy to delete the language found illegal by the Hearing Examiner.

The Association did file exceptions. It asserts that rating employees according to the number of absences violates education laws; the Board violated its obligation to negotiate over the cost of required doctors' notes and a requirement that employees produce medical evidence of the illnesses of family members; and the Board negotiated in bad faith.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-18) are thorough and accurate. We incorporate them.

We add these facts to finding no. 4. The August 14, 1989 letter (CP-5) from the Association's attorney to the Board's attorney and Klavon stated that they had advised the Association that the Association's "draft was well received and that you would be making minor modifications and providing us with an amended draft." The October 4, 1989 letter (CP-6) from the Association's attorney to a Commission staff agent stated that the Board's attorney had promised to submit an amended draft "forthwith" and that a "settlement was near at hand"; the Board did not respond. The administration was slow to respond to the Association's proposal because Klavon was on vacation for three weeks in August 1989 and central office responsibilities were reorganized when he returned (T114-T115).

We add to finding no. 5 that the record does not indicate what specific objections the Association raised at the January 9, 1990 meeting. It does not appear that the Board required any

employees to pay for doctors' notes or that the Association asked to negotiate over that issue.

The Hearing Examiner's analysis of the law (H.E. at 18-26) is also thorough and essentially accurate. We specifically agree that any challenge to the annual evaluation ratings under the education laws should be presented to the Commissioner of Education (H.E. at 21);[2/] the record did not show that the Board unilaterally required employees to pay for doctors' notes or refused to negotiate over the cost of doctors' notes (H.E. at 20); the Board had a right to verify the illness of family members attended to by its absent employees (H.E. at 22);[3/] and the Board did not agree to negotiate over a mutually acceptable plan or act in bad faith after the exploratory conference (H.E. at 23-24).[4/]

2/ See Teaneck Bd. of Ed., P.E.R.C. No. 86-4, 11 NJPER 445 (¶16155 1985); Neptune Tp. Bd. of Ed., P.E.R.C. No. 88-114, 14 NJPER 349 (¶19134 1988). While we may interpret other statutes in determining whether a subject is negotiable or preempted, Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 316-317 (1979), we will not enforce statutes administered by other agencies.

3/ Once the parties have contractually agreed to paid leave in case of serious family illness, the Board has a prerogative to verify that the leave was in fact used for that purpose. See Barnegat Tp. Bd. of Ed., P.E.R.C. No. 84-123, 10 NJPER 269 (¶15133 1984).

4/ While the Board was slow to respond to the Association's draft, we do not believe it "toyed with" or misled the Association (Exceptions at 11-12).

ORDER

The Matawan-Aberdeen Regional School District Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the Matawan Regional Teachers Association over an employee organization reporting requirement in the Employee Attendance Plan adopted on March 28, 1990.

2. Refusing to negotiate in good faith with the Association concerning terms and conditions of employment, particularly by failing to negotiate over an employee organization reporting requirement in the Employee Attendance Plan adopted on March 28, 1990.

B. Take this action:

1. Remove the reporting requirement language from the Employee Attendance Plan.

2. Offer to negotiate with the Association over any future attempts to adopt such language.

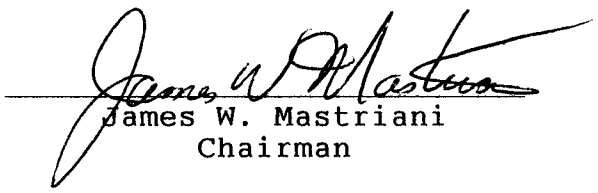
3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days.

Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

All remaining allegations are dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration.

DATED: Trenton, New Jersey
February 27, 1991
ISSUED: February 28, 1991

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 NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the Matawan Regional Teachers Association over an employee organization reporting requirement in the Employee Attendance Plan adopted on March 28, 1990.

WE WILL NOT refuse to negotiate in good faith with the Association concerning terms and conditions of employment, particularly by failing to negotiate over an employee organization reporting requirement in the Employee Attendance Plan adopted on March 28, 1990.

WE WILL remove the reporting requirement language from the Employee Attendance Plan.

WE WILL offer to negotiate with the Association over any future attempts to adopt such language.

Docket No. CO-H-89-352

MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION

(Public Employer)

Dated: _____

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, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E. NO. 91-16

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

In the Matter of

MATAWAN-ABERDEEN REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-89-352

MATAWAN REGIONAL TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Matawan-Aberdeen Regional School District Board of Education violated the New Jersey Employer-Employee Relations Act by implementing a sick leave verification plan that contained language requiring the Association to report inconsistent application of the plan. The Hearing Examiner recommended the Board be ordered to remove that language from its plan. The Hearing Examiner, however, did not find that any other aspect of the plan violated the Act and recommended dismissal of all remaining allegations.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 91-16

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

In the Matter of

MATAWAN-ABERDEEN REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-89-352

MATAWAN REGIONAL TEACHERS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, DeMaio & DeMaio, Attorneys
(Vincent C. DeMaio, of counsel)

For the Charging Party, Mark J. Blunda, Attorney

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (Commission) on May 25, 1989 and amended on March 29, 1990, by the Matawan Regional Teachers Association (Association) alleging that the Matawan-Aberdeen Regional School District Board of Education (Board) violated subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[1/] In the original charge the Association alleged that on

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

Footnote Continued on Next Page

January 23, 1989 the Board unilaterally changed terms and conditions of employment by adopting and subsequently implementing an attendance improvement plan which unilaterally altered terms and conditions of employment. The Association sought to restrain the Board from implementing the plan; rescind unfavorable actions taken pursuant to the plan; compel the Board to negotiate in good faith; and seeks compensatory damages, attorney fees and costs.

In the amended charge the Association alleged that at an exploratory conference on June 21, 1989 the Board agreed to negotiate over an attendance policy; and, in February and March 1990 the Board unilaterally introduced and adopted a new attendance policy and procedure. The Association seeks the same remedies sought in the original charge.

A Complaint and Notice of Hearing (C-1) was issued on April 24, 1990. The Board filed an Answer (C-2) on May 4, 1990 denying it violated the Act. A hearing was held on May 30, 1990 in Trenton, New Jersey. Both parties filed post-hearing briefs and the Board filed a reply brief the last of which was received on August 7, 1990.

1/ Footnote Continued From Previous Page

> restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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."

Based upon the entire record I make the following:

Findings of Fact

1. The Board and Association are parties to a collective agreement (J-1) covering teachers and other professional employees entered into on June 2, 1988 but effective from July 1, 1986 through June 30, 1990. Exhibit J-1 contains a grievance procedure which ends with binding arbitration. It also contains the following pertinent clause:

Article 21 Absence and Forfeiture of Salary Sections A, B, C(1) and (2).

A. Non-Promotion in Salary Because of Absence

A member of the teaching staff who has been absent from school during the previous school year, whether such absence has been excused or not, shall be given credit on the guide for the year in question in accordance with the following schedule:

1. Absences up to and including sixty (60) days - full credit.

2. Absences between sixty one (61) days and one hundred twenty (120) days - half step credit.

3. Absences in excess of one hundred twenty (120) days - no credit.

B. Approved Reasons for Absence

Teachers shall attend their duties faithfully and shall not be absent therefrom except for personal illness or for other good and sufficient reasons authorized by these Board rules and regulations, or approved by the Superintendent of Schools or the Board of Education. Teachers absent from school duty shall forfeit full per diem salary during such absence except as hereinafter provided.

C. Sick Leave

1. Sick leave is hereby defined to mean the absence from his or her post or duty, of any person covered by N.J.S.A. 18A:30-2 because of personal disability due to illness or injury or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household (N.J.S.A. 18A:30-1).

2. A teacher absent from school because of personal illness shall suffer no deduction of pay for each of the first ten (10) days of absence in any school year.

Article 21 also contains sections covering on-the-job injuries (D); absences for death in family (E); death of relative (F); quarantine or court order (G); appearance before military or selective service official (H); serious family illness (I); and a section for personal days (J). Article 21 ends with the following sections:

K. Report of Absence

A teacher who is absent from duty because of personal illness, death in the family, quarantine, appearance before military or selective service officials, or in compliance with the requirements of a court, shall notify the principal as early as possible, and notification shall be given in advance where possible. A teacher who is absent from duty for another reason shall first secure permission from the Superintendent through the principal. A teacher shall, in reporting absence for personal illness, communicate to the principal the probable duration of the illness.

A teacher who has been absent for two (2) days or more shall, before the end of the school day prior to the return, notify the principal of his expected return.

L. Examination

> The school physician shall examine all cases of absence for personal illness upon the request of the superintendent or the Board unless the teacher prefers to arrange for an examination by the teacher's personal physician. If the absence because of personal illness exceeds ten (10) days in a calendar month, certification of such illness by the school physician or by the teacher's personal physician may be required.

The Association also represents separate units of bus drivers, and custodial and maintenance employees.

2. Background

In anticipation of monitoring by the State Department of Education scheduled for early 1989, the Board began monitoring teacher attendance in 1986 (R-5, R-6), implemented a computerized attendance system during the 1986-87 school year, and attached a copy of each employee's computerized attendance sheet to their 1987 evaluations (T87, T89, T93, T99, R-4). During the 1987-88 school year Deputy Superintendent Michael Klavon directed administrators, by memorandum of March 1, 1988 (R-7), to make a written comment regarding attendance on teacher evaluations and professional improvement plans (PIP's) with particular reference to attendance based upon the number of days off. They were also required to attach the employee's calendar to the evaluation. That directive

was implemented in the evaluations and PIP's prepared in 1988 (T93, T99, R-7).[2/]

Klavon was using the computerized attendance program to determine whether the Board's teachers exceeded State guidelines for absenteeism. If the absence rate exceeded 3.5 percent, State law mandated the development of a staff attendance improvement plan and policy (T88, T90)(R-2). When Klavon, in anticipation of monitoring and development of a plan, realized the absenteeism rate exceeded 3.5 percent he did research and attended conferences to aid him in developing a plan (T91-T93).

Prior to 1989 the absentee procedure required an employee to call the district substitute placement secretary who arranged for a substitute. When the employee returned from the absence he or she was expected to sign an absentee roster. Also prior to 1989, doctors' notes were not required except as provided for in Article 21, Section (L); there was no limitation on using days before or after holidays; teachers were not generally required to advise the

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2/ Association President Marie Panos testified that prior to January 1989, there was no practice or procedure regarding the use of attendance in evaluations and PIP's (T16). Klavon testified, however, that he directed administrators to refer to attendance in preparing teacher PIP's in 1988 (T93, T99, R-7). Exhibit R-7 shows that Klavon informed administrators to make written comments about attendance on evaluations. Exhibits R-3A--R-3D also show there was some reference to attendance in evaluations and PIP's beginning in 1988 regarding school aides (R-3A), secretaries (R-3B), custodians (R-3C), and bus drivers (R-3D). At least two of those groups, custodians and bus drivers, are still represented by the Association. The Association did not effectively rebut Klavon's testimony or R-7, thus I credit it here.

Board of the nature of the illness that caused the absence; and there was no official written plan establishing ratings (excellent, good, average, etc.) based upon the number of days absent except as provided for in Article 21, Section (A). (T16-17; T20-T21a).[3/]

3. As a result of monitoring attendance in 1986-87 and 1987-88 the Board knew in late 1988 that it had over a 4% absenteeism rate for certificated employees and that it was, thus, required to implement an attendance improvement plan prior to the scheduled 1989 State monitoring (T124-T128). On December 19, 1988 the Board took the first step toward the development of an attendance plan by adopting a "staff attendance" policy (C-1C). The policy authorized the development of a plan and the promulgation of procedures in order to implement the policy (T129-T130). Although C-1C did not specifically establish procedures, it mandated that procedures require employees to personally report all absence and lateness whenever possible, and at the earliest time. The opening paragraph of C-1C includes the following sentence: "Excessive absenteeism or tardiness is unacceptable and is subject to disciplinary action up to and including dismissal." The Association

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3/ This sentence is not entirely accurate. First, although there was no fixed limitation on using days before or after holidays prior to 1989, R-7 dated March 1, 1988, did require administrators to note on evaluations in 1988 whether an employee had a pattern of absences. Second, even pursuant to Article 21, Section K of J-1, teachers absent for personal illness were required to notify the principal and communicate the probable duration of the illness. Nothing in that language suggests the principal could not inquire into or learn about the nature of the illness.

did not openly contest C-1C. It did not file a grievance, a petition with the Commissioner of Education, or a charge with the Commission over that policy (T108).

Also on December 19, 1988 the Board adopted an "employee attendance" policy (pages H.1 and H.2 of C-1D). That policy was similar to C-1C but also included language about what a policy and procedure should accomplish. Exhibit C-1D explained, for example, that: even legitimate absences are not immune from discipline seeking to deter excessive absences; and counseling and/or discipline should be the result for excessive use or abuse.

On January 9, 1989, a staff attendance improvement plan was presented to the Board for a first reading and discussion. After that date Klavon spoke to Panos by telephone and asked her if she read the plan. Panos had only skimmed it, but said there were some problems. Klavon asked Panos to quickly give him her comments prior to the next Board meeting set for later that month. (T109-T110). There was no evidence that Panos complied with Klavon's request.

On January 23, 1989 the Board adopted and subsequently implemented a Staff Attendance Improvement Plan (CP-1) without negotiations with the Association (T19). That plan included

guidelines for absences which listed ratings based upon number of days absent.[4/]

That was not the procedure in existence prior to 1989. There were no such ratings based upon the number of days absent

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4/ Those guidelines are as follows:

10-Month Employees

Number of Days Absent	Explanation
0 - 1	Excellent, Outstanding
2 - 4	Good, Above Average
5 - 7	Average
8 - 10	Below Desired Level
11 or more	Below Desired Level, needs improvement

12 Month Employees

Number of Days Absent	Explanation
0 - 1	Excellent, Outstanding
2 - 5	Good, Above Average
6 - 9	Average
10 - 12	Below Desired Level
13 or more	Below Desired Level, needs improvement

NOTE WELL:

1. All days out are included in the absence total except professional days and vacation days. Professional days might include visitations to other schools or in-service activities. Field trips are also regular work days. Vacation days are awarded by contract. All of these must have prior administrative approval.
2. Personal days do count as absences.
3. While the State does not count consecutive absences over five days, the district does.

(T21, T58). Exhibit CP-1 also included the following sections: initial procedures covering call-in and returning to work; evaluation and PIP procedures; and conference and investigatory interview procedures which could lead to discipline.

The initial procedures section included: no changes in attendance recording can be made without authorization; and misrepresentation may lead to discipline.

The evaluation and PIP procedures included: administrators will refer to the computer analysis of each employee's attendance in preparing evaluations; administrators are to question employees about the nature of absences including family member illness, but not if the absence was a personal day.

The procedures for conferences and investigatory interviews included: requiring conferences or interviews where attendance records show a pattern of absences or exhausting of sick leave; a written summary of all such conferences and interviews will be made and used in making employee evaluations and PIP's; the summary will be placed in an employee's file and may result in withholding increment, reprimand, or other discipline or discharge; a physician's note or employee statement may be required for any absences claimed.

Exhibit CP-1 then includes more detailed procedures for conducting conferences and investigatory interviews concerning absences. Those procedures provide for written notification of the conference or interview stating the reason for the conference; warns

that discipline could be a result of the conference; permits the employee to have a representative at the conference consistent with contractual provisions; and allows the employee to attach his/her own comments to any written conference report.

On March 6, 1989 Klavon sent a memo (CP-2) and copy of CP-1 to all administrators directing them to use the plan in preparing evaluations and dealing with attendance problems, and to use the "guidelines for absences" set forth in the plan. After using the plan and guidelines in preparing evaluations, several teachers complained about or wrote rebuttals to evaluations because of the attendance procedures used in preparing the evaluations (T22-T23).[5/] But no grievances were filed.

4. By the spring of 1989 the Board did not voluntarily rescind CP-1, thus, on May 25, 1989 the Association filed the Charge. An exploratory conference was held on June 21, 1989 at which the parties agreed to leave the Charge pending while they attempted to agree on a sick leave plan (T112-T113).[6/]

5/ On March 21, 1989, for example, Association Vice President Carl Kosmyna sent a letter (CP-3) to Klavon objecting to the use of classifications: average, below or above average, etc.; in relationship to attendance. That letter led to the exchange of letters between those parties about attendance issues on April 4, 1989, and a final letter by Klavon on April 12, 1989.

6/ Panos testified that the parties agreed to hold the complaint in abeyance while they reached agreement on an attendance policy (T65). Klavon denied reaching such an agreement. He

Footnote Continued on Next Page

On July 24, 1989 the Association sent a two-page proposed draft of an Attendance Policy/Procedure (CP-4) to the Board which was reviewed by Klavon and the Board's attorney at a meeting between the parties on July 25, 1989. In CP-4 the Association proposed that the procedures for conferences and investigatory interviews be "Per [Association] contract procedures for withholding of increment."[7/] Klavon was pleased with several aspects of CP-4, but wanted time to prepare a response to it (T26-T27; T113-T114). No agreement on a plan was reached at that time (T114).

On August 14, 1989 the Association's attorney sent a letter (CP-5) to the Board's attorney and Klavon asking for their response to CP-4. No response was provided. On October 4, 1989 the Association's attorney sent a letter (CP-6) to the Commission's staff agent asking that the matter continue to be held in abeyance because he expected a settlement.

6/ Footnote Continued From Previous Page

acknowledged that the Board was willing to attempt developing a plan with the Association that both parties could accept, but he indicated it was ultimately a managerial prerogative (T112-T113). Panos was not at the June 21 meeting and did not know what was said. Klavon was present, thus, I credit his testimony.

7/ There is no specific article in J-1 regarding increment withholding. Article 4, Section C (Teacher Rights), however, provides that whenever an employee is required to appear before the superintendent or other Board representative(s) regarding a matter that could adversely affect his/her position, employment, salary or increment, he/she shall receive prior written notice stating the reason for the meeting and be entitled to have an Association representative present. The Association did not introduce a copy of any other increment withholding procedures.

The parties met again on December 15, 1989. The Board had not earlier submitted its response to CP-4, thus, on December 15 Klavon gave the Board's oral response. The parties did not agree on the Board's proposed modifications to CP-4 and Klavon agreed to put his position in writing (T30-T31, T115-T116).

On December 20, 1989 the Association's attorney sent a letter (CP-7) to Klavon and the Board's attorney, with a copy to Panos, scheduling a meeting for January 9, 1990 to review this matter. On December 22, 1989 Klavon sent a letter (CP-8A) to the Association's attorney transmitting a copy of the Board's draft policy and regulations on employee attendance (CP-8B). The letter indicated that: the Board was working from the Association's proposal (presumably CP-4) not its plan (presumably CP-1); the Board in its draft (presumably CP-8B) accepted all of the Association's procedural recommendations to use existing policy/contract procedures for investigations and increment withholding; and the Board was in agreement with several other concerns raised by the Association. The Board's draft, CP-8B, was different from C-1C, the first two pages of C-1D, and from CP-1. CP-8B proposed an absent employee be required: to bring a doctor's note if the call-in was made less than an hour before reporting time; a doctor's note may be required in any illness; and the following scale to measure attendance was proposed:

Twelve-Month Employees Ten-Month Employees	0-1 day out - Outstanding " " " "
Twelve-Month Employees	2-9 days out - Tolerable

Ten-Month Employees	2-7 " " "
Twelve-Month Employees	10 or more days out - Needs Improvement
Ten-Month Employees	8 or more days out - Needs Improvement

Exhibit CP-8B also proposed that: "Anyone who has knowledge of such conduct [misuse or abuse of sick leave] has an obligation to report it";[8/] the above evaluation scale would not automatically lead to discipline; the policy and regulations would not be mechanistically applied; and each employee's case would be considered based upon particular circumstances.

5. At the meeting on January 9, 1990, the parties discussed, but the Association rejected, CP-8B. No agreement on procedures was reached (T35, T68, T136, T140). The parties did not meet again to review an attendance plan (T36). On February 8, 1990, however, Klavon hand delivered a letter (R-1) to the Association's attorney, and to Panos, and asked for a quick response (T120-T121). The letter indicated numerous changes he (Klavon) made to the attendance policy and regulations (presumably CP-8B) based upon the Association's concerns raised at the January 9th meeting. Those changes included: that the Board's reporting requirements would apply unless otherwise limited by J-1; removal of the so-called "snitching" sentence and substituting: "Any employee organization that has knowledge of any inconsistent application of this policy

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8/ The Association termed this requirement the "snitching" sentence.

has a duty to report such to the Superintendent or designee"; and including a provision that where the Board's physician and employee's physician disagree, the opinion of a third physician picked by the parties would prevail.

Klavon also stated in R-1 that the Board would agree to a side-bar letter dealing with absences of Association officers for litigation related reasons. Klavon indicated that the Board's attorney would provide the Association's attorney with a draft regarding that matter. Klavon believed that R-1 reflected a final draft of the attendance policy and regulations (T120). Klavon concluded R-1 with the following paragraph:

> It is my desire to present this for a first reading before the Board at its February 26 meeting. If you concur with the revised policy/regulations, please send me a letter. If there are minor suggestions for additional changes, please feel free to call me or have Marie call me. If you wish to meet, I would like to do so prior to February 26. Call me to suggest a date and time if you desire to meet.

Neither Panos nor the Association's attorney responded to R-1. Similarly, the Board's attorney did not submit the side bar draft to the Association's attorney subsequent to R-1 (T84). The Association did not respond to R-1 because it did not concur with it, and expected continued discussion about procedures (T76-T78, T122). Klavon had received no response to R-1 by the Thursday before the scheduled February 26 meeting, thus, he telephoned the Association's attorney and told his secretary to have him return the call (T122). Klavon was hoping to get a response to R-1 prior to the February 26 first reading because the Board has, in past years,

gone back to a first reading if objections were raised which needed to be considered prior to a second reading (T123). But there was no response to R-1 or the telephone call (T122).

On February 26, 1990 the Board adopted the new policy and procedures (C-1D, pages H.3, H.4, H.5) at a first reading which included the changes Klavon had noted in R-1. Exhibit C-1D established reporting requirements which included call-in procedures; conference/investigatory interview procedures; and specific circumstances that would trigger a "needs improvement" notation on an evaluation. The "Reporting Requirements" section began with the following condition precedent: "(Unless otherwise limited by the employee's Collective Bargaining Agreement)." The "Conference/Investigatory Interviews" section of C-1D began by indicating that: "Investigations/conferences, shall be conducted as per law, code, Board policy and/or contract provisions, as will resultant disciplinary actions, if any." (Emphasis added)

C-1D at H.5 emphasized that: there would be no automatic disciplinary consequences for absenteeism; the policy and regulations would not be mechanistically applied; and concluded with the following paragraph requiring a notation on an evaluation based upon specific circumstances:

> In the event that a pattern of absences is detected; or, if a person has 8 or more days out, in the case of a ten-month employee or 10 or more days out, in the case of a twelve-month employee, for at least two years in a row; or, if an employee has an excessive number of days out in any one year as determined by an examination of each case (14 or more days out for twelve-month employees; or, 12 or more days out for

> ten-month employees), then there shall be, minimally, a notation that improvement is needed. If abuse or misuse is discovered then some kind of disciplinary action may be taken.

A second reading of the plan and procedures was scheduled for the March 28, 1990 Board meeting. The Association had access to Board minutes of the February 26 meeting and should have been aware that the Board adopted the policy and procedure at the first reading (T82-T83, T122, T123).[9/] Klavon did not receive any response to R-1 or any objections to C-1D from the Association between the first and second readings (T123). On March 28, 1990 the Board adopted the new policy and procedures for staff attendance (C-1E), which were the same as C-1D. The Association at hearing objected to most of C-1E (T44-T52).

The provisions of C-1E were implemented in evaluations for the 1989-90 school year. They included needs improvement remarks pursuant to the last paragraph of C-1E. Panos, herself, received a needs improvement on her evaluation because she had 12 absences even though they were, as she claimed, legitimately based (T37-T39). She argued that the mere inclusion of "needs improvement" language on an evaluation form constitutes discipline (T59). She did not object to the Board's listing the number of days an employee was absent, but

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9/ Panos acknowledged that the Board provides the Association with copies of Board minutes, but sometimes not before the day of the next Board meeting. Here the Association did not establish that it was unaware of the results of the February 26 meeting, or was unaware of the second reading scheduled for the March 28th meeting.

objects to any judgment the Board might make regarding the absences (T80). Panos seeks to have "needs improvement" language removed from employee evaluations and PIP's (T40).

ANALYSIS

The Commission has consistently held that a public employer has the managerial prerogative to establish and unilaterally implement a sick leave verification policy using reasonable means to verify employee illness. Piscataway Tp. Bd. of Ed., (Piscataway I), P.E.R.C. No. 86-64, 8 NJPER 95 (¶13039 1982); City of East Orange, P.E.R.C. No. 84-68, 10 NJPER 25 (¶15015 1983); Jersey City Medical Center, P.E.R.C. No. 87-5, 12 NJPER 602 (¶17226 1986). But, the Commission also held that issues regarding the application of the policy, particularly the denial of contractually allotted leave benefits, may be submitted to the parties grievance procedure. Piscataway I; Piscataway Tp. Bd. of Ed., P.E.R.C. No. 83-111, 9 NJPER 152 (¶14072 1983); Union Cty. Reg. H.S. Dist. No. 1, P.E.R.C. No. 84-102, 10 NJPER 176 (¶15087 1984); City of Newark, P.E.R.C. No. 85-13, 10 NJPER 505 (¶15231 1984); Rockaway Tp. Bd. of Ed., P.E.R.C. No. 90-107, 16 NJPER 321 (¶21132 1990). The Commission further established that payment for the cost of obtaining physician notes is mandatorily negotiable. City of Elizabeth, P.E.R.C. No., 84-75, 10 NJPER 39 (¶15022 1983), aff'd 198 N.J. Super. 382 (App. Div. 1985); Borough of Butler, P.E.R.C. No. 90-61, 16 NJPER 45 (¶21021 1989).

In establishing that the implementation of sick leave verification policies is a managerial prerogative the Commission upheld managements right to require: a physician's note or proof of illness for any sick leave absence (Borough of Spring Lake, P.E.R.C. No. 88-150, 14 NJPER 475 (¶19201 1988)), even where the verification requirement is contrary to language in the parties collective agreement (City of Elizabeth; Union Cty. Reg.; City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988); Borough of Butler); home visitation to verify sickness (Piscataway I; City of East Orange); employees to attend conferences and/or investigatory interviews to verify sickness (Piscataway I; Union County Regional; Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984)); administrators to use absence or leave information as criteria for evaluation (Piscataway I); and the establishment of penalties - even discharge - for abuse or misuse of sick leave (Newark Bd. of Ed.).

In many of these cases the verification policies established by the employers included procedures to be followed in different parts of the verification process. See Union Cty. Reg.; City of Newark. On balance, these procedures were intimately connected to the employer's ability to implement the verification policies and the Commission has not found such procedures negotiable. In Newark Bd. of Ed., P.E.R.C. No. 85-26, 10 NJPER 551, 552 (¶15256 1984), for example, the Commission applied the balancing tests from Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Assn., 81 N.J. 582 (1980) and In re IFPTE, Local 195 v. State, 88 N.J. 393

404-405 (1982) in holding that the employers managerial prerogative to control possible sick leave abuse was the predominant issue.

In the original charge the Association alleged only that the Board violated the Act by unilaterally adopting and implementing CP-1, the Staff Attendance Improvement Plan. Since the adoption and implementation of sick leave verification policies is a managerial prerogative, however, the original charge must be dismissed. The predominant issue regarding CP-1 was the verification of sick leave, and there was no showing that CP-1 was unreasonable.

Issues regarding the application of sick leave verification policies may be submitted to the parties grievance procedure, and issues regarding cost of physician fees may be negotiated or grieved. The Association did not show that it filed any grievance over the application of CP-1, or that the Board interfered with the processing of any such grievance. Similarly, the Association did not allege in the charge or produce evidence at hearing that: the Board deviated from the language in Article 21, Sec. L of J-1 concerning physicians examinations by implementing CP-1; any employee paid any fees for exams inconsistent with Article 21, Sec. L or any other contract provision or prior practice; conference or investigatory procedures were different from preexisting procedures or from the procedures in Article 4, Section C; any grievance was filed regarding the cost of physician exams or that the Board interfered with the processing of any such grievance.

In its post-hearing brief the Association further challenged the legality of CP-1. First, it argued that CP-1 violated certain decisions of the State Board of Education by applying ratings or giving warnings or evaluations mechanistically or based solely on the number of absences. Whether CP-1 complies with school law, however, is a matter within the jurisdiction of the Commissioner and State Board of Education, and not the Commission. The Commission has already held that adoption and implementation of sick leave verification policies is a managerial prerogative. Thus, such a policy cannot rise to the level of an unfair practice under our Act because it may not comply with school law. The Association must present those issues in the proper forum.

Second, the Association argued that the parties already negotiated a call-in procedure, Article 21, Section K, which, it maintained, the Board could not unilaterally alter. Call-in procedures however, play an intimate role in a public employer's ability to verify sick leave. Since implementation of such policies in non-negotiable, call-in procedures included in the policy that are different from contractual procedures are not inherently violative of the Act. See City of Elizabeth; Union County Regional. The Association, however, retains the right to grieve application of the policy. The call-in procedures implemented by the Board in CP-1 were not unreasonable, thus, were not violative of the Act.

The Association also challenged, as part of the call-in procedures, the Board's requirement that the recording of days out could not be changed without proper administrative authorization. Such a recording procedure protects against abuse and is inherently managerial.

Third, the Association argued the Board does not have the right to compel production of the records of an ill family member even when that was the basis of the leave. Once again, the Board had the right to implement a reasonable verification policy. If an employee refuses to provide the information requested and the use of a sick day is rejected by the Board the employee may grieve over the application of the policy.

Fourth, the Association argued that through negotiations or prior practice, the parties had established evaluation, discipline and investigatory interview procedures, but that the Board did not negotiate over such procedures in CP-1. While the Board did not negotiate over CP-1, the Association did not produce evidence that CP-1 procedures were different from prior or contractually negotiable procedures. It did not introduce independent prior procedures, only J-1. Article 12 of J-1 deals with teacher classroom observation and evaluation which was different than the evaluation and other procedures in CP-1 created to prevent misuse or abuse of sick leave. Article 4, Section C of J-1 provided for notice and Association representation at conferences or meetings that might adversely affect employees, and the

conference/investigatory interview procedures in CP-1 comply with that section. The language in CP-1 indicated that the procedures were consistent with the parties' contractual provisions and the employee could attach a rebuttal to the Board's summary report. There was no showing that this procedure differed from J-1.

In the amended charge the Association alleged that at a June 21, 1990 meeting the Board agreed to negotiate an attendance policy and procedure with the Association but that in February and March 1990 the Board violated the Act by unilaterally introducing and adopting a new attendance policy and procedure, C-1E.

But for one element of C-1E discussed infra, neither the facts nor law support the Association's allegations. I credited Klavon's testimony that he did not agree to negotiate an attendance policy with the Association, he only agreed to attempt reaching a mutually acceptable plan, but he explained it was ultimately a managerial prerogative. There is no evidence that the Board "induced" the Association to hold the original charge in abeyance, thus, the Board did not repudiate J-1 or any enforceable agreement. Even if there had been an agreement to "negotiate" a verification plan, since implementation of such a plan is a managerial prerogative, the Board could not be in violation of the Act by unilaterally implementing such a plan.

Notwithstanding what the parties agreed to do in June 1990, they meet twice to attempt to reach a mutually acceptable plan. After the meetings on December 15, 1989 and January 9, 1990, the

Board adopted several Association concerns in CP-8B and R-1, respectively. R-1 was hand-delivered to the Association on February 8, 1990 and requested the Association contact Klavon prior to February 26 over any elements raised in R-1, but the Association did not respond either before February 26 or March 28, 1990, the date C-1E was finally adopted.

The Association may not have responded to R-1 because it did not "concur" with it, and because it was waiting for a side-bar letter concerning Association leave time. But without a response the Board was unaware of specific Association objections to R-1 and C-1D and could not be certain the Association wanted to continue meeting about the plan. At the very least, there was no meeting of the minds about an agreement over the content of R-1. Nevertheless, since implementation of sick leave verification policies is a managerial prerogative, the Board had the right to unilaterally implement those lawful aspects of C-1E, including the various procedures. The procedures in the "Reporting Requirements" and "Conferences/Investigatory Interviews" sections of C-1E (and C-1D) were limited to contract provisions, and the Association did not produce evidence to the contrary. If the procedures were applied inconsistent with J-1 procedures, the Association could grieve over the application of the policy.

In addition to the above issues regarding the amended charge, the Association in its post-hearing brief, raised the same

issues it raised about the original charge,[10/] as well as the following issues: placing a duty on the Association to report inconsistent application of the policy to the superintendent, and failure to provide the side-bar letter mentioned in R-1.

While the Board has the right to implement reasonable sick leave verification policies to curb employee abuse or misuse of sick leave, it does not have the right to unilaterally impose a reporting requirement on employee organizations such as the Association. The Association certainly has the right to agree to such a requirement, but absent legislative fiat, the Board cannot impose the requirement in a verification plan. Here the Board proposed the reporting requirement language in R-1 but the Association did not respond to R-1, thus, did not agree to such language. Absent the Association's agreement, the Board violated the Act by unilaterally imposing the reporting requirement in C-1E. The Board must strike that requirement from C-1E and negotiate over any future inclusion.

In the context of this case the Board's failure to provide the side-bar letter as promised does not rise to the level of an unfair practice. There was no allegation or showing that the Board had unilaterally changed the parties' practice regarding Association leave days. But the mention of the side-bar letter in R-1 does leave open a question of whether the parties had agreed to new or

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10/ The Association specifically argued that the "needs improvement" paragraph in C-1E violated school law. That issue should be litigated before the Commissioner and State Board of Education.

different language concerning the number or use of Association leave days. Such leave days are negotiable, and the parties should complete the negotiations on that issue.

Finally, no evidence was presented showing that the Board discriminated in its application of CP-1 or C-1E. Thus, but for the reporting requirement language in C-1E, the Board's implementation of CP-1 and C-1E did not otherwise violate the Act.

Accordingly, based upon the above facts and analysis, I make the following:

RECOMMENDED ORDER

I recommend that the COMMISSION ORDER:

A. That the Board cease and desist from:

Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the Association over the inclusion of employee organization reporting requirement language in the Board's Employee Attendance Plan adopted on March 28, 1990.

B. That the Board take the following affirmative action:

1. Remove the reporting requirement language from the Employee Attendance Plan.

2. Offer to negotiate with the Association over any future attempts to adopt such language.

3. 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.

4. 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 all remaining allegations be dismissed.[11/]

Arnold H. Zudick
Hearing Examiner

Dated: December 7, 1990
Trenton, New Jersey

11/ The Association's request for damages, attorney fees and cost of suit are denied. Commercial Tp. Bd. Ed. v. Commercial Tp. Supportive Staff Assoc., 10 NJPER 78 (¶15043 App. Div. 1983).