

H.E. NO. 2020-1

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

In the Matter of

CITY OF EAST ORANGE,

Respondent,

-and-

Docket No. CO-2018-131

EAST ORANGE FIRE OFFICERS' ASSOCIATION,

Charging Party.

**SYNOPSIS**

A Hearing Examiner determines the negotiability of sixteen unilateral changes by the City of East Orange (City) to the East Orange Fire Department's Rules and Regulations. The Hearing Examiner finds some of the changes alleged by the East Orange Fire Officers' Association (FOA) concerning the usage of personal and vacation leave were mandatorily negotiable and were not negotiated by the City. The Hearing Examiner also finds that the other rule changes were not mandatorily negotiable because they either: (1) did not intimately and directly affect the work and welfare of FOA unit employees, (2) they had a *de minimis* impact on FOA unit employees' terms and conditions of employment; and/or (3) they were the exercise of the City's inherent managerial prerogative. In addition, the Hearing Examiner found the City violated the Act by not providing relevant information to the FOA concerning past meetings between FOA and City officials about the Department's rules.

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

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Appearances:

For the Respondent,  
O'Toole, Scrivo, Fernandez, Weiner Van Lieu, LLC  
(Marlin G. Townes, III, of counsel)

For the Charging Party,  
Zazzali, Fagella, Nowak, Kleinbaum & Friedman  
(Paul L. Kleinbaum, of counsel)

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

On November 29, 2017 and January 9, 2018, the East Orange Fire Officers' Association (FOA) filed an unfair practice charge and amended charge against the City of East Orange (City). The charge, as amended, alleges three claims: (1) In or about July 2017, the City unilaterally changed terms and conditions of employment by revising, without negotiations, the East Orange Fire Department's Rules and Regulations (Dept. Rules); (2) the City failed to provide information in response to the FOA's May 31, 2017 letter requesting information about meetings between FOA

representatives and City officials in 2016, and (3) on or about November 8, 2017, the City unilaterally implemented changes to certain personal, vacation and sick leave procedures without negotiations with the FOA. The FOA claims the City's conduct violates 5.4a(5) and, derivatively, (a)(1)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

On June 14, 2018, the Director of Unfair Practices issued a Complaint and Notice of Pre-hearing. On July 6, 2018, the City filed an Answer, denying it violated the Act and asserting that the City discussed the Dept. Rule changes with the FOA in 2016 and the FOA agreed to those changes in 2017. On January 29 and March 27, 2019, I conducted a hearing at which the parties examined witnesses and introduced exhibits. Post-hearing briefs were filed on May 31, 2019.

Upon the record, I make the following:

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<sup>1/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

**FINDINGS OF FACT**

1. The FOA is the exclusive majority representative of fire captains and deputy fire chiefs employed by the City. (1T34; J-1 and J-2)<sup>2/</sup>. The FOA is affiliated with the New Jersey Firefighters' Mutual Benevolent Association (FMBA) Local 223. (1T21, 1T32)<sup>3/</sup>

2. The FOA is a party to two collective negotiations agreements (CNA) with the City. One CNA covers fire captains and the other CNA applies to deputy fire chiefs. (1T34-35; J-1, J-2). Both agreements extend from July 1, 2013 through December 31, 2017. (J-2, J-3).

3. Ricardo Carter is President of the FOA and is a City fire captain. (1T31, 1T32). He has served as a captain for seven (7) years and has been a firefighter for the City for eighteen (18) years. (1T31, 1T32). Carter has been President of the FOA since February 2018. (1T32). Prior to becoming FOA's president, Carter was Vice President of the FOA from November 2016 to February 2018. (1T32). Carter did not hold any office

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2/ "T" represents the transcript, preceded by a "1" or "2" signifying the first or second day of hearing, followed by the page number(s); "C" represents Commission exhibits; "J" represents joint exhibits; "CP" represents Charging Party's exhibits; and "R" represents Respondent's exhibits.

3/ The Charging Party's and Respondent's witnesses sometimes refer to the FOA as "FMBA Local 223." They are one and the same organization. The rank and file firefighters unit is affiliated with FMBA Local 23. (1T33).

with the FOA prior to November 2016. (1T32). He did serve for four (4) years as President of FMBA Local 23, the rank-and-file firefighters unit, prior to becoming a fire captain. (1T33).

4. Prior to Carter becoming FOA president, Anthony Thompson, a City fire captain, was FOA president from November 2016 to February 2018. (1T33-34). Andre Williams, the City's current Fire Chief and a former fire captain, served as FOA president from May 2016 to November 2016. (1T33-34). Williams has served as Fire Chief since January of 2017 and has been a firefighter for the City for sixteen (16) years. (1T152; R-5).

5. In 1998, the City adopted a book of rules and regulations governing the fire department (hereinafter referred to as the "1998 Rule Book"). (1T35; CP-7).

6. Sheila Coley served as the City's Director of Public Safety from November 30, 2015 through June 8, 2018. (1T121). As Public Safety Director, Coley reviewed the 1998 Rule Book and determined that the rules were "...outdated in terms of the needs of the organization [fire department]..." (1T118, 1T119). After reviewing the 1998 Rule Book, Coley met with then FOA President Williams and Garrett Winn, the President of the rank and file firefighters' union (FMBA Local 23) in or around June or July of 2016. (1T123-124). At the meeting, Coley explained that "...some updates needed to happen" to the 1998 Rule Book. (1T119). Coley, Winn and Williams met again in September 2016 to

review the 1998 Rule Book. (1T125). Coley did not participate in any other meetings with FOA representatives concerning the 1998 Rule Book and does not recall having any discussions with Williams about the Dept. Rules after Williams became Fire Chief in January 2017. (1T129-130, 1T140). She has no knowledge of any meetings concerning amendments to the Dept. Rules in 2017. (1T148).

7. In describing the "process" of reviewing the 1998 Rule Book at the June/July 2016 and September 2016 meetings, Coley testified:

[W]e [Winn, Williams, and Coley] each had a copy of the existing rules and regulations and we went through every page, every article, read every line, and if I saw changes, I made my recommendations. If they saw changes, they made their recommendations and then we printed those—we wrote those out and then we had them printed and read so that we could determine at a later date what existed and what recommended changes were made.

[1T124]

Coley also testified that when she met with Winn and Williams in September 2016, they had "...went through every page, every line [of the Dept. Rules] to make sure that what we agreed on is what was captured in the document." (1T125). Coley referred to exhibit R-1 as the document representing the proposed changes to the 1998 Rule Book. (1T124-125).

After the September 2016 meeting, Coley testified that a copy of the final amended rules and regulations were given to Winn and Williams and "...it was my order to issue it and make sure that everyone had a copy of the rules and regulations, and that was pretty much the end of it." (1T130). She testified that Winn and Williams notified her that the Dept. Rule changes were reviewed with each unions' membership and "cleared" by the union and recalls that the amended rules were issued "at the end of 2016 or possibly in 2017." (1T130-131, 1T141-142). According to Coley, she had given Williams in November 2016 copies of the amended Dept. Rules for members to sign and she believed at that point, the rules had been finalized, issued and implemented. (1T143, 1T144). Coley recalls the amended Dept. Rules being issued prior to Williams becoming Fire Chief and does not recall any meetings concerning amendments to the Dept. Rules taking place after December 31, 2016. (1T145, 1T148). She recalls only one objection being raised by the FOA after Williams became Fire Chief concerning the Dept. Rules and the City's purchasing of uniforms. (1T126).

I do not credit Coley's testimony that the FOA agreed to proposed amendments to the 1998 Rule Book in 2016 and that the FOA membership had reviewed and approved Dept. Rules for issuance at the end of 2016, as this testimony is inconsistent with Williams' and Carter's testimony about how Dept. Rules were

revised. Williams and Carter testified that the FOA President and Vice President (Thompson and Carter at the time) met with Williams in January 2017 to discuss proposed changes to the 1998 Rule Book and objections the FOA had to the proposed rule changes. (1T41-42, 1T159; R-5). Williams also testified that the FOA President met with him in May and August 2017 to review proposed changes to the 1998 Rule Book, that the changes to the Dept. Rule Book were finalized and issued in August 2017 and that the "body" or union membership did not approve changes to the 1998 Rule Book. (1T157, 1T159, 1T160; R-5). The issuance of the revised rule book in August 2017 is further corroborated by Carter's testimony and documentary evidence that the Dept. Rules were issued in August 2017 and that the FOA did not approve of Dept. Rule changes in 2016. (1T40, 1T63; CP-9). This evidence contradicts Coley's assertions that the rules were "cleared" by the FOA and finalized and issued at the end of 2016. Williams also testified, contrary to Coley's testimony, that the "final rules and regulations" were distributed to FOA members in August 2017 and that he did not know of any final rules or regulations being distributed to FOA members prior to August 2017. (1T208, 1T209).<sup>4/</sup> I find that while Coley did meet with Williams in

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<sup>4/</sup> Williams testified that a version of the Dept. Rules were mistakenly sent out in March 2017, but later "recalled" since they did not represent the final changes to the Dept. Rules. (1T209). This testimony also conflicts with Coley's  
(continued...)

June/July 2016 and September 2016 to discuss changes to the 1998 Rule Book, those discussions between the FOA and City continued into 2017, and that the 2016 meetings with Coley did not culminate in agreement by FOA to changes to the 1998 Rule Book.

8. In November 2016, Carter first became aware that the City was considering making changes to the Dept. Rules from his conversation with Thompson, who was FOA President at the time. (1T37, 1T40). Thompson provided Carter with the City's proposed, revised Dept. Rule book in November 2016 (1T38-39; CP-8). Prior to November 2016, the FOA did not authorize Williams to discuss or negotiate changes to the Dept. Rules and the FOA did not vote on any changes to the Dept. Rules prior to November 2016.<sup>5/</sup> (1T40).

9. Thompson and Carter examined and compared the revised rule book (CP-8) with the 1998 Rule Book (CP-7) for changes. (1T41). At an FOA membership meeting in December 2016, Carter discussed the proposed rule changes with members and outlined

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4/ (...continued) testimony that the rules were approved, finalized and implemented in 2016.

5/ Williams testified that he reviewed Coley's proposed rule changes with some members of the FOA's Executive Board, but acknowledged that he did not review the proposed rule changes with the "body" or membership of the FOA and that the FOA did not approve Coley's proposed changes. (1T157). He explained he did not seek FOA approval by the "body" or general membership of the FOA because he, as FOA President, was expected to negotiate the rule changes without prior approval. (1T158).

what changes the FOA did not agree with. (1T42). The FOA has membership meetings on a quarterly basis each year. (1T39).

10. On or about January 27, 2017, Carter, Williams, Thompson, Winn, then-FMBA Local 23 Vice President Steven Suggs, and FMBA state union delegate Corey Baskerville met to discuss the City's proposed changes to the 1998 Rule Book. Coley did not attend the meeting and Williams represented the City as the City's Fire Chief at the meeting. (1T42-43, 1T159; R-5). Williams was promoted to Fire Chief on January 23, 2017. (R-5).

11. During the January 2017 meeting, the FOA outlined "discrepancies" between the 1998 Rule Book and revised Dept. Rule book and explained the FOA did not agree with several changes to the Dept. Rules. (1T43). The FOA also suggested changes to the Dept. Rules. (1T211). In response to the FOA's comments and objections, Williams advised that he would bring back their objections and proposals to Coley but that Coley "...can just say no about the changes..." the FOA was proposing. (1T43-44). Williams did not respond specifically to the proposals and comments made by the FOA at the meeting and did not arrive at any compromises with the FOA on the issues raised at the meeting. (1T57, 1T98).<sup>6/</sup>

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<sup>6/</sup> Williams acknowledged on cross examination that FOA representatives suggested changes to the Dept. Rule book at the January 2017 meeting and that he told the FOA any changes "had to go back to Director Coley as per ordinance."  
(continued...)

12. The FOA objected to several proposed changes by the City to the 1998 Rule Book at the January 2017 meeting. One objection concerned a change in the amount of notice a unit officer must provide the City when calling out sick for a scheduled shift. (1T44, 1T45). Under the 1998 Rule Book, a unit officer was required to provide at least one hour's notice of being unavailable for a scheduled shift due to illness or injury prior to the start time of the shift. (CP-7). Specifically, the 1998 Rule Book provided:

Any Department member becoming ill or injured while off-duty and thereby unable to report for a scheduled shift, shall report by telephone to the Tour Chief not less than one hour before the beginning of the scheduled shift.

[Article 15, Section 1 of CP-7]

The revised Dept. Rule book provided:

Any Department members becoming ill or injured while off-duty and thereby unable to report for a scheduled shift, shall report by telephone to the Dispatcher/Communications not less than two hours before the beginning of the scheduled shift.

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6/ (...continued)  
(1T211). He also testified that he responded to the FOA's comments at the meeting but did not specifically explain how he responded to the merits of the FOA's proposals and objections. (1T162). Williams does not rebut Carter's testimony that the parties did not reach any compromise on the issues raised at the meeting. I credit Carter's testimony and find that Williams' response to the FOA's objections and proposals at the January 2017 meeting was limited to explaining that changes had to be cleared and approved by Coley.

[Article 11, Section 1 of CP-8)

Carter testified that Williams did not respond to the FOA's objections to this change at the January 2017 meeting. (1T46). Williams does not rebut this testimony but did testify that this change was made "...at the request of the deputy chiefs to Director Coley." (1T170, 1T171). Williams does not provide the names of the deputy chief(s) who requested this change, nor does he testify about when they made the requested change and whether that request was made through the FOA. Moreover, Coley did not testify that this change was requested by deputy chiefs. I therefore do not credit Williams' testimony on this point and credit Carter's testimony. Moreover, even if a deputy chief contacted Williams about making this change, that request was not made by or through the FOA. I find the FOA did not request or consent to this change.

13. At the January 2017 meeting, the FOA also objected to a change to the 1998 Rule Book concerning the time period for submitting change of address or telephone number information to a supervisor. (1T47). The 1998 Rule Book provides, in pertinent part:

Members of the Department upon changing their place of residence and/or telephone number shall promptly notify their immediate superior of such change on Department form "Change in Personnel Record."

[Article 1, Section 7 of CP-7]

The City's revised Dept. Rule book substitutes the word "promptly" with a twenty-four (24) hour time period for submitting a "Change in Personnel Record." (1T47-48). The revised Dept. Rule Book provides, in pertinent part:

Members of the Department, upon changing their place of residence, telephone number or name shall promptly notify their immediate superior of such change on Department form "Change in Personnel Record" at least 24 hours after such change.

[Article 1, Section 7 of CP-8]<sup>7/</sup>

Williams testified that he agreed to this change when he was FOA President and that the FOA did not complain about the change after Williams' tenure as FOA President. (1T176). I do not credit this testimony, as it is inconsistent with Williams' and Carter's testimony about the January 2017 meeting. Williams did not rebut Carter's testimony that the FOA objected to this change at the January 2017 meeting and Williams acknowledges that he advised the FOA at that meeting that he would have to "take back" the FOA's comments and objections to Coley for consideration and approval. (1T47, 1T211). Williams did not testify that he responded to the FOA's objection at the January 2017 meeting by

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<sup>7/</sup> The text of this section reads "twelve (24) hours after such change." (CP-8). I infer that the "twelve" was a typographical error and that the author(s) of the Dept. Rule book meant to write "twenty-four (24) hours after such change."

asserting the FOA had already agreed to the change during his tenure as FOA President (which, at a meeting to discuss the rule changes, would naturally have been raised). I infer that if the FOA had agreed to the changes when Williams was FOA President, Williams would have informed the FOA of that fact at the January 2017 meeting. Given these circumstances, I find that the FOA did not agree to this change during Williams tenure as FOA President.

14. The FOA also objected to a Dept. Rule change at the January 2017 meeting that gave the Fire Chief the authority to overturn a Hearing Officer's disciplinary decision. (1T48). The 1998 Rule Book did not give the Fire Chief the authority to overturn a Hearing Officer disciplinary determination. The revised Dept. Rule book (CP-8), provides, in Section 9 of Article 13, that:

The Chief of Department or his designee will be the hearing officer in all minor disciplinary matters (suspensions of 5 days or less). In all major disciplinary matters (discipline of 5 days or more) the City Law Department will arrange for an "outside" independent hearing officer to preside over the departmental hearing. The hearing officer's decision will be final, but may be overturned by the Chief of the Department and/or Appropriate Authority. The decision of said hearing officer will be completed within 20 days of the hearing.

The language in this section vesting the Chief with the power to overturn a Hearing Officer decision does not appear in the corresponding article of the 1998 Rule Book. (Article 17 of CP-7).

15. Carter testified that the FOA objected at the January 2017 meeting to another change to the 1998 Rule Book concerning the advance notice required for taking special leave. (1T49). "Special leave" is described by Carter as the "...ability to leave work whenever necessary to handle...a doctor's appointment, family emergency, so forth and so on." (1T50). The revised Dept. Rule book requires two weeks advance notice prior to taking special leave, the 1998 Rule Book contains no such requirement. (1T51, CP-7, CP-8). Specifically, the 1998 Rule Book provides in Article 18, Section 4:

Special Leaves of Absence shall be applied for in writing, well in advance of the date such leave is desired, on the application form provided therefore. All information, data or communications involved in showing the necessity for such leave shall be submitted with the application

[CP-7]

The Revised Dept. Rule Book at Article 14, Section 4 provides:

Special Leaves of Absence shall be applied for in writing, two (2) weeks in advance of the date such leave is desired, on the application form provided therefore. All information, data, or communications involved in showing the necessity for such leave shall be submitted with the application.

[CP-8]

Article 14, Section 4, mirrors the language in the rule book that was finalized and issued in 2017. (Article 14, Section 4 of CP-9).

Carter testified Williams did not respond to the FOA's objection to this change. (1T51). Williams acknowledges that the two weeks notice requirement was a change from the 1998 Rule Book, but testified that this amendment was agreed to by the FOA when Williams was FOA President and that the FOA did not complain about the change when Williams became Chief. (1T180, 1T181). For the reasons explained in Finding of Fact 13, I do not credit Williams' testimony that the FOA agreed to this change when he was FOA President and credit Carter's testimony that Williams was not responsive to the FOA's objection at the January 2017 meeting.

16. The FOA also objected to a change to the 1998 Rule Book concerning the time period for submitting a "change of time" request. A "change of time" request is when two unit offices agree to swap or exchange shifts. (1T182). The deadline for submitting such request changed from within thirty (30) days of the requested shift change to within forty-eight (48) hours of the request time. (1T52-53; CP-7, CP-8). Article 18, Section 16 of the 1998 Rule Book provides:

All change of time requests must be submitted within thirty days of the requested time. If personnel do not wish to have the repayment of time with the thirty (30) day period, they must write "to be repaid at a later date." When they wish repayment they must submit a change of time form within thirty (30) days of the date requested and state on this form that it is a repayment of time for (date).

[CP-7]

The Revised Dept. Rule Book provides, in pertinent part:

All change of time requests must be submitted within 48 hours of the requested time. If personnel do not wish to have the repayment of time within the 48 hour period, they must write "to be repaid at a later date." When they wish repayment they must submit a change of time form within thirty (30) days of the date requested and state on this form that it is repayment of time for (date).

[Article 14, Section 15 of CP-8].

The language in Article 14, Section 15 of the Revised Dept. Rule Book (CP-8) is identical to the language in Article 14, Section 16 of the Dept. Rule book issued in August 2017 (CP-9). While Williams testified that the Revised Dept. Rule book did not represent a change from the 1998 Rule Book's procedures on requesting payment for changes in time (1T183), I find that this testimony conflicts with the plain language of the above-quoted provisions and do not credit it. The Revised Dept. Rule Book (CP-8) and August 2017 Rule Book (CP-9) clearly reduces the time period for submitting a change of time request from thirty (30) days to within 48 hours of the requested time. I also infer, from the language of these provisions and Williams' testimony, that a "change of time request" is a request from the City for payment for working a shift that was scheduled to be worked by someone else.

17. The FOA also objected at the January 2017 meeting to a newly created notice requirement for returning to duty following

recovery from injury. (1T53-54). Under the 1998 Rule Book, an officer cleared by a workers compensation panel doctor to return to work was not required to provide advance notice to the City about what day he or she would return to work. (1T53-54; CP-7). The revised Dept. Rule book requires an officer provide the City with four (4) hours notice prior to starting the shift he is returning to work. (Article 11, Section 17 of CP-8). Specifically, Article 11, Section 17 of the revised Dept. Rule book provides, in pertinent part:

When the officer is given a "Return to Duty" date by the Compensation Panel Doctor, the firefighter is required to notify the Secretary assigned to Line of Injuries and Tour Chief of his return to duty no less than four (4) hours prior to his duty time.

[CP-8]

The four (4) hour notice requirement is not included in the August 2017 rule book. There, Article 11, Section 16 provides instead:

When the member is given a "Return to Duty" date by the Compensation Panel Doctor, the firefighter is required to notify the Tour Chief and Medical Officer of their return to duty **IMMEDIATELY**.

[CP-9]

18. Carter testified that he also objected at the January 2017 meeting to the omission from the revised Dept. Rule Book of the requirement in the 1998 Rule Book that the City purchase uniforms to "...wear around the fire house but not fire fighting

gear itself." (1T55). The 1998 Rule Book, provides, in pertinent part:

The regulation station uniform (work attire) for members of the fire-fighting force shall be purchased by the Department in accordance with OSHA regulations.

[p. 55 of CP-7]

I do not credit Carter's testimony that the revised Dept. Rule Book (CP-8) omitted this provision. The revised Dept. Rule book contains identical language to the 1998 Rule Book's above-quoted provision. (Article 15, Section 3 of CP-8). The purchasing requirement was omitted from the August 2017 rule book (CP-9), but Carter acknowledged this was omitted because the parties agreed, in or around 2010, to roll into unit officers' base salary the money the City used to provide for station-wear uniforms. (1T98-99). In 2010 or 2011, the FOA and City settled a contract with the City that rolled the uniform allowance into base salary. (1T108). I find that this contract settlement was the reason the uniform allowance provision was removed from the August 2017 Dept. Rule book. (CP-9).

19. By letter dated March 24, 2017 from Paul Kleinbaum, Esq. (FOA's legal counsel) to City Administrator William Senande, Kleinbaum requested on behalf of FOA a copy of any rules, regulations, or other documentation concerning the establishment by Coley of a "Professional Services Unit" (PSU). (CP-1). Kleinbaum wrote that the FOA "...has a number of concerns about

the PSU but will await review of any documentation concerning the establishment of the unit." (CP-1). Coley and Thompson were carbon copied on the correspondence. (CP-1).

20. In response to Kleinbaum's March 24 letter, Marlin G. Townes, III, Esq., then Assistant Corporation Counsel for the City, sent a letter dated April 12, 2017 to Kleinbaum (CP-2). Senande, Coley and City Corporation Counsel Khalifah L. Shabazz were carbon copied on the letter. Townes's letter clarified that the "Professional Services Unit" referred to in Kleinbaum's letter was actually called the "Professional Standards Unit" (PSU), and that the PSU was "...staffed by appropriate personnel from the Fire Division and all current rules and regulations of the Division are being followed and enforced." (CP-2). Townes goes on to write that the "...union leadership and the rank and file membership are aware of this new unit" and that "...the Department of Public Safety is in the process of updating the Rules and Regulations for the Fire Division which will, in part, address the Fire PSU." (CP-2).

21. By letter dated April 18, 2017, Kleinbaum acknowledged receipt of Townes's April 12 letter and replied, in pertinent part:

Because there may be negotiable issues involved in creating rules and regulations, please provide the FMBA with a copy of any new or updated rules or regulations concerning the PSU, as well as for any new or updated rules and regulations. As I am sure

you are aware, the City is required to negotiate with the FMBA over the adoption of any new rules or regulations or changes in current rules and regulations concerning terms and conditions of employment.

[CP-3]

22. Carter and Williams offer divergent accounts of what discussions about the Dept. Rules occurred between FOA and City representatives after the January 2017 meeting.

Williams testified that he met with Thompson, Winn, and Suggs on May 9, 2017 and August 3, 2017 "...to again discuss the final changes to the rulebook before Director Coley approved" the Dept. Rule book. (1T160-161; R-5). Williams does not recall Carter attending either of these meetings. (1T160-161). Coley did not attend either meeting and she has no knowledge of any meetings between Williams and the FOA in 2017 concerning the Dept. Rules. (1T129-130, 1T148, 1T160-161). On cross examination, Williams testified that he had "several union meetings" to discuss "some of the [rule] changes", but he could not recall when those meetings were. (1T206). He then characterized those meetings as conversations with FOA executive board members that would occur "...in the course of our work days...I would come in on days that I was off and talk to guys that weren't working my shift...I showed the document [Dept. Rules] to pretty much anybody who was around that was an officer." (1T206). When asked on cross examination about how

many union meetings occurred to discuss Dept. Rule changes, Williams engaged in the following colloquy with FOA counsel (1T208-209):

Q: And tell me what—how many union meetings did you discuss these changes in the rules and regulations?

A: Well, the meetings weren't called just to discuss rules and regulations.

Q: That wasn't my question. My question was at how many meetings did you discuss the rules and regulations?

A: Oh, I do not remember.

Q: Was it one meeting, two meetings, three meetings?

A: I do not remember. Like I said, I don't remember.

Q: But you remember—you remember well enough that these individuals all agreed with these changes, according to your testimony?

A: Yes. Those were smaller meetings, yes.

Q: And at these meetings you never put up these rules and regulations for a vote of the membership, did you?

A: No I did not.

[1T208-209]

While the City requested a subpoena for Thompson's testimony, the City chose not to call Thompson as a witness at the hearing.

Carter testified on rebuttal that he was not aware of any meetings between Williams and Thompson after the January 2017

meeting and that Thompson never advised Carter of a meeting with Williams after January 2017. (2T10-11). Carter also testified that he did not attend any meetings about the Dept. Rules with Williams in May or August of 2017 and that he is not aware of any meetings between FOA representatives and Williams in May or August 2017 to discuss Dept. Rule. changes. (1T83-84). On direct examination, Carter testified that between the January 2017 meeting and the issuance of the Dept. Rules in August 2017, the City did not meet with the FOA to discuss the Dept. Rule changes and Williams and Coley did not respond to the FOA's concerns and objections concerning the proposed rule changes (CP-8). (1T64).

I credit Carter's testimony and do not find Williams' testimony about meetings with the FOA credible. Williams at first testified about "meetings" with the FOA to finalize Dept. Rule changes, but was unable to recall when or how many meetings took place. He then qualified this testimony by characterizing these meetings as more akin to spontaneous or sporadic conversations in the office with whomever wanted to review the rules, and less actual negotiations sessions or scheduled meetings with the FOA.

While Williams asserted he met with Thompson in May and August 2017 to finalize the Dept. Rule changes, I do not find it credible that Thompson would have participated in such

discussions on behalf of the FOA without Carter knowing about the meetings, since it was Thompson who informed Carter about the proposed rule changes in November 2016 and participated with Carter at the January 2017 meeting. I also draw a negative inference against Williams' testimony based on the City's decision not to call Thompson to rebut Carter's testimony and corroborate Williams' testimony that the FOA met with Williams to finalize the Dept. Rule changes.<sup>8/</sup> If the meetings did take place with FOA's authority and consent, Thompson, who was FOA President at that time, could have testified and corroborated Williams' testimony about the May and August 2017 meetings. In the absence of Thompson's testimony and for the other reasons discussed above, I find the FOA did not meet with Williams in May or August 2017 to finalize the Dept. Rule changes and that, at most, Williams may have discussed the Dept. Rules with Thompson and/or other officers from time to time without the approval or assent of the FOA.

23. By letter dated May 17, 2017, Gregory Franklin, Esq., then outside legal counsel to the City, responded to Kleinbaum's

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<sup>8/</sup> See North Bergen Tp. Bd. of Ed., H.E. No. 2002-1, 27 NJPER 315, 319 (¶32112 2001), adopted P.E.R.C. No. 2002-12, 27 NJPER 370 (¶32135 2001), stay denied, P.E.R.C. No. 2002-31, 28 NJPER 55 (¶33018 2001), aff'd 28 NJPER 406 (¶33146 App. Div. 2002)

April 18 letter and carbon copied Senande, Coley and Townes on the response. (CP-4). In the letter, Franklin asserts that the City did engage in good faith negotiations with the FOA over the Dept. Rule changes, that an initial meeting with the FOA occurred in June 2016, that proposed rule changes were emailed to the FOA and that further discussions between the FOA and Coley ensued that resulted in Coley's issuance of "new rules and regulations in March 2017." I find that this letter was received by Kleinbaum, but do not credit the assertions therein by Franklin about good faith negotiations.<sup>9/</sup>

24. In a letter dated May 31, 2017, Kleinbaum responded to the City's May 17 letter by requesting the City provide the following information (CP-5):

(1) The dates of meetings between the City and FOA with a list of attendees at each meeting;

(2) Any documents referring to changes in the Dept. Rules that were signed off on or agreed to by the FOA; and

(3) Any documents referencing the issuance of modified Dept. Rules in March 2017 from Director Coley.

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<sup>9/</sup> As discussed in footnote 4, *supra*, Williams acknowledged that a version of the Dept. Rules were mistakenly sent out in March 2017 but were later "recalled" since they did not represent the final changes to the Dept. Rules. (1T209).

There is no indication in the record that the documents requested were provided to the FOA or that the City advised the FOA such documents did not exist or were otherwise unavailable.<sup>10/</sup>

25. The City finalized and issued the revised Dept. Rule book in August of 2017. (1T63, 1T208; CP-9). FOA unit officers were required by the City to meet with Williams and "sign off" on the August 2017 Dept. Rules. (1T63). At no time did the FOA membership vote on or approve the August 2017 rule book. (1T65, 1T208-209).

26. The August 2017 Dept. Rule book (CP-9) incorporated some of the proposed Dept. Rule revisions (CP-8), modified and dropped other proposed revisions, and added some new provisions that were not discussed at the January 2017 meeting or contained in the City's proposed Dept. Rule book (CP-8). The chart below

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<sup>10/</sup> Williams refers in his testimony to a July 25, 2018 letter from Townes to Kleinbaum as the City's response to the information request. (1T195; R-6). While the letter references the dates of purported negotiations sessions between the FOA and City officials, it does not refer to documents requested in items (2) and (3) of Kleinbaum's letter. Williams also testified that the City responded to the May 31 letter through Franklin, who was then the City's outside counsel, but he did not have a copy of Franklin's response and "did not know" whether he had a copy of Franklin's response at his office. (1T204-205). I do not credit this testimony and find that Franklin did not respond to the May 31, 2017 information request.

identifies the language changes<sup>11/</sup> between the 1998 Rule Book (CP-7) and the revised, August 2017 Rule Book (CP-9)<sup>12/</sup>:

1998 Rule Book (CP-7)	August 2017 Rule Book (CP-9)
<p>Page 4, Article 1, Section 7:</p> <p>Members of the Department upon changing their place of residence and/or telephone number shall promptly notify their immediate superior of such change on Department form "Change in Personnel Record."</p>	<p>Page 7, Article 1, Section 7:</p> <p>Members of the Department upon changing their place of residence, telephone number or name shall promptly notify their immediate superior of such change on Department form "Change in Personnel record" <b>at least 24 hours after such change. In the event the aforementioned change is of exigent circumstances and the Twenty four (24) hour stipulation cannot be met,</b></p>

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<sup>11/</sup> Words in bold are intended to highlight the actual change in policy language.

<sup>12/</sup> Carter prepared a chart (CP-10) highlighting the language changes between the 1998 Rule Book and August 2017 Rule Book. (1T70-71). I rely only on those changes identified in CP-10 that are reflected in CP-7 and CP-9. Those changes referred to in CP-10 that are not corroborated by CP-7 and CP-9 or are otherwise unclear are discredited. For instance, Carter's chart (CP-10) claims a change to the 1998 Rule Book in the time period officers were permitted to wear shorts from May 1 through September 30 to July 1 through September 30. Carter references page 60, Article 19 of the 1998 Rule Book in identifying the change, but nowhere in Article 19 does the word "shorts" or the right to wear shorts appear. (CP-7). Instead, Article 19 refers to a "Class B" uniform being worn from May 1 through October 31 and the Class B uniform does not include shorts. (CP-7).

1998 Rule Book (CP-7)	August 2017 Rule Book (CP-9)
	<p>then the member will immediately notify their Deputy Chief upon such change. The member will then submit a written report explaining why the above twenty four (24) hours stipulation could not be met.</p>
<p>Page 4, Article 1, Section 13:  As per Department of Personnel regulations, unexplained absence without leave on the part of any member of the Department for the duration of five days shall be deemed and held to be a resignation. Such Members may be dismissed from the service at the discretion of the Board of Fire Commissioners.</p>	<p>Page 8, Article 1, Section 14:  As per Department of Personnel regulations, unexplained absence without leave on the part of any Member of the Department for the duration of <b>five twenty four hours shifts (5-24hr)</b> shall be deemed and held to be a resignation. Such Member may be dismissed from the service at the discretion of the <b>Appropriate Authority, with the authorization of the Appointing Authority.</b></p>
<p>Page 12, Article 4, Section 1:  The Administrative Assistant to the Chief of Department shall be a <b>Chief Officer</b> designated and assigned to the duties hereinafter prescribed by the Board of Fire Commissioners, and shall be under the direct supervision of the Chief of Department to whom he/she shall be responsible for the proper discharge of his/her duties.</p>	<p>Page 17, Article 4, Section 1:  The Administrative Assistant to the Chief of Department shall be <b>an Officer</b> designated and assigned to the duties hereinafter prescribed by the Chief of the Department with approval from the Appropriate Authority, and shall be under the direct supervision of the Chief of Department to whom he/she shall be responsible for the proper discharge of his/her duties.<sup>13/</sup></p>

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<sup>13/</sup> Walter Cosby, a FOA unit employee, is the Administrative Assistant to the Fire Chief. (1T229, CP-12, CP-13). The  
(continued...)

1998 Rule Book (CP-7)	August 2017 Rule Book (CP-9)
<p>Page 13, Article 4, Section 9:</p> <p><b>Internal Affairs</b> - he/she shall investigate and conduct hearings on disciplinary cases, or he/she shall have others investigate a situation which he/she deems necessary. These findings shall be reported to the Chief of Department.</p>	<p>Page 18, Article 4, Section 9:</p> <p><b>Professional Standards</b> - He/she shall investigate and or conduct hearings on disciplinary cases if authorized or requested to do so by the <b>Chief of the Department and/or Appropriate Authority</b>. If authorized to conduct an investigation, his/her findings shall be reported to the Chief of Department as promulgated in Article 13, Section 6.</p>
<p>Page 16, Article 6, Section 2:</p> <p>They [tour chiefs] shall be responsible for the conduct and efficiency of the Companies in their respective Tours, and for the strict compliance with all Rules and Regulations and Orders governing the Department.</p>	<p>Page 19, Article 5, Section 2:</p> <p>They [tour chiefs] shall be responsible for the conduct and efficiency of all officers, <b>members and equipment</b> in the Companies of their respective Tours, and for the strict compliance with all Rules and Regulations and Orders governing the Department.</p>

13/ (...continued)

City appointed Cosby as a fire captain on September 26, 2014. (CP-13). Cosby filed a petition with the Civil Service Commission seeking a classification review of his position as Administrative Assistant and a determination that the duties of Administrative Assistant are consistent with that of a deputy chief, not a fire captain. On May 2, 2018, the CSC adopted Cosby's position and determined that Cosby's duties as an Administrative Assistant are that of a deputy chief. (CP-13).

There is no indication in the record that an employee outside FOA's unit was appointed or assigned the duties of Administrative Assistant.

1998 Rule Book (CP-7)	August 2017 Rule Book (CP-9)
<p>Page 43, Article 15, Section 1:</p> <p>Any department member becoming ill or injured while off duty and thereby unable to report for a scheduled shift, shall report by telephone to the Tour Chief <b>not less than one hour</b> before the beginning of the scheduled shift.</p>	<p>Page 39, Article 11, Section 1:</p> <p>Any department member becoming ill or injured while off duty and thereby unable to report for a scheduled shift, shall report by telephone to the Tour Chief or Dispatcher/Communication <b>not less than two hours</b> before the beginning of the scheduled shift.</p>
<p>Pages 43-44, Article 15, Section 4:</p> <p>After being out on sick leave without a doctor's note for more than eight work days in a calendar year, members may be required by Chief on their next absence to see a physician and submit a physician's report to the department "within ten days of the onset of the illness.</p>	<p>Page 40, Article 11, Section 7:</p> <p>Change is that members must submit a physician's note to department "immediately upon return to work."</p>
<p>Page 44, Article 15, Section 5:</p> <p>Before personnel have accumulated eight sick days in a calendar year (any combination of days), and they are on sick leave for three or more days, on the third consecutive work day, they must be seen by their physician, and they must submit an FD-5 Form as outlined above [i.e. FD-5 form must be submitted within ten days of the onset of the illness]</p>	<p>Page 41, Article 11, Section 8:</p> <p>Whenever a member of this Department is out sick for more than 48 consecutive hours (two 24 hour shifts, four 12 hour shifts, or any combination of hours that total more than 48 hours), said member must be seen by their physician and they must submit a doctor's note immediately upon return to work.</p>

1998 Rule Book (CP-7)	August 2017 Rule Book (CP-9)
<p>-This section was added to the August 2017 Rule Book and was not in the 1998 Rule Book.</p>	<p>Page 42, Section 18, Article 11:</p> <p>"Any member of this agency absenting themselves from duty in an improper manner shall be subject to loss of pay and/or disciplinary action for such absence. Members are guilty of an unauthorized absence if they:</p> <p>(a) are not at home or are not at their place of recovery when contacted by a Representative of this department during their restriction hours;</p> <p>(b) fail to report to the Compensation Doctor for examination as ordered.</p> <p>c) Feign illness or injury, or deceive the Compensation Doctor or a Superior Officer in any way as to their condition.</p> <p>(d) become injured or sick and go off duty on personal sick leave as a result of improper conduct or intemperate, illegal, immoral or vicious habits or practices.</p> <p>(e) Fail to report for duty when so directed by the Compensation Doctor or a Superior Officer, or violate any provision concerning the reporting of sickness or injury.</p> <p>(f) Fail to return to duty from sick leave when so directed.</p>

1998 Rule Book (CP-7)	August 2017 Rule Book (CP-9)
<p>Page 52, Section 4, Article 18:</p> <p>Special Leaves of Absence shall be applied for in writing, <b>well in advance</b> of the date such leave is desired, on the application form provided therefore. All information, data or communications involved in showing the necessity for such leave shall be submitted with the application.</p>	<p>Page 52, Section 4, Article 14:</p> <p>Special Leaves of Absence shall be applied for in writing, two <b>(2) weeks in advance</b> of the date such leave is desired, on the application form provided therefore. All information, data, or communications involved in showing the necessity for such leave shall be submitted with the application.</p>
<p>Page 54, Article 18, Section 16:</p> <p>All change of time requests must be submitted <b>within thirty days of the requested time.</b> If personnel do not wish to have the repayment of time <b>within the thirty (30) day period,</b> they must write "To be repaid at a later date." When they wish repayment they must submit a change of time form within thirty days of the date requested and state on this form that it is a repayment of time for (date).</p>	<p>Page 54, Article 14, Section 16:</p> <p>All change of time requests must be submitted <b>within 48 hours of the requested time.</b> If personnel do not wish to have the repayment of time <b>within the 48 hour period,</b> they must write "To be repaid at a later date." When they wish repayment they must submit a change of time form within thirty days of the date requested and state on this form that it is a repayment of time for (date).</p>

1998 Rule Book (CP-7)	August 2017 Rule Book (CP-9)
<p>Page 50, Article 17: Provides for an investigative hearing for minor disciplinary matters and, in the case of major discipline, provides a disciplined member with a hearing before the Fire Chief, a member of the Board of Fire Commissioners, a member of "Senior Staff" and the City Attorney. The Board of Fire Commissioners is given authority to review and decide all disciplinary matters that involve more than a five day "fine" and may approve or deny the recommendations of the Fire Chief on discipline.</p>	<p>Pages 80-81, Article 29: In the event of major discipline, provides for a hearing before an "outside" hearing officer designated by the City attorney. The decision of the outside hearing officer is ". . . final and binding unless overruled by the Chief of the Fire Department or Appropriate Authority." The authority to overrule a hearing officer's disciplinary determination does not appear in the 1998 Rule Book.</p> <p>-Article 13, Section 9 also provides that the "Chief of the Department or his designee will be the hearing officer in all minor disciplinary matters (suspensions of 5 days or less)" and that "in all major disciplinary matters (discipline of five days or more) the City Law Department will arrange for an 'outside' independent hearing officer to preside over the departmental hearing." The section adds that "the hearing officer's decision will be final, but may be overturned by the Chief of the Department and/or Appropriate Authority."</p>

27. On November 9, 2017, Debra Chandler, an Administrative Secretary for Williams, emailed several unit officers that the City would be implementing certain procedures for taking

personal, sick and vacation leave. (CP-6; 1T190). Williams was carbon copied on the email. (CP-6). Chandler writes in the email that the City "...is in the process of updating 2017 Leave Time for Fire Prevention, Administration, Training, and Community Relations..." and that "leave time for vacation, sick and personal days are to be submitted on the attached form and approved by Chief Williams as follows:

**Vacation Leave:** The request must be submitted and approved at least ten (10) days prior to the first planned day of vacation.

**Sick time:** The leave form must be submitted within three (3) days after returning to work. A doctor's certificate must accompany [the] leave form when sick leave exceeds more than five (5) consecutive days.

**Personal Day:** Cannot be used on a day immediately before or after a holiday.

[CP-6].

Chandler also writes that "effective immediately, administrative fire personnel are to use the attached Leave Time Request Form for vacation." (CP-6).

28. In November 2017, Carter received a copy of Chandler's November 9 email from Marcus Broughton, a fire captain and one of the email's recipients. (1T77-78). Prior to the email being sent, Carter did not receive any notice from the City about these leave procedures and did not participate in any meeting with City officials about the leave procedures. (1T78).

29. Carter testified that the November 9 leave procedures represented a change in prior practices. Prior to the November 9 email, there was no ten day notice requirement for taking vacation leave. (1T79). He testified that the sick leave form the City attached to the November 9 email was not used in the past and the previous sick leave form could be submitted within five days of returning to work instead of three days. (1T79-80). Prior to the November 9 email, "in staff" FOA unit officers who worked 9 a.m. to 5 p.m. or 8 a.m. to 4 p.m. could take personal days before or after a holiday. (1T82). Carter acknowledged that FOA fire officers who worked in the field performing "line firefighting duties" worked "24 hours on, 72 hours off" and did not have personal days. (1T81, 2T12-13). On rebuttal, Carter testified that there were FOA unit members who worked in the office and were entitled to take personal days, such as captains and other staff. (2T12-13).

Williams testified that the leave procedures in Chandler's November 9 email do not apply to FOA unit employees, but instead apply to employees belonging to the Communication Workers of America's (CWA) negotiations unit. (1T190). FOA unit employees, according Williams, are also not required to use the 2017 Leave Form attached to the November 9 email. Williams testified that non-uniformed, CWA unit members such as Chandler, fire official Alicia Brisson, records technicians, and fire investigators are

subject to the November 9 leave requirements and are required to use the Leave Form. (1T188).

I credit Carter's testimony that there are FOA unit employees who are not uniformed fire-fighters and are subject to the November 9 leave procedures. First, the FOA's CNA governing fire captains (J-1) recognizes investigators as part of FOA's unit and Williams acknowledges investigators are subject to the November 9 directive. (See Article I of J-1 and 1T188). Second, the City did not offer testimony in response to Carter's rebuttal testimony that there are FOA unit staff who work in the office for 9-5 or 8-4 shifts and do not fight fires. (2T12-13). Third, I find Carter more credible than Williams in terms of knowing what employees are in FOA's bargaining unit and what types of leave those employees can use since Carter is FOA's President. While Williams and Carter agree that FOA unit employees who perform duties "in the field" do not receive personal days, I find that FOA unit office employees are impacted by the November 9 leave procedures and that those procedures represent a change in past practice concerning the use of personal, sick and vacation leave.

30. By letter dated December 20, 2017 to Franklin, Kleinbaum enclosed a copy of Chandler's November 9 email and characterized the policy changes as a "...unilateral decision to change terms and conditions of employment by implementing a

variety of procedures for vacation and sick leave requests.”

(CP-6). Kleinbaum went on to write:

The new policy changes terms and conditions of employment in two major respects. First, it imposes certain notice requirements for submitting vacation requests. Second, it imposes requirements on when the form must be returned after a return from sick leave and requires a doctor's note in certain circumstances. There is no indication that the City will pay for any doctor's note if a note is required. These are all negotiable terms and conditions of employment and cannot be unilaterally imposed by the City. Accordingly, we request that the City rescind this memo and this form and raise these issues with the union at the appropriate time. Please advise me of the City's position immediately.

[CP-6]

There is no indication in the record that the City responded to this letter.

#### **ANALYSIS**

The FOA claims the City unilaterally implemented sixteen (16) changes to FOA unit employees' terms and conditions of employment. The FOA also argues that the City did not provide information it requested about the City's alleged negotiations sessions with the FOA in 2016. The City counters that it negotiated these changes and that it exercised a managerial prerogative in implementing some of those changes. I conclude some of the changes the FOA challenges did not trigger an

obligation to negotiate because they either: (1) did not "intimately and directly affect the work and welfare" of unit employees<sup>14/</sup>, (2) they had a *de minimis* impact on terms and conditions of employment, and/or (3) they were the exercise of a managerial prerogative. I also find some of the changes altered mandatorily negotiable terms and conditions of employment and that those changes were not negotiated by the City. Finally, I conclude the FOA's request for information was relevant to the discharge of its duties as majority representative and that the City has not provided the information the FOA requested.

Given the multiplicity of issues raised by FOA's charge, I am organizing the analysis of this case into four sections: the first involves a discussion of "terms and conditions of employment" and the standards for negotiability; the second analyzes whether changes to the City's Dept. Rules were mandatorily negotiable and, if so, whether they were negotiated; the third category concerns changes to the City's leave procedures and analysis of whether those changes were mandatorily negotiable and/or were negotiated, and the fourth concerns the City's duty to provide information to the FOA.

#### **Terms and Conditions of Employment**

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<sup>14/</sup> See Paterson PBA Local 1 v. City of Paterson, 87 N.J. 78, 86 (1981).

A majority representative is entitled under the Act to negotiate "terms and conditions of employment" on behalf of unit employees. N.J.S.A. 34:13A-5.3 (Legislation provides that a duly elected majority representative "...shall be the exclusive representative for collective negotiation concerning the terms and conditions of employment of the employees in such unit.") Not all changes at the workplace implicate "terms and conditions of employment." While the Act does not define what a "term and condition of employment" is, the New Jersey Supreme Court has defined negotiable terms and conditions of employment as "...those matters which **intimately and directly affect the work and welfare of public employees** and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy." Paterson PBA Local 1 v. City of Paterson, 87 N.J. 78, 86 (1981) quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 67 (1978) (emphasis added).

The Court has also identified "prime examples" and "essential components" of terms and conditions of employment under the Act, such as wages, working hours, compensation, an employee's "physical arrangements and facilities" and "customary fringe benefits." County of Atlantic, 230 N.J. 237, 253 (2017); State Supervisory Employees, 78 N.J. at 67, citing Englewood Bd. of Ed. v. Englewood Teachers' Ass'n, 64 N.J. 1, at 6-7. In

Local 195, IFPTE v. State of New Jersey, 88 N.J. 393 (1982), the New Jersey Supreme Court established this standard for determining whether a change in a term and condition of employment is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulations; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[88 N.J. at 404-405]

While the scope of negotiations for police and firefighters is broader than it is for other public employees and the Act allows for agreement between employer and union on permissively and mandatorily negotiable subjects affecting police and firefighters, the Commission will only find unfair practice liability when *mandatorily* negotiable terms and conditions of employment have been unilaterally changed. Paterson PBA; Fairfield Tp., D.U.P. No. 2011-6, 37 NJPER 129 (¶38 2011). A

unilateral change to a permissively negotiable term and condition of employment is not an unfair practice. Id.<sup>15/</sup>

Workplace changes that do not "intimately and directly affect the work and welfare" of employees are not terms and conditions of employment and are not mandatorily negotiable. Public employers may unilaterally adopt rules and regulations governing unit employees if those rules and regulations do not have an identifiable impact on employees' terms and conditions of employment. Pennsauken Tp., P.E.R.C. No. 80-51, 5 NJPER 486 (¶10248 1979) (Employer's decision to change the method of recording work time of unit employees from a time clock to using a sign in/sign out time-sheet had no affect on terms and conditions of employment and was not negotiable); City of Plainfield, P.E.R.C. No. 80-72, 5 NJPER 550 (¶10284 1979) (Employer's requirement that fire officers use a new, more detailed inspection reporting form did not result in any measurable impact on workload or other terms and conditions of employment and was therefore non-negotiable); State of New Jersey, P.E.R.C. No. 81-81, 7 NJPER 70 (¶12026 1981) (Employer is

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<sup>15/</sup> As the Supreme Court explained in Paterson PBA: "The distinguishing feature of the permissive category is that neither party is *required* to negotiate with respect to any such subjects. The employees may propose an item from the permissive category, but the employer may simply refuse to discuss that subject at any time before an agreement is reached. The employees may not insist on that item to the point of impasse or pursue interest arbitration with regard to the item unless the employer consents." 87 N.J. at 88.

not obligated to negotiate over changes to departmental rules and regulations and is not required to provide notice of such changes where rules do not affect working conditions); Old Bridge Bd. of Ed., P.E.R.C. No. 89-23, 14 NJPER 576 (¶19243 1988) (Employer's decision to issue one paycheck and discontinue practice of issuing two paychecks for extracurricular work was not mandatorily negotiable since it did not change the amount or method of payment and did not "intimately and directly affect" the work and welfare of employees); City of Trenton, D.U.P. No. 95-12, 21 NJPER 10 (¶26004 1994)(An employer does not violate its obligation to negotiate by unilaterally adopting departmental rules and regulations on policy issues that do not have an identifiable impact on terms and conditions of employment); Town of Kearny, H.E. No. 98-28, 24 NJPER 369 (¶29176 1998) (final agency decision) (Employer's unilateral adoption of a personnel manual is not a violation of the Act if it does not have an identifiable impact on terms and conditions of employment); Borough of South River, P.E.R.C. No. 2008-38, 33 NJPER 338 (¶126 2007) (Employer's new requirement that employees submit two separate forms for requesting compensatory and vacation leave was not negotiable, noting that "This is a matter that does not intimately and directly affect the work and welfare of these police officers, but is instead wholly within the managerial realm, it is pertinent to management's need to keep track of

employee work hours and time off."); City of Elizabeth, 42 NJPER 568 (¶158 2016), aff'd 44 NJPER 99 (¶32 App. Div. 2017) (Employer's newly created finger-scanning requirement for timekeeping purposes was not negotiable since it had "...at most a minimal effect on employee work and welfare and allowing a challenge to the new timekeeping system would place substantial limitations on the City's governmental policymaking powers.")

Even when an employer's unilateral action does impact terms and conditions of employment, the Commission has declined to find an unfair practice or a subject negotiable when the impact is *de minimis*. Cinnaminson Bd. of Ed., P.E.R.C. No. 82-84, 8 NJPER 220 (¶13089 1982) (Commission found restructuring of the work day for teachers to accommodate student pep rallies on four occasions that resulted in a thirty-six minute increase in pupil contact time over a few months was *de minimis* and not negotiable); Wharton Bd. of Ed., H.E. No. 82-63, 8 NJPER 417 (¶13191 1982), adopted at P.E.R.C. No. 83-24, 8 NJPER 549 (¶13252 1982) (New requirement that teachers submit already prepared lesson plans with personal leave request was *de minimis* and not negotiable); Middlesex Cty. Bd. of Social Services, H.E. No. 87-13, 12 NJPER 681 (¶17258 1986), adopted at P.E.R.C. No. 87-41, 12 NJPER 804 (¶17307 1986) (Short term increase in workload resulting from employer's reorganization of its case intake procedures was *de minimis* and non-negotiable); Mercer Cty. Bd. of Social Services,

H.E. No. 92-29, 19 NJPER 484 (¶24228 1992), adopted at P.E.R.C. No. 92-122, 18 NJPER 356 (¶23153 1992) (Workload increase resulting from reorganization by employer of income maintenance unit was *de minimis* and not negotiable.) The *de minimis* doctrine stems from the recognition that imposing an obligation to negotiate on an employer over every deviation, no matter how minute, from a prior practice would frustrate the primary purpose of the Act to promote labor peace and stability. Middlesex Bd. of Social Services; Caldwell- West Caldwell Education Ass'n v. Caldwell-West Caldwell Board of Education, 180 N.J. Super. 440, 447-448 (App. Div. 1981); N.J.S.A. 34:13A-2 (Declaring the public policy of the State to achieve the "prevention or prompt settlement of labor disputes..." and "...promote permanent, public... employer-employee peace..." while recognizing that labor strife "...regardless where the merits of the controversy lie, are forces productive ultimately of economic and public waste").

In holding that a board of education was not obligated to negotiate over curriculum changes that added fifteen minutes of instruction in English and social studies without lengthening the teachers' work day, the Appellate Division in Caldwell-West Caldwell Bd. of Ed. explained:

The Board must have some flexibility in making managerial decisions. The concept of preexisting practices should not be so rigidly adhered to

as to require negotiation of every minute deviation. Unless there is room in the joints for modification and adaptation necessary to make the system work, educational machinery would become stalled in endless dispute, grievance procedures, arbitration, unfair labor practice charges, hearings, reviews and appeals.....Without some measure of flexibility constant battles would be waged over every change in format, with each change viewed as an opportunity to extract more concessions

[180 N.J. Super. at 447-448.]

With these principles in mind, we turn to the question of whether the City's Dept. Rule changes were mandatorily negotiable.

### **Changes to Dept. Rules**

#### **Change of Address Form**

The FOA argues the City unilaterally changed the deadline for submitting a change of address and/or telephone number form. Under the 1998 Rule Book, a unit officer was required to "promptly notify" his immediate superior of a change in address or telephone number from the time the change occurred. The August 2017 Dept. Rules require an officer to provide that same notice "within 24 hours of such change", with the proviso that an officer who does not meet this deadline must notify their deputy chief of the reasons why the deadline was missed.

I find this change is not mandatorily negotiable because it does not "intimately and directly affect the work and welfare" of FOA unit employees. Paterson PBA, 87 N.J. at 86. The difference between "prompt notice" and "24 hours notice" is imperceptible. Indeed, one can envision scenarios where the "prompt notice" requirement afforded employees *either* less than or more than 24 hours to submit the change of address form. The record does not indicate how the "prompt notice" requirement was administered by the City. And even if the record reflected that "prompt notice" meant employees had more than 24 hours to submit a change of address form, that impact is *de minimis* and does not relate to terms and conditions of employment, such as compensation, hours or workload. Paterson PBA; Middlesex Cty. Bd. of Social Services; Old Bridge Bd. of Ed.. There is also no record evidence to suggest what, if any, consequences flow from an employee's failure to meet the 24 hour deadline.

The City's decision to clarify what the deadline is for submitting a change of address form is "...instead wholly within the managerial realm..." and has virtually no affect on employee work or welfare. Borough of South River, 33 NJPER at 339. I conclude this change was not negotiable but rather part and parcel of the flexibility an employer needs to manage its workplace. Caldwell-West Caldwell Bd. of Ed. Given this

conclusion, the City was not obligated to negotiate this change prior to its implementation in August 2017.

**Unexplained Absences Deemed Resignation**

The FOA also challenges a change to the 1998 Rule Book concerning the number of unexplained absences that the City would deem a "resignation" by an officer. The 1998 Rule Book provided, in pertinent part:

As per Department of Personnel regulations, unexplained absence without leave on the part of any member of the Department for the duration of five days shall be deemed and held to be a resignation. Such members may be dismissed from the service at the discretion of the Board of Fire Commissioners.

[Article 1, Section 13 of CP-7]

The August 2017 Rule Book provides, in pertinent part:

As per Department of Personnel regulations, unexplained absence without leave on the part of any Member of the Department for the duration of five twenty-four hour shifts (5-24 hr) shall be deemed and held to be a resignation. Such Member may be dismissed from the service at the discretion of the Appropriate Authority, with the authorization of the Appointing Authority.

[Article 1, Section 14 of CP-9]

This change in policy is not mandatorily negotiable. As a general matter, the penalties associated with an employer's absenteeism policy are mandatorily negotiable. UMDNJ, P.E.R.C.

No. 95-68, 21 NJPER 130, 131 (¶26081 1995). But the change at issue here does not alter the penalty for unexplained absences, but instead only clarifies the language "work day" to mean a "24 hour shift."<sup>16/</sup> It is unclear from the record what, if any, impact this language change had on the conditions for dismissal, resignation, or any other terms and conditions of FOA unit employees' employment. To the extent any impact can be discerned from this change, I find it is *de minimis* and not negotiable.

The language of the August 2017 Rule Book vesting decision-making authority over dismissals for unexplained absences in an "Appropriate Authority" as opposed to the Board of Fire Commissioners is also not negotiable. While disciplinary review procedures are mandatorily negotiable, *who* an employer designates to make a disciplinary determination is not. City of Passaic, P.E.R.C. No. 2000-54, 26 NJPER 75, 76 (¶31027 1999) (Whether employees were entitled to a pre-disciplinary hearing before an Employee Hearing Board was negotiable, but *who* the employer appointed to that hearing board was not negotiable); Borough of Sayreville, P.E.R.C. No. 98-58, 23 NJPER 631 (¶28307 1997) (Commission restrains arbitration of a grievance challenging borough's designation of a disciplinary hearing officer).

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<sup>16/</sup> To put a button on the point, Carter testified that a work day for a fire officer was a 24 hour shift and their weekly schedules were "24 hours on, 72 hours off." (1T81). Thus, the difference between "five work days" and "five 24 hour shifts" is, at most, negligible.

**Administrative Assistant to the Chief**

Next, the FOA objects to a change in the Dept. Rules that expanded the pool of eligible candidates for appointment as Administrative Assistant to the Fire Chief. The FOA contends that the City "...unilaterally altered the qualifications related to the position of Administrative Assistant to the Chief", noting that "...previously the position required the rank of Deputy Chief..." but now "...the City lowered this qualification to the rank of 'Officer.'" (Page 11 of FOA Brief).<sup>17/</sup> Moreover, the FOA refers to a Civil Service Commission (CSC) determination that an Administrative Assistant "...was properly classified for Deputy Chiefs" and cannot be assigned to another officer, such as a fire captain. (Page 11 of FOA Brief). I reject the FOA's arguments and find the City's change in the qualifications for the position of Administrative Assistant was a managerial prerogative.

A public employer has a managerial prerogative to assign, appoint and deploy personnel. Town of Kearny, P.E.R.C. No. 80-81, 6 NJPER 15, 16 (¶11009 1979), aff'd NJPER Supp.2d 106 (¶88 App. Div. 1981) (Commission held that "...the determination of the ultimate criteria for the selection of employees to perform

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<sup>17/</sup> As stated in Finding of Fact 26, *supra*, the 1998 Dept. Rule on this subject reads: "The Administrative Assistant to the Chief of the Department shall be a Chief Officer..." The August 2017 modified Dept. Rule reads, in pertinent part: "The Administrative Assistant to the Chief of the Department shall be an Officer..."

particular duties on a temporary or permanent basis and the right to select individuals is within the scope of managerial authority and not subject to mandatory negotiations"); Perth Amboy Bd. of Ed., P.E.R.C. No. 83-36, 8 NJPER 573 (¶13264 1982), recon. den. P.E.R.C. No. 83-63, 9 NJPER 16 (¶14007 1982) ("The question of which personnel to assign was solely within the Board's discretion since it is well established that the right to assign is a managerial prerogative."); Rutgers University, P.E.R.C. No. 84-45, 9 NJPER 663 (¶14287 1983) (Commission restrains arbitration over university's decision to change work assignments within negotiations unit and notes that the Commission "...repeatedly held that management has a non-negotiable prerogative to make assignments within a negotiations unit based on its assessment of employee qualifications."); City of Newark, P.E.R.C. No. 88-87, 14 NJPER 248 (¶19092 1988) (Contract proposals regarding procedures for lateral transfers were mandatorily negotiable "So long as management's right to deploy personnel on the basis of qualifications is preserved..."); Medford Lakes Bd. of Ed., P.E.R.C. No. 92-49, 17 NJPER 500 (¶22244 1991) (Commission holds that a board of education has a managerial prerogative to "...determine how assignments of lunchroom supervision will be apportioned between two distinct classifications of unit employees who have always done that work—teachers and assistants"); City of Atlantic City, P.E.R.C.

No. 97-132, 23 NJPER 339 (¶28154 1997) (City had a non-negotiable prerogative to determine who would be in charge of a public safety department); City of Newark, P.E.R.C. No. 2006-30, 31 NJPER 347, 349 (¶137 2005) (Commission explains that "a decision to reassign an employees is generally not mandatorily negotiable" and that while "...an employee's assignment has an appreciable effect on his or her welfare, that impact is outweighed by the managerial interest in deploying personnel in the manner the employer considers best suited to the delivery of governmental services."); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 2015-71, 41 NJPER 482, 483 (¶149 2015) ("A public employer has discretion to determine who to hire to perform services it offers to the public."); Sayreville Bd. of Ed., P.E.R.C. No. 2016-67, 42 NJPER 496, 497 (¶137 2016) (Commission explains that contract clauses that "...give preference to certain employees for promotion based on seniority or other designations when qualifications among the employees are equal" are negotiable, provided an employer "retains the right to determine whether employees are in fact equally qualified"; Gloucester Tp. Fire District No. 2, P.E.R.C. No. 2016-89, 43 NJPER 55 (¶13 2016) ("Public employers have managerial prerogative to determine the qualifications required for a job.").<sup>18/</sup>

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<sup>18/</sup> The preservation of unit work and the reassignment of unit work to employees in another negotiations unit, with limited (continued...)

Inherent in the power to appoint, assign and deploy personnel is the managerial prerogative to establish and modify qualifications, duties and job descriptions for positions.<sup>19/</sup> Willingboro Bd. of Ed., P.E.R.C. No. 85-74, 11 NJPER 57, 59 (¶16030 1984) (Commission holds that a public employer "...has a right to establish job descriptions and to require employees to perform additional duties related to their normal duties."); Gloucester Tp. Fire District No. 2, 43 NJPER 55. The corollary of this principle is that a negotiated agreement or contract

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18/ (...continued) exceptions, are mandatorily negotiable subjects. Rutgers University, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd NJPER Supp.2d 132 (¶113 App. Div. 1983). However, the FOA does not argue or present evidence that the Administrative Assistant's work was being reassigned to employees in another negotiations unit. On the contrary, the FOA presented evidence and testimony that Walter Cosby, a FOA unit employee, has held this position since 2014 and works as an Administrative Assistant to the present day. (1T229; CP-12, CP-13). There is no evidence in the record that the City has or even would reassign Administrative Assistant duties to employees outside of FOA's unit.

19/ Employees "...generally have a right to negotiate over not being assigned tasks that are unrelated to normal job functions." County of Atlantic, P.E.R.C. No. 2006-6, 31 NJPER 244, 246 (¶94 2005). However, in the case of public safety employees such as firefighters, the Commission has allowed for "greater managerial discretion" in assigning duties "...that, at first glance, may appear unrelated to the employee's normal tasks." Id., see also Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106, 110-111 (¶28054 1997). The FOA does not contend the duties of an Administrative Assistant are so unrelated to the normal job functions of an officer such as a fire captain that their assignment would be mandatorily negotiable.

proposal cannot bind or dictate to a public employer the criteria or qualifications it must set for an existing or newly created position. Gloucester Tp. Fire District; Sayreville Bd. of Ed., 42 NJPER at 497. Nor can a negotiated agreement or contract proposal limit the pool of candidates a public employer may consider in filling a position. Gloucester Tp. Fire District (Commission explains that "where an employer fills a position or a vacancy based upon a comparison of employee qualifications, that decision is neither negotiable nor arbitrable" and that a contract clause "cannot be read to limit a pool of eligible candidates to employees presently employed by an employer."); Sayreville Bd. of Ed., 42 NJPER 496, 497 (Commission restrains arbitration over grievance challenging a board of education's decision not to limit a pool of candidates for a secretarial position to current full-time employees, noting that "The Board's determination of who was the most qualified to fill the position is paramount to the Association's claim that the pool of candidates must be limited to current full-time employees.")

Here, the City's decision to broaden the pool of candidates for Administrative Assistant to any "officer" is a legitimate exercise of the City's managerial prerogative to determine the criteria and qualifications for appointment to the position of Administrative Assistant to the Chief. The FOA's position that an Administrative Assistant can only be filled by a deputy chief

would significantly interfere with the City's prerogative to appoint, assign and deploy fire personnel by limiting the City's ability to consider candidates it views as best qualified to perform the functions of Administrative Assistant. Gloucester Tp. Fire District; Sayreville Bd. of Ed. While the assignment of Administrative Assistant duties to officers other than deputy chiefs may have some effect on some FOA unit employees, "...that impact is outweighed by the managerial interest in deploying personnel in the manner the [City] considers best suited to the delivery of governmental services." City of Newark, 31 NJPER at 349. Balancing the interest of the FOA to keep one classification of unit employees (deputy chiefs) as the exclusive pool of applicants for Administrative Assistant versus the City's interest in having the flexibility to consider other qualified candidates for the position, I find the City's interest is predominant and the issue not mandatorily negotiable.

The FOA argues the CSC determined the duties of an Administrative Assistant are consistent with that of a deputy chief. True enough. But that point is beside the point. The CSC analyzed the job descriptions and duties for the deputy chief and fire captain and determined Cosby should be classified as a deputy chief and that the job description and duties of a deputy chief were consistent with that of an Administrative Assistant. It did not address whether the City was obligated to negotiate

over changing the job description, qualifications or duties for an Administrative Assistant. Nor could it. The Commission has exclusive jurisdiction to adjudicate unfair practices and determine whether a unilateral change was negotiable. N.J.S.A. 34:13A-5.4c. While the CSC can decide whether a job title's duties are consistent with that title's job description/duties or the job description/duties of another title, it cannot supplant the Commission's jurisdiction to decide whether the City can change a job description/duties or hiring criteria without negotiating the change with the FOA. Based on Commission precedent, I conclude the city was not obligated to negotiate this change in policy concerning the Administrative Assistant.

**Professional Standards Unit and Fire Chief's Role in Discipline**

The FOA challenges three changes to the City's disciplinary policies: (1) the creation of a Professional Standards Unit (PSU); (2) designating the Fire Chief as the hearing officer for minor discipline; and (3) allowing the Chief to overturn the rulings of an independent hearing officer concerning major discipline. (Pages 4, 10,16-17 of FOA Brief). I find these changes are not mandatorily negotiable because they concern the employer's *designation* of who will investigate and mete out discipline.

Disciplinary review procedures are mandatorily negotiable. N.J.S.A. 34:13A-5.3; Passaic, 26 NJPER at 76.<sup>20/</sup> Public employers "...can agree to fair procedures for initiating and hearing disciplinary charges, subject to the employer's ultimate power, after complying with the negotiated procedures, to make a disciplinary determination." 26 NJPER at 76. But a public employer has a managerial prerogative to designate *who* will hear disciplinary cases. Id., Sayreville, 23 NJPER at 632 (Employer has managerial prerogative to decide whether police chief could hear disciplinary charges); accord Borough of Mt. Arlington, P.E.R.C. No. 95-46, 21 NJPER 69 (¶26049 1995); City of Newark, I.R. No. 99-5, 24 NJPER 490, 491 (¶29228 1998), recon. den. P.E.R.C. No. 99-37, 24 NJPER 517 (¶29240 1998); Bedminster Tp., P.E.R.C. No. 2015-20, 41 NJPER 169 (¶60 2014).

The City's creation of a PSU to investigate disciplinary matters and verify the appropriate use of leave is a managerial prerogative.<sup>21/</sup> The record does not indicate that the PSU's

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<sup>20/</sup> However, police and firefighters cannot challenge through arbitration disciplinary discharges or other major discipline that are appealable as of right to the CSC. City of Newark, P.E.R.C. No. 86-74, 12 NJPER 26 (¶17010 1985); Passaic, 26 NJPER at 76. Uniformed personnel can, however, negotiate contractual assurances that they will receive a hearing before the employer decides what discipline to impose. 26 NJPER at 76.

<sup>21/</sup> The FOA asserts and cites to testimony by Carter that Carter first learned of the PSU's existence "...when a member of  
(continued...)

creation resulted in a change to disciplinary review procedures.

On this subject, Article 4, Section 9 of the August 2017 Dept.

Rules provides<sup>22/</sup>:

Professional Standards: He/she shall investigate and or conduct hearings on disciplinary cases if authorized or requested to so by the Chief of the Department and/or Appropriate Authority. If authorized to conduct an investigation, his/her findings shall be reported to the Chief of the Department as promulgated in Article 13, Section 6.  
[CP-9]

The language of the corresponding provision in the 1998 Rule Book is different:

Internal Affairs: he/she shall investigate and conduct hearings on disciplinary cases, or he/she shall have others investigate a situation which he/she deems necessary. These findings shall be reported to the Chief of Department.  
[CP-7]

While the language of these provisions differ, their impact on disciplinary review procedures is indecipherable. The FOA does

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21/ (...continued)

the PSU visited his home while he was out on sick leave to verify that he was in fact restricted to his primary residence." (Page 4 of FOA Brief). This suggests the PSU played some role in verifying the proper use of sick leave by FOA unit members. The creation and implementation of reasonable sick leave verification procedures is a managerial prerogative. City of Elizabeth v. Elizabeth Fire Officers Aas'n 198 N.J.Super. 382, 386-387 (App. Div. 1985).

22/ The FOA identified Article 4, Section 9 of the August 2017 Dept. Rules as the provision codifying the creation of the PSU. (Page 23 of FOA Brief).

not argue that the creation of the PSU altered disciplinary review procedures. To the extent the FOA challenges the City's designation of a different representative (PSU) than was previously used (Internal Affairs) to investigate and hear disciplinary cases and/or verify sick leave usage, that designation and leave verification procedure is an inherent managerial prerogative and is, therefore, not negotiable. Sayreville; City of Passaic; City of Elizabeth, 198 N.J. Super. at 386-387.

The FOA suggests as much. It contends that even "...assuming *arguendo*, that creation of the PSU fell within the City's managerial prerogative to determine the basis of discipline...", this conclusion "...does not alter the obligation to negotiate with the union over the impact of its [PSU's] creation and over sanctions or penalties to be imposed for specific violations." (Page 17 of FOA Brief). But this argument conflicts with our precedent on the duty to negotiate the severable impact of a managerial prerogative. Simply stated, a public employer is not obligated to negotiate the impact of a managerial prerogative unless and until a majority representative specifically demands to negotiate impact issues. Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569, 570 (¶15265 1984) (Commission determined the union, not the employer, had the burden of initiating negotiations over the severable impact of a

subcontracting decision); State of New Jersey (Judiciary), P.E.R.C. No. 2008-12, 33 NJPER 225, 227 (¶85 2007) (Commission explained that a "broad request to negotiate over the exercise of a managerial prerogative does not constitute a specific demand to negotiate over severable negotiable issues"); Warren Cty. College, P.E.R.C. No. 2018-25, 44 NJPER 287, 290-291 (¶80 2017)

Here, the FOA did not demand to negotiate the impact of PSU's creation. Nor did FOA prove what, if any, severable impact resulted from PSU's creation.<sup>23/</sup> On March 24, 2017, the FOA sent a letter flagging its concerns over the "establishment" of the

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23/ The FOA contends on page 17 of its brief that "the newly-added sections which govern the PSU clearly impose new penalties not previously set forth in the 1998 Rules and Regulations." The FOA cites R-1 and testimony from Carter on the second day of hearing (2T8-9) in support of this argument. But those citations to the record do not support this assertion. Carter testified that the FOA membership and its officers did not agree to the *establishment* of the PSU, not its impact on terms and conditions of employment. (2T8-9). Carter further alludes to the fact that FOA members were content with the prior arrangement of having a deputy chief investigate disciplinary matters. (2T9). As we stated previously, however, that change in designation of who hears or investigates discipline is a managerial prerogative. And R-1 does not lend further support to this claim, since exhibit CP-9, represents the final rules implemented by the City (R-1 being a version of the rules discussed in 2016 but not yet implemented). If the FOA wanted to prove a severable impact, it would have to identify what provision in the 1998 Rule Book (CP-7) was altered by the August 2017 Dept. Rules (CP-9). It did not. While FOA is correct that, as a general matter, disciplinary penalties for workplace infractions are mandatorily negotiable, the record does not indicate the FOA demanded to negotiate over the *impact* of the PSU, nor did FOA satisfy its burden of proving a severable impact resulting from PSU's creation.

PSU, but that correspondence neither identifies nor specifically demands negotiations over the impact of the PSU's establishment on terms and conditions of employment. (CP-1). The requirement to specifically demand negotiations over identifiable impact-related issues is a necessary element in finding the City refused to negotiate over PSU's impact. State of New Jersey (Judiciary), 33 NJPER 225; Warren Cty. College, 44 NJPER 287. And the FOA's subsequent correspondence to the City does not specifically demand or identify the severable impact of the PSU. (CP-3, CP-5, CP-6). Nor did Carter offer testimony about what the severable impact of the PSU's establishment was and whether the FOA demanded to negotiate over the impact. In the absence of probative evidence of what the PSU's severable impact was on FOA unit employees' terms and conditions of employment and without evidence that the FOA demanded to negotiate impact-related issues with City, I find the City was not obligated to negotiate over the impact of exercising a managerial prerogative to create a PSU to investigate disciplinary matters and verify the use of sick leave. Monroe Bd. of Ed., Warren Cty. College, City of Elizabeth, 198 N.J. Super. 382.

Next, the FOA challenges the City's decision to designate the Fire Chief as a hearing officer for minor discipline. (Page 10 of FOA Brief). As we stated previously, the City's designation of who will hear or decide disciplinary matters is a

managerial prerogative. Sayreville, Passaic; Bedminster Tp..

Therefore, the City was not obligated to negotiate over its decision to designate the Fire Chief as a hearing officer for minor disciplinary cases.

The third and final disciplinary policy change the FOA objects to was permitting the Fire Chief to overturn the decision of a hearing officer on major discipline. (Page 10 of FOA Brief). This, too, represents a change in who will impose discipline, and not a change in disciplinary review procedures. On this subject, the 1998 Rule Book provides:

For disciplinary action on a serious matter, or progressive disciplinary action, the Chief of Department, or his designee, will conduct a hearing with a member of the Board of Fire Commissioners, a member of the Senior Staff, and the City Attorney, after a thorough investigation has been completed. This Panel may recommend up to six (6) months suspension without pay or termination of the employee. Since expediency is very important in disciplinary matters, if a Fire Commissioner is not available, the Chief of Department shall have a second Staff Officer present for this hearing.

The Board of Fire Commissioners, as the Appointing Authority, will review and decide all disciplinary matters that involve more than a five (5) day fine. The Board will approve or deny the recommendations made by the Chief of the Department, concerning the disciplinary action.  
[Article 17, Sections 7 and 8 of CP-7]

The August 2017 Dept. Rules essentially substitutes the Board of Fire Commissioners with the Fire Chief for the role of deciding

whether to overturn or accept a hearing officer determination.

It provides, in pertinent part:

In all major disciplinary matters (discipline of 5 days or more) the City Law Department will arrange for an "outside" independent hearing officer to preside over the departmental hearing. The hearing officer's decision will be final, but may be overturned by the Chief of the Department and/or Appropriate Authority.  
[Article 13, Section 9 of CP-9]

This revision represents a change in (1) who the hearing officer will be and (2) who will review the hearing officer's decision (change from the Board of Fire Commissioners to the Fire Chief). Both changes are changes in *who* will hear and impose discipline and are not mandatorily negotiable. Passaic; Sayreville, Bedminster.

**Responsibilities of Tour Chiefs**

The FOA also objects to a change in the Dept. Rules concerning the responsibilities of Tour Chiefs for firefighting equipment. (Page 12 of FOA Brief). Article 6, Section 2 of the 1998 Rule Book provides:

They [tour chiefs] shall be responsible for the conduct and efficiency of the Companies in their respective Tours, and for the strict compliance with all Rules and Regulations and Orders governing the Department.  
[Article 6, Section 2 of CP-7]

The August 2017 Dept. Rules provide, in pertinent part:

They [tour chiefs] shall be responsible for the conduct and efficiency of all officers,

members and equipment in the Companies of their respective Tours, and for the strict compliance with all Rules and Regulations and Orders governing the Department.

[Article 5, Section 2 of CP-9]

I find this revision to the Dept. Rules is not mandatorily negotiable because (1) the language merely clarifies what fire captains and deputy chiefs are responsible for under the parties' collective negotiation agreements; and (2) even if the revision represents additional duties not otherwise performed by FOA unit employees, the City has a managerial prerogative to assign duties incidental to or related to the normal job duties of a firefighting officer.

A majority representative may negotiate on behalf of unit employees for contractual protections against being required to assume duties outside their job title and beyond their normal duties. New Jersey Highway Authority, P.E.R.C. No. 2002-76, 28 NJPER 261, 263 (¶33100 2002), aff'd 29 NJPER 276 (¶82 App. Div. 2003). Such provisions ". . . protect the integrity of the equation between negotiated salaries and the required work." 28 NJPER at 263. Employers may unilaterally assign new duties if they are incidental to or comprehended within an employee's job description and normal duties. *Id.*; City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985), (fire officers required to perform crossing guard or patrol duties connected to fires); Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-6, 10 NJPER 494 (¶15224

1984) (bus drivers required to pump gas).

In cases where an employer assigns additional duties to public safety employees, such as firefighters, the Commission has "...allowed greater managerial discretion to assign duties that, at first glance, may appear unrelated to the employee's normal tasks." County of Atlantic, 31 NJPER at 246. The Commission, for instance, has allowed public employers to assign school crossing guard and patrol duties to firefighters. Newark, 11 NJPER 300; West Orange Tp., P.E.R.C. No. 83-14, 8 NJPER 447 (¶13210 1982), recon. den. P.E.R.C. No. 83-30, 8 NJPER 560 (¶13258 1982). And the Commission, in different contexts, has recognized that maintaining fire company equipment in good order and being trained in the operation of that equipment are essential to a firefighters' ability to ensure the safe and effective delivery of firefighting services to the public. Town of Kearny, P.E.R.C. No. 78, NJPER Supp. 344, 348 (¶78 1973)(Kearny fire captains are responsible for managing the "Fire Station establishment", including "care of apparatus and equipment" and "maintaining required standards of operation and training" for usage of fire station equipment); City of Camden, P.E.R.C. No. 94-63, 20 NJPER 50 (¶25017 1993)(Commission discussing the prerogative the City has to ensure officers are properly trained to operate fire equipment).

Here, not only is the responsibility for the proper

functioning of firefighting equipment germane to a fire officer's duties, it is contemplated by the collective negotiation agreements governing FOA unit employees. The collective negotiation agreements covering fire captains and deputy chiefs provide, in pertinent part:

Employees covered by this Agreement may be assigned to supervise the performance of any duty which is related to firefighting, fire prevention, rescue, salvage, overhaul work, **care and maintenance of fire-fighting equipment.**

[Article XIX, Section 1 of J-1 and J-2, emphasis added]

The August 2017 Dept. Rules merely codify this contractual authority. And even if the responsibility for the proper functioning of fire equipment were an additional duty FOA officers did not perform in the past, it is axiomatic that a fire company cannot operate effectively without functional firefighting equipment. The responsibility for ensuring fire equipment is operating properly is sufficiently related to a fire officer's duties to justify the finding that its assignment by the City was a managerial prerogative and, therefore, non-negotiable. Newark; Kearny; Camden.

### **Sick Leave Verification Procedures**

The FOA also contends the City violated the Act by unilaterally implementing four changes to sick leave verification procedures. (Pages 12-13 of FOA Brief). The changes concern: (1) the call-out procedure for taking sick leave; (2) the

deadlines for submitting a physician's note; (3) the creation of a new form to verify sick leave; and (4) the deadline for submitting the new sick leave form. I find these changes are not mandatorily negotiable because: (1) they fall within the City's managerial prerogative to establish and implement sick leave verification procedures; and (2) the changes do not intimately and directly affect the work and welfare of FOA unit employees.

First, the City altered the time frame for officers to provide notice to their employer about calling out sick for a scheduled shift. The 1998 Rule Book provides:

Any department member becoming ill or injured while off duty and thereby unable to report for a scheduled shift, shall report by telephone to the Tour Chief **not less than one hour** before the beginning of the scheduled shift.

[Article 15, Section 1 of CP-7, emphasis added]

The change to this rule is codified in Article 11, Section 1 of the August 2017 Dept. Rules:

Any department member becoming ill or injured while off duty and thereby unable to report for a scheduled shift, shall report by telephone to the Tour Chief or Dispatcher/Communicator **not less than two hours** before the beginning of the scheduled shift.

[CP-9, emphasis added]

Based on Commission precedent, I find this change is not mandatorily negotiable.

A public employer has a managerial prerogative to establish and implement a sick leave verification policy and use reasonable

means to verify employee illness. 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). In implementing a sick leave verification policy, an employer has a managerial prerogative to require sick leave verification at any time and for any use of sick leave. City of Elizabeth, 198 N.J. Super. at 386 (Public employer has managerial prerogative to require sick leave verification at any time); Union County Sheriff, P.E.R.C. No. 2016-65, 42 NJPER 488, 490 (¶135 2016) (Employer can require verification for any use of sick leave regardless of an employee's past history.) The prerogative to implement this policy extends to the adoption of any forms by an employer to verify sick leave. City of Newark, P.E.R.C. No. 85-26, 10 NJPER 551 (¶15256 1984); Union County Sheriff, 42 NJPER at 490. An employee, however, may grieve or challenge the application of an employer's sick leave verification policy in denying an employee's contractually allotted sick leave or imposing discipline on an employee for non-compliance with the policy. 42 NJPER at 490 (Commission noted that if an employee failed to comply with employer's one hour notice requirement for calling out sick and were disciplined or denied sick leave for non-compliance, he or she can challenge through the collective agreement's grievance procedures the discipline or sick leave denial).

The Commission has repeatedly held that a public employer's establishment of a notice requirement for calling out sick is a non-negotiable, managerial prerogative. Matawan-Aberdeen Regional Bd. of Ed., H.E. No. 91-16, 17 NJPER 32, 36 (¶22013 1990), adopted P.E.R.C. No. 91-71, 17 NJPER 151 (¶22061 1991) (Call-in procedures for using sick leave are non-negotiable as they "...play an intimate role in a public employer's ability to verify sick leave."); Rahway Valley Sewage Authority, P.E.R.C. No. 96-69, 22 NJPER 138, 139 (¶27069 1996) (An "...employer may require its employees to report a known illness at least one hour before they otherwise would have to report to work as part of a verification policy."); Union County Sheriff, 42 NJPER at 490. I find that the City's change in call-in procedure from one to two hours prior to an officer's shift was a managerial prerogative.<sup>24/</sup>

The FOA also objects to a change in the deadlines for submitting a physician's report. On this subject, the 1998 Rule Book provides:

After being out on sick leave without a doctor's note for more than eight work days in a calendar year, members may be required by the Chief on their next absence to see a

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<sup>24/</sup> If the City denies a FOA unit employee sick leave or otherwise disciplines a unit employee for non-compliance with this policy, the FOA can challenge the denial and discipline in accordance with contractual and statutory disciplinary review procedures. Union County Sheriff; Rahway Valley Sewage Authority.

physician and submit a physician's report to the department **within ten days of the onset of illness.**

[Article 15, Section 4 of CP-7, emphasis added]

The August 2017 Dept. Rules change the language providing a ten day deadline to requiring a physician's report "immediately upon return to work." (Article 11, Section 7 of CP-9). I find this change by the City was a managerial prerogative.

A public employer has managerial prerogative to decide *when* sick leave verification is required. Borough of Cresskill, P.E.R.C. No. 89-19, 14 NJPER 569 (¶19239 1988) (Commission found that union proposal limiting when sick leave verification was required was not mandatorily negotiable); Rockaway Tp. Bd. of Ed., P.E.R.C. No. 90-107, 16 NJPER 321 (¶21132 1990), *aff'd* NJPER Supp.2d 250 (¶209 App. Div. 1991) (Contract provision that restricted a board of education's managerial prerogative to determine when to demand medical proof of illness was not mandatorily negotiable); Union County Sheriff, 42 NJPER at 490. In exercising the prerogative to determine when sick leave verification is required, a public employer may unilaterally set or change the deadline for submitting proof of illness. Id. Based on this precedent, I find the City's unilateral change in the deadline for submitting a physician's report verifying a unit officer's illness was a managerial prerogative and, therefore, not mandatorily negotiable.

This precedent also applies to the City's changes in when an

employee must submit a FD-5 form to verify illness. Under Article 15, Section 5 of the 1998 Rule Book, a unit employee must submit this form within ten days of the onset of illness after accumulating eight sick days in a calendar year and taking three additional sick days that year. (CP-7). The FD-5 form under the August 2017 Dept. Rules (Article 11, Section 8 of CP-9) must now be submitted when a unit officer is "out sick for more than 48 consecutive hours (two 24 hour shifts, four 12 hour shifts, or any combination of hours that total more than 48 hours) and the deadline for submission is "immediately upon return to work." (CP-9). This change, and the use of the FD-5 form to verify sick leave, are managerial prerogatives and are not mandatorily negotiable. City of Newark, 10 NJPER 551; Union County Sheriff; Elizabeth, 198 N.J. Super. At 386.

Finally, the City's November 9, 2017 directive (CP-6) to use another sick leave form for verification purposes and return the same to the employer within three days of returning to work (as opposed to the prior practice of affording employees four days to submit a different sick leave form) was a managerial prerogative and is not mandatorily negotiable. Union County Sheriff; Rockaway Tp. Bd. of Ed.; Elizabeth, 198 N.J. Super. at 386.

One final point about these changes. None of them "intimately and directly affect the work and welfare" of FOA unit employees. Paterson PBA, 87 N.J. at 86. "A public employer has

a managerial right to establish procedures to keep track of employee work hours and time off." Borough of South River, P.E.R.C. No. 2008-38, 33 NJPER 338, 339 (¶126 2007). And an employer needs some flexibility to deviate from prior practices in order to manage its workforce. Caldwell-West Caldwell Bd. of Ed., 180 N.J. Super. at 447-448. These disputed changes fit within a lawful "flexible deviation" from prior practice and do not implicate terms and conditions of employment. Id.

The FOA is correct in asserting that the City has an obligation to negotiate, upon demand, over the financial impact of a sick leave verification policy on unit employees (such as who pays for a doctor's note) (Page 13 of FOA Brief). I find the FOA made such a demand when, in its December 20, 2017 letter to then City attorney Greg Franklin (CP-6), it identified the issue of who shall pay for a doctor's note and asserted that issue must be negotiated with the FOA. There is no indication in the record the City responded to this demand to negotiate. I find the City is obligated to negotiate in good faith over the financial impact of the City's sick leave verification policy, including but not limited to the issue of who pays for doctor's notes. Elizabeth, 198 N.J. Super. 382 (App. Div. 1985).

### **Special Leaves of Absence**

The FOA also objects to a change in the language of the Dept. Rules concerning the notice required for taking a "special

leave"<sup>25/</sup> of absence. (Pages 11-12 of FOA Brief) The 1998 Rule Book provides the following:

Special Leaves of Absence shall be applied for in writing, **well in advance** of the date such leave is desired, on the application form provided therefore. All information, data or communications involved in showing the necessity for such leave shall be submitted with the application.

[Article 18, Section 4 of CP-7, emphasis added]

The August 2017 Dept. Rules substitute the language "well in advance" with the words "2 weeks in advance", thus clarifying that an officer must provide two weeks notice. This change is *de minimis* and does not intimately and directly affect the work and welfare of FOA unit employees. It is not mandatorily negotiable.

As with the City's change in the deadline for submitting a change of address form, the difference between requiring notice "well in advance" of a requested date of leave versus "two weeks" is imperceptible. One can construe the words "well in advance" to mean either notice within two weeks or exceeding two weeks. The record does not indicate what "well in advance" notice meant in practice. The change, in short, has no identifiable impact on terms and conditions of employment and is not mandatorily negotiable. City of Trenton, 21 NJPER 10; Town of Kearny, 24

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<sup>25/</sup> Carter testified that "special leave" was the "...ability to leave work whenever necessary to handle...a doctor's appointment, family emergency, so forth and so on." (1T50).

NJPER 369.

FOA, relying on Township of Maple Shade, I.R. No. 2011-33, 37 NJPER 50 (¶19 2011), argues this change in language "...directly implicates the procedural aspects of leave..." and is therefore negotiable. (Page 12 of FOA Brief). In Maple Shade, a Commission Designee, in a single sentence without explanation, held that "...a unilateral imposition of a 3 day notice requirement for requesting vacation leave, personal holiday leave or compensatory time off is procedural and consequently, mandatorily negotiable." 37 NJPER at 53. The implication of this argument is that if a unilateral change is "procedural" in nature, it is negotiable. But this argument is based on a non-sequitur.

The fact that a change in leave policy is procedural does not, *ipso facto*, make it negotiable. A change in leave procedures is not negotiable if it has a *de minimis* impact on terms and conditions of employment or does not "intimately and directly affect the work and welfare" of employees. Paterson PBA, 87 N.J. at 86. If the premise that a change, if procedural, must be negotiable were true, then decades of Commission precedent on the *de minimis* doctrine and related doctrines would make little sense since, in many of those cases, there were changes in workplace procedures that were found non-negotiable. See, e.g. Pennsauken Tp., 5 NJPER 486 (Change in procedure for

recording work time found non-negotiable since it had no affect on terms and conditions of employment); Middlesex Cty. Bd. of Social Services, 12 NJPER 804 (Change in case intake procedures was non-negotiable as it had a *de minimis* impact on workload); Borough of South River, 33 NJPER 338 (Change in procedures for requesting compensatory and vacation leave were non-negotiable); City of Elizabeth, 42 NJPER 568 (Change in timekeeping procedures deemed non-negotiable). The change in the notice requirement for taking special leave may be procedural, but it did not have an identifiable impact on FOA unit employees' terms and conditions of employment and is not mandatorily negotiable.

### Change of Time Requests

Next, the FOA objects to a change in the procedure for submitting a "change of time" request. (Page 11 of FOA Brief). A "change of time" request is when two unit officers agree to swap or exchange shifts. (1T182). On this subject, the 1998 Rule Book provides:

All change of time requests must be submitted **within thirty days of the requested time.** If personnel do not wish to have the repayment of time **within the thirty (30) day period,** they must write "to be paid at a later date." When they wish repayment they must submit a change of time form within thirty days of the date requested and state on this form that it is a repayment of time for (date).  
[Article 18, Section 16 of CP-7, emphasis added]

The August 2017 Dept. Rules modifies the time period for submitting a change of time request and reads:

All change of time requests must be submitted **within 48 hours of the requested time**. If personnel do not wish to have the repayment of time **within the 48 hour period**, they must write "To be paid at a later date." When they wish repayment they must submit a change of time form within thirty days of the date requested and state on this form that it is a repayment of time for (date).

[Article 14, Section 16 of CP-9, emphasis added]

This change in policy alters the required notice to the City for exchanging shifts and being paid for the swapped shifts. "To be mandatorily negotiable, proposals permitting voluntary shift exchanges must be conditioned on the employer's prior approval." City of Passaic, P.E.R.C. No. 2001-27, 27 NJPER 14,15 (¶32007 2000). A change that only requires prior notice, rather than prior approval, of shift exchanges is not mandatorily negotiable. Borough of North Plainfield, P.E.R.C. No. 97-77, 23 NJPER 38, 40 (¶28026 1996); Teaneck Tp., P.E.R.C. No. 85-52, 10 NJPER 644 (¶15310 1984). Since this change appears only to the modify the notice required for exchanging shifts, and does not condition shift exchange on the City's prior approval, I find the change is not mandatorily negotiable. North Plainfield; Teaneck Tp..<sup>26/</sup>

### Absenteeism Policy

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<sup>26/</sup> As with the application of sick leave verification policies, a unit employee may challenge the denial of a shift exchange or other discipline for failing to comply with this notice requirement through the parties contractual grievance and disciplinary review procedures. Passaic, 27 NJPER 14; Union County Sheriff, 42 NJPER 488.

The FOA contends the City violated the Act by unilaterally adopting a new provision to the Dept. Rules that defines an "unauthorized absence." (Page 10 of FOA Brief). This provision is not part of the 1998 Rule Book. On this subject, the August 2017 Dept. Rules provide:

Any member of this agency absenting themselves from duty in an improper manner shall be subject to loss of pay and/or disciplinary action for such absence. Members are guilty of an unauthorized absence if they:

- (a) are not at home or are not at their place of recovery when contacted by a Representative of this department during their restriction hours;
  - (b) fail to report to the Compensation Doctor for examination as ordered;
  - c) feign illness or injury, or deceive the Compensation Doctor or a Superior Officer in any way as to their condition;
  - (d) become injured or sick and go off duty on personal sick leave as a result of improper conduct or intemperate, illegal, immoral or vicious habits or practices;
  - (e) fail to report for duty when so directed by the Compensation Doctor or a Superior Officer, or violate any provision concerning the reporting of sickness or injury;
  - (f) fail to return to duty from sick leave when so directed.
- [Article 11, Section 18 of CP-9]

I find this change in policy is not mandatorily negotiable because it predominantly concerns the government policy of establishing an absenteeism policy to verify the proper use of

sick leave. UMDNJ, P.E.R.C. No. 95-68, 21 NJPER 130, 131 (¶26081 1995); City of Elizabeth, P.E.R.C. No. 2000-42, 26 NJPER 22, 24 (¶31007 1999). However, the subject of what disciplinary penalties should be imposed on a unit employee for violating the absenteeism policy is mandatorily negotiable. 21 NJPER at 131; 26 NJPER at 24. Upon demand, the City is obligated to negotiate in good faith over what disciplinary penalties can be imposed against FOA unit employees for violating this policy.<sup>27/</sup>

The City should be guided by these principles in fulfilling its obligation to negotiate with the FOA. The Act requires negotiations, not agreement, on mandatorily negotiable subjects. Piscataway Tp., P.E.R.C. No. 2005-55, 31 NJPER 102 (¶44 2005), recon. den. P.E.R.C. No. 2005-79, 31 NJPER 176 (¶71 2005), aff'd 32 NJPER 417 (¶172 App. Div. 2006). Negotiations "require dialogue between two parties with an intent to achieve common agreement rather than an employee organization presenting its view and the employer considering it and later announcing its decision." Piscataway Tp., 31 NJPER at 103. Meetings, discussions or information sessions where an employer explains a proposed change in working conditions without soliciting a majority representative's consent to the change does not satisfy

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<sup>27/</sup> The record does not indicate the FOA demanded to negotiate over the disciplinary penalties associated with this policy. Instead, the FOA challenges the City's establishment of an absenteeism policy.

the negotiations obligation under the Act. Pennsauken Tp., P.E.R.C. No. 88-53, 14 NJPER 61 (¶19020 1987) (Commission finds township did not meet its negotiations obligation by conducting information sessions about a forthcoming change in health insurance plans where employer did not solicit consent to change from union); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 87-18, 12 NJPER 737 (¶17276 1986), aff'd NJPER Supp.2d 185 (¶163 App. Div. 1987), certif. denied 111 N.J. 600 (1988) (Discussion between employer and teachers' union about compensation for an additional teaching assignment did not qualify as "negotiations" where the employer did not make counter-proposals on the subject and where discussions were limited to outlining why the employer believed the union's compensation demands were inappropriate), Pennsauken Tp., H.E. No. 93-9, 19 NJPER 24 (¶24011 1992), adopted, P.E.R.C. No. 93-62, 19 NJPER 114 (¶24054 1993) (Employer's invitation to union to provide input about a unilateral change in lunch procedures for unit employees did not satisfy employer's negotiations obligation).<sup>28/</sup>

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<sup>28/</sup> The FOA also argues the City unilaterally implemented changes to the 1998 Rule Book that would permit the discipline of a FOA unit officer for not being in uniform and not submitting to drug testing. (Page 10 of FOA Brief). Carter does not testify about these changes, nor does Carter identify these changes in CP-10. The FOA did not cite to the relevant exhibits (CP-7 and CP-9) demonstrating this change occurred. I find the FOA did not satisfy its burden of proving, by a preponderance of evidence, that these changes were implemented by the City without negotiations.

**Changes to Leave Procedures**

In addition to objecting to changes in the August 2017 Dept. Rules, the FOA contends the City violated the Act by issuing a November 9, 2017 directive that modified procedures for using personal and vacation leave.

Regarding personal leave, the FOA asserts the City unilaterally implemented a restriction on the use of personal leave by "in staff" FOA officers<sup>29/</sup> by prohibiting staff officers from using a personal day immediately before or after a holiday. Prior to that restriction, in staff officers were permitted to use personal days immediately before and after a holiday.

Concerning vacation leave, the FOA contends the City instituted a new vacation leave policy requiring ten days notice and prior approval by the City before using a planned vacation day. Prior to this change, there was no ten day notice and approval condition for using vacation leave. I find these changes concern mandatorily negotiable subjects and that the City did not negotiate with the FOA about these changes.

The scheduling of vacation and personal leave is mandatorily negotiable provided an employer can meet its minimum staffing requirements. Pennsauken Tp., P.E.R.C. No. 92-39, 17 NJPER 478, 480 (¶22232 1991); Borough of Rutherford, P.E.R.C. No. 97-12, 22

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<sup>29/</sup> "In staff" officers refers to officers who work from 8 a.m. to 4 p.m. or 9 a.m. to 5 p.m. in the office and not in the field fighting fires. (2T12-13).

NJPER 322, 323 (¶27163 1996), recon. den. P.E.R.C. No. 97-95, 23 NJPER 163 (¶28080 1997); East Orange Bd. of Ed., P.E.R.C. No. 2007-3, 32 NJPER 270, 272 (¶111 2006). The method of allocating available vacation leave and the length of vacations are also mandatorily negotiable. Pennsauken Tp., 17 NJPER at 480. While an employer may deny a requested vacation or personal day to ensure that it has enough employees to cover a given shift, an employer may also negotiate and agree to allow an employee "...to take a vacation day even though doing so would require it to pay overtime compensation to a replacement employee." East Orange Bd. of Ed., 32 NJPER at 272. "An employer does not have a prerogative to limit the amount or timing of vacation days absent a showing that minimum staffing requirements would be jeopardized." Id.

Here, the City unilaterally changed the method of scheduling vacation and personal leave by issuing the November 9, 2017 directive. There is no evidence in the record establishing the City needed to implement these changes to ensure minimum staffing requirements were met. Moreover, there is no evidence in the record that the City negotiated the terms of the November 9 directive with FOA or even responded to FOA's December 20, 2017 letter (CP-6) objecting to the unilateral implementation of these changes. The ability to use and schedule vacation and personal leave are implicated by the directive and both unilateral changes

concern mandatorily negotiable subjects that should have been negotiated with the FOA. Pennsauken; Rutherford; East Orange Bd. of Ed.

### **Duty to Provide Information**

The FOA, by letter dated May 31, 2017 (CP-5), requested three items of information from the City:

(1) The dates of meetings or negotiations sessions concerning the Dept. Rule changes between the City and FOA, with a list of attendees at each meeting;

(2) Any documents referring to changes in the Dept. Rules that were signed off on or agreed to by the FOA; and

(3) Any documents referencing the issuance of modified Dept. Rules in March 2017 from Director Coley.

The City referenced a July 25, 2018 letter (R-6) as being responsive to the FOA's May 31 information request. I find, based on the record before me, that while the May 31 letter was responsive to item (1) of the FOA's information request, the City did not respond to and/or provide information to the FOA in response to items (2) and (3).<sup>30/</sup> I also find that the requests in items (2) and (3) were relevant to the discharge of FOA's duties as a majority representative and that the City's failure to provide information or otherwise respond to these requests violated the Act.

A majority representative has a statutory right to

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<sup>30/</sup> I do not credit Williams' testimony that the City, through Greg Franklin, responded to the May 31, 2017 information request. See footnote 10, *supra*.

information in a public employer's possession which is relevant to its representational duties. Mt. Holly Bd. of Ed. et al., P.E.R.C. No. 2019-6, 45 NJPER 103, 104 (¶27 2018). "Relevance" includes a broad range of information that ". . . should be disclosed to majority representatives for the purpose of effectuating their duties." Mt. Holly Bd. of Ed., 45 NJPER at 104. The majority representative's right to relevant information, however, is not absolute. Id. An employer "...is not required to produce information clearly irrelevant, confidential, or which it does not control or possess." Id. Barring these limited exceptions, an employer's refusal to provide a majority representative with information it needs to represent its members is a violation of N.J.S.A. 34:13A-5.4(a)(5). Id. And a majority representative is entitled to information about past collective negotiations sessions, including agreements reached and negotiations proposals made by current and former union representatives and employer representatives. Newark Bd. of Ed., H.E. No. 76-11, 2 NJPER 195 (1976), aff'd P.E.R.C. No. 77-16, 2 NJPER 330 (1976), aff'd 152 N.J. Super. 51 (App. Div. 1977).

The City's July 25, 2018 letter is responsive to item (1). As requested by the FOA, it lists dates and attendees of negotiations sessions concerning the Dept. Rules between the FOA and City. However, that letter does not respond to items (2) and

(3) of the FOA's May 31 information request, and the City has not presented credible evidence establishing it has responded to or provided the information requested in items (2) and (3). These items are also relevant to the FOA's representational duties, since knowledge of the scope and nature of the Dept. Rule changes and what current or former FOA officers agreed to with respect to those rules is necessary to determine whether there are any impact-related issues affecting the terms and conditions of employment of FOA unit employees. Furthermore, the City does not argue the information requested by FOA is clearly irrelevant, confidential, or not in the City's control or possession. Mt. Laurel Bd. of Ed., 45 NJPER at 104. The FOA is entitled to this information.

#### **CONCLUSIONS OF LAW**

1. The City violated N.J.S.A. 34:13A-5.4(a)(5) and, derivatively, N.J.S.A. 34:13A-5.4(a)(1), by unilaterally changing the following mandatorily negotiable terms and conditions of employment:

(a) The restriction on the use of personal days by in-staff FOA unit officers before and after holidays (November 9 directive); and

(b) The requirement that FOA unit employees provide ten days notice to the City of a planned vacation day and obtain prior City approval ten days in advance of a vacation day being used (November 9 directive).

2. The City violated N.J.S.A. 34:13A-5.4(a)(5) and, derivatively, N.J.S.A. 34:13A-5.4(a)(1) by refusing to provide information in response to items (2) and (3) of the FOA's May 31, 2017 request for information.

3. The City did not violate N.J.S.A. 34:13A-5.4(a)(5) by unilaterally changing the following Dept. Rules and leave procedures, which subjects are not mandatorily negotiable:

(a) Deadline for submitting a change of address and telephone number form (Article 1, Section 7 of August 2017 Dept. Rules);

(b) Unexplained absences deemed resignations (Article 1, Section 14 of August 2017 Dept. Rules);

(c) Change in who can be appointed an Administrative Assistant to the Fire Chief (Article 4, Section 1 of August 2017 Dept. Rules);

(d) Creation of Professional Standards Unit (Article 4, Section 9 of August 2017 Dept. Rules);

(e) Tour chiefs' responsibilities (Article 5, section 2 of August 2017 Dept. Rules);

(f) Two hour notice requirement for calling out sick (Article 11, Section 1 of August 2017 Dept. Rules);

(g) Deadline for submitting doctor's note verifying sick leave (Article 11, Section 7 of August 2017 Dept. Rules);

(h) Requirement for doctor's note after 48 hours of consecutive sick leave (Article 11, Section 8 of

August 2017 Dept. Rules);

(I) Absenteeism policy (Article 11, Section 18 of August 2017 Dept. Rules);

(j) Two weeks notice of special leave (Article 14, Section 4 of August 2017 Dept. Rules);

(k) Change in deadline for submitting change of time requests (Article 14, Section 16 of August 2017 Dept. Rules);

(l) Deadlines for submitting an FD-5 and sick leave form (November 9 Directive);

(m) Designation of Fire Chief as hearing officer on disciplinary matters (Article 13, Section 19 of August 2017 Dept. Rules); and

(n) Power of Fire Chief to overturn a Hearing Officers's decision on discipline.

**RECOMMENDED ORDER**

A. That the City of East Orange cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act, particularly by issuing a November 9 directive unilaterally changing the procedures by which FOA unit officers may use personal and vacation leave and refusing to provide information in response to items (2) and (3) of the FOA's May 31, 2017 request for information.

2. Refusing to negotiate in good faith with the

majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, particularly by issuing a November 9 directive unilaterally changing the procedures by which FOA unit officers may use personal and vacation leave and refusing to provide information in response to items (2) and (3) of the FOA's May 31, 2017 request for information.

B. That the City of East Orange take the following action:

1. Rescind the November 9, 2017 directive concerning the use of personal leave immediately before and after holidays and rescind the requirement that FOA unit officers provide ten (10) days' notice to the City prior to using a planned vacation day;

2. Restore the status quo ante governing the use of personal and vacation leave by FOA unit officers that existed prior to the issuance of the November 9, 2017 directive;

3. Negotiate in good faith with the FOA over any proposed changes by the City to the use of personal and vacation leave and maintain the status quo during negotiations.

4. Provide the FOA, in a reasonably prompt fashion, the information requested in items two (2) and (3) of the FOA's May 31, 2017 request for information.

5. 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.

6. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this ORDER.

7. Dismiss the FOA's remaining claims with prejudice.

/s/ Ryan Ottavio  
Ryan Ottavio  
Hearing Examiner

DATED: July 31, 2019  
Trenton, New Jersey

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

Any exceptions are due by August 12, 2019.



# NOTICE TO EMPLOYEES

## PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, AS AMENDED,

We hereby notify our employees that:

**WE WILL** cease and desist interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act, particularly by issuing a November 9 directive unilaterally changing the procedures by which FOA unit officers may use personal and vacation leave and refusing to provide information in response to items (2) and (3) of the FOA's May 31, 2017 request for information.

**WE WILL** cease and desist from refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, particularly by issuing a November 9 directive unilaterally changing the procedures by which FOA unit officers may use personal and vacation leave and refusing to provide information in response to items (2) and (3) of the FOA's May 31, 2017 request for information.

**WE WILL** rescind the November 9, 2017 directive concerning the use of personal leave immediately before and after holidays and rescind the requirement that FOA unit officers provide ten (10) days' notice to the City prior to using a planned vacation day;

**WE WILL** restore the status quo ante governing the use of personal and vacation leave by FOA unit officers that existed prior to the issuance of the November 9, 2017 directive;

**WE WILL** negotiate in good faith with the FOA over any proposed changes by the City to the use of personal and vacation leave and maintain the status quo during negotiations.

**WE WILL** provide the FOA, in a reasonably prompt fashion, the information requested in items two (2) and (3) of the FOA's May 31, 2017 request for information.

Docket No. CO-2018-131

City of East Orange  
(Public Employer)

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

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

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830

**WE WILL** 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.

**WE WILL** notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this ORDER.

**WE WILL** dismiss the FOA's remaining claims with prejudice.