

H.E. NO. 93-31

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

In the Matter of

BOROUGH OF ROSELLE PARK,

Respondent,

-and-

Docket No. CO-H-93-46

ROSELLE PARK PBA LOCAL 27,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission granted a motion for summary judgment finding the Borough failed to negotiate over negotiable aspects of a sick leave verification policy. The Hearing Examiner recommended the Commission Order the rescission of language in certain Items of the policy dealing with the selection of physicians, and what, if any, penalties should be included in the policy, and that the Borough negotiate with the PBA over proposed language dealing with those issues.

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

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Appearances:

For the Respondent, Gill & Cphen, attorneys
(Neil M. Cohen, of counsel)

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

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION
ON MOTION FOR SUMMARY JUDGMENT

On August 3, 1992, the Roselle Park PBA Local 27 filed an unfair practice charge with the Public Employment Relations Commission against the Borough of Roselle Park alleging the Borough violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} The

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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."

PBA alleged that on or about July 9, 1992, the Borough adopted a sick leave verification policy unilaterally changing certain terms and conditions of employment. The PBA initially only objected to Section 1, Item 5 of the policy specifying the circumstances under which a police officer could be denied paid sick leave. The PBA sought a decision rescinding that Item of the policy.

A Complaint and Notice of Hearing was issued on November 25, 1992, scheduling a hearing before me for February 25, 1993. No Answer was filed. On February 1, 1993, the PBA filed an amendment to the charge. It alleged: that Section 1, Items 1, 3 and 4, also violated the Act because the Borough unilaterally required a physical exam by a Borough selected physician; and, that the second sentence of Section 1, Item 2, violated the Act because it required the employee to be available for contact by his/her supervisor while on sick leave.

On February 3, 1993, I notified the parties (including the Borough's attorney of record at that time) that pursuant to N.J.A.C. 19:14-2.2(a) I was amending the Complaint to include the amended charge, and I gave the Borough additional time to file an Answer. No Answer was filed. On February 10, 1993, the PBA, pursuant to N.J.A.C. 19:14-4.8(a) filed a motion for summary judgment accompanied by a supporting brief, affidavits and documents with the Commission's Chairman seeking a decision that the Borough violated the Act, and seeking an order requiring the Borough to rescind the objectionable items of the policy. By letter of February 12, 1993

(received on February 17), the Borough's newly appointed attorney of record (see Appearances) requested the hearing and motion be adjourned for sixty days to allow him time to review the file and prepare a response. I adjourned the hearing pursuant to that request.

By letter of March 18, 1993, the Chairman's Special Assistant confirmed a telephone conversation wherein he suggested to the Borough's attorney that he seek the PBA's consent for an extension of time before his sixty-day request was officially considered. The Special Assistant asked that he be informed of the status of the request for PBA consent. There was no response.

By letter of April 22, 1993, the Special Assistant notified the parties that the Chairman, pursuant to N.J.A.C. 19:14-4.8, had assigned the motion to me for determination. There was no response to the motion, brief or affidavits.

Based upon the documents filed in this proceeding to date, I make the following:

FINDINGS OF FACT

1. On August 9, 1982, the Borough adopted a police manual which included at section 4:9 the policy on "Sickness And Injury Leave." That policy generally: required employees to report sickness to their commanding officer; required employees to notify their supervisor of the place of their confinement; and, provided for discipline due to an unauthorized absence such as when an employee was not at his stated place of confinement when visited by

a department physician or superior officer. That policy provides as follows:

4:9.1 Reporting Sick Or Injured. Members and employees unable to report for duty because of sickness or injury shall make an immediate report to their commanding officer or desk officer in person or by telephone. If unable to report, a relative or other responsible person shall notify the commanding officer or desk officer of all pertinent facts either in person or by telephone.

4:9.2 Address of Confinement. Members and employees, when sick or injured, shall be responsible for notifying their supervisors as to their place of confinement or of any subsequent change in their places of confinement.

4:9.3 Sick Or Injured On Duty. Members taken sick or injured on duty shall report the facts to their command and shall remain on duty until relieved, unless excused by a superior officer. The only exception to this rule would be where the sickness or injury is disabling to the point of preventing compliance.

4:9.4 Unauthorized Absence. Members or employees who absent themselves in an improper manner shall be subject to disciplinary action being preferred against them. Unauthorized absence occurs when members or employees:

(a) Are not at home or who are not at their place of confinement, within reason, while on sick leave, when visited by the department surgeon or a superior officer.

(b) Feign illness or injury.

(c) Deceive the department surgeon in any way as to their true condition.

(d) Are injured or become sick as the result of improper conduct or of intemperate, immoral, or vicious habits or practices.

(e) Violate any provisions concerning the reporting of sickness or injury.

On December 31, 1984, the Borough passed Ordinance No. 1307 which provided for a variety of benefits including the following sick leave for police employees:

SECTION IX. Sick Leave - Police Department.

(a) Each police officer and probationary patrolman shall be entitled to fifteen (15) days' sick leave, with pay, per year and may accrue unused sick leave.

(b) Effective January 1, 1984, a police officer who retires will be entitled to a cash payment equaling one day's regular pay for each five (5) days of accrued sick leave up to one hundred and five (105) days with a ceiling of \$2,500.

(c) Effective January 1, 1985, a police officer who retires will be entitled to a cash payment equaling one day's regular pay for each four (4) days of accrued sick leave up to one hundred and twenty (120) days with a ceiling of \$3,500.

That Ordinance did not outline any circumstances under which the Borough could deny paid sick leave. But from at least mid-1985 until July 1992, police officers were also subject to the Borough's administrative code, particularly section 47-8, which provided, in part, that every absence after three days of absence due to sickness had to be certified by a physician, and gave the Borough the right to have police officers absent due to sickness examined by a physician. But the Borough Code did not require a particular physician, or address who paid for the physician, and no evidence was produced showing the parties prior practice on those issues. That section of the Roselle Park Code provides:

§47-8. Sick leave for police officers.

- A. Each police officer and probationary patrolman shall be entitled to fifteen (15) days' sick leave, with pay, per year and may accrue unused sick leave.
- B. Effective January 1, 1984, a police officer who retires will be entitled to a cash payment equaling one (1) days' regular pay for each five (5) days of accrued sick leave up to one hundred five (105) days with a ceiling of two thousand five hundred dollars (\$2,500).
- C. Effective January 1, 1985, a police officer who retires will be entitled to a cash payment equaling one (1) days' regular pay for each four (4) days of accrued sick leave up to one hundred twenty (120) days with a ceiling of three thousand five hundred dollars (\$3500).
- D. Every absence on account of sickness in excess of three (3) working days must be certified by a written statement from the attending physician. The borough shall have the right to have a police officer or probationary patrolman who is absent on account of sickness examined by a physician or a nurse in order to report on the employee's condition. [Added 5-28-85 by Ord. No. 1324]
- E. After a police officer has used the maximum accumulated sick leave to which he or she is entitled, an additional period up to ninety (90) days may be granted at the discretion of the Mayor and Council after a complete and thorough review of the medical history and medical reasons surrounding the police officer's absence. Prior to the end of any extended period, the police officer must provide the Mayor and Council with information regarding his or her intent and ability to resume his or her employment with the borough. [Added 7-8-85 by Ord. No. 1330]

2. The Borough and PBA were parties to a collective agreement effective from January 1, 1990 through December 31, 1991.

Article 16 "Sick Leave" of that agreement provides as follows:

ARTICLE XVI

SICK LEAVE

Each employee shall be entitled to fifteen (15) days sick leave, with pay, per year. An employee may accrue up to 200 days unused sick leave for a confirmed (Doctor's Certificate) long term illness or disability.

Effective January 1, 1989, 1990 and 1991, an employee who retires will be entitled to cash payment equaling one day's regular pay for each four days of accrued sick leave with a ceiling of \$4,500.

During negotiations for a successor agreement, Borough representatives advised the PBA that the Borough was concerned about loss of productivity and the number of sick days being used by police officers. At the negotiations session on January 16, 1992, the Borough proposed a revision to Article 16 that would have included the withholding of sick leave payments in accordance with an absence and sickness policy.^{2/}

^{2/} The proposed revision to Art. 16 provided as follows:

Each employee shall be entitled to fifteen (15) days sick leave, with pay, per year. Payment may be withheld in accordance with the Borough's Absence and Sickness Policy. An employee may accrue up to 200 days unused sick leave for a confirmed (Doctor's Certificate) long-term illness or disability.

Effective January 1, 1992, and for the term of this Contract, an employee will be entitled to cash payment equaling one (1) day's regular pay for each four (4) days of accrued sick leave with a ceiling of \$4,500.

The PBA rejected the Borough's proposal, and the PBA's attorney advised Borough representatives that aspects of a sick leave policy may be negotiable, and that the PBA would challenge any ordinance adopted by the Borough if it did not negotiate with the PBA.

The Borough did not raise that issue again during negotiations or interest arbitration, and the Borough did not make proposals regarding verification of sick leave, nor did it propose circumstances under which sick leave with pay might be denied, nor did it advise the PBA it was considering such provisions.^{3/}

3. On March 30, 1992, the PBA filed a Petition for Compulsory Interest Arbitration. An interest arbitrator was appointed on April 28, 1992. The arbitrator conducted a mediation session on July 9, 1992, but it did not result in a resolution of the issues. Later, on July 9, 1992, however, the Borough adopted Ordinance No. 1707 which established a new sick leave verification policy in Section I, Items 1-4, and included in Section I, Item 5, circumstances under which sick leave with pay would not be allowed. The Borough never requested negotiations over Section I, Item 5, nor was the PBA ever aware that such provisions were being considered by the Borough. Ordinance No. 1707 provides as follows:

^{3/} Since there were no facts in opposition to the facts as alleged by the PBA, the facts set forth above were taken from the affidavits submitted by the PBA.

ORDINANCE NO. 1707

AN ORDINANCE ESTABLISHING A SICK LEAVE VERIFICATION
POLICY IN THE BOROUGH OF ROSELLE PARK

BE IT ORDAINED, by the Mayor and Council of the Borough of Roselle Park, County of Union, and State of New Jersey as follows:

SECTION I. The Borough of Roselle Park shall grant sick leave to all eligible employees subject to negotiated agreements, statute and judicial precedent. The right to verify illness for which sick leave is claimed shall remain a prerogative of the Borough of Roselle Park. The administrative procedures and guidelines which will insure that sick leave is used for its intended purposes are as follows:

1. An employee's paid sick leave days shall be limited to a maximum of five (5) separate occurrences in a rolling twelve (12) month period. Payment beyond the five (5) occurrences shall require the employee to be examined and evaluated by a physician selected and paid by the Borough of Roselle Park.

2. If an employee is absent due to illness, the employee and/or designated representative shall inform his/her supervisor within a reasonable period of time from his/her normal starting time of his/her inability to report to work. An employee must be available for contact by his/her supervisor during the time he/she is out sick.

3. If an employee is absent on account of sickness in excess of two (2) successive working days, he/she shall be required to submit to an examination and evaluation of a physician chosen and paid by the Borough of Roselle Park.

4. The Borough of Roselle Park reserves the right to have an employee, who is absent on account of sickness, examined and evaluated by a physician selected and paid by the Borough of Roselle Park.

5. Sick leave with pay shall not be allowed under any of the following conditions:

a. Failure by an employee to comply with the requirements of the Borough of Roselle Park's Sick Leave Verification Policy;

b. Failure by an employee, who is under medical care, to comply with the orders of the attending physician;

c. If the opinion of the examining physician retained under the Borough of Roselle Park's authorization discloses that the illness is not of sufficient severity to justify the employee's absence from employment; and

d. If the employee is unable to perform his/her duties because of illness, accident or other health causes resulting from employment other than with the Borough of Roselle Park, but excluding the off-duty assignments and work details that are statutorily mandated that a police officer in uniform perform subject to the review and approval of the Chief of Police or his designated representative.

4. The charge was filed on August 3, 1992. An Interest Arbitration hearing was conducted on September 18, 1992, and final offers were submitted to the arbitrator on October 13, 1992.

The arbitrator had been given conventional arbitration authority and issued his Award, Docket No. IA-92-155, on October 24, 1992, selecting different elements of the parties' proposals. There was no proposal regarding Article 16, and the new agreement which was made effective from January 1, 1992 through December 31, 1993, essentially contains the same wording as in Article 16 of the prior agreement.^{4/}

^{4/} Article 16 as it appears in the 1992-93 agreement provides:

Each employee shall be entitled to fifteen (15) days sick leave, with pay, per year. An employee may accrue up to 200 days unused sick

ANALYSIS

It is well settled law in this State that in considering motions for summary judgment, all inferences are drawn against the moving party and in favor of the party opposing the motion. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954). Additionally, in considering a motion for summary judgment, no credibility determinations may be made. The motion must be denied if material factual issues exist. Id. at 74. A motion for summary judgment must be granted with extreme caution, all doubts resolved against the movant, and the summary judgment procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super 182, 185 (App. Div. 1981); State of N.J., Dept. of Personnel, P.E.R.C. No. 89-67, 15 NJPER 76 (¶20031 1988), aff'd App. Div. Dkt. No. A-3465-88T5 (6/14/90), certif. den. 122 N.J. 395 (1990); AFT Local 481 (Jackson), H.E. No. 87-9, 12 NJPER 628 (¶17237 1986), adopted P.E.R.C. No. 87-16, 12 NJPER 734 (¶17274 1986); Essex County Educational Services Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

4/ Footnote Continued From Previous Page

leave for a confirmed (Doctor's Certificate) long-term illness or disability.

Effective January 1, 1992, and for the term of this Contract, an employee will be entitled to cash payment equaling one (1) day's regular pay for each four (4) days of accrued sick leave with a ceiling of \$4,500.

However, the Court in Judson also established that if the opposing party offers "no affidavits or matter in opposition," to the moving party, summary judgment may be granted, taking the movant's uncontradicted facts and documents as true, provided those facts or documents did not raise a disputed material fact. Id. at 75. See also, In re City of Atlantic City, H.E. No. 86-36, 12 NJPER 160 (¶17064 1986), adopted P.E.R.C. No. 86-121, 12 NJPER 376 (¶17145 1986); In re CWA, Local 1037, AFL-CIO, H.E. No. 86-10, 11 NJPER 621 (¶16217 1985), adopted P.E.R.C. No. 86-78, 12 NJPER 91 (¶17032 1985). The Court in Judson specifically held that:

...if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature...he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts and the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact. 17 N.J. at 75.

Since the Borough did not respond to the Motion, I accept the PBA's uncontradicted facts as true, and find there are no material facts in dispute.

The facts show that prior to July 9, 1992, a policy existed entitling the Borough to require a doctors certificate to verify sickness in certain circumstances, and which authorized the Borough to discipline employees for unauthorized absences. While there was no evidence showing which doctors were used, who paid them, or how discipline, if any, was determined, the PBA did not allege the existing policy and procedure was inappropriate.

On July 9, 1992, the Borough adopted Ordinance No. 1707 which changed the prior sick leave verification policy. The new policy required, among other things, that employees be examined by a Borough physician, and set forth a series of penalties affecting the employees contractually allotted sick leave. The Borough did not negotiate with the PBA over the physician, penalty or any other section of the new policy.

The issue here is whether particular sections of the new policy are/were mandatorily negotiable. If they are, I must determine whether the PBA is entitled to a favorable decision on its motion as a matter of law. The focus is on whether Borough Ordinance No. 1707 complies with the case law developed regarding sick leave verification.

The law in New Jersey on sick leave verification is well settled. A public employer has the managerial prerogative to establish and unilaterally implement a sick leave verification policy and may require employees to provide proof of illness, including a doctor's verification for absences of any duration, in order for the employee to be eligible for sick leave benefits. So. Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989); Union Cty. H.S. Dist., P.E.R.C. No. 84-102, 10 NJPER 176 (¶15087 1984); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). However, the application of any such policy, the denial of sick leave pay, sick leave procedures, and the penalties for violating such a policy are all mandatorily negotiable. See Tp.

of Teaneck, P.E.R.C. No. 93-44, 19 NJPER 18 (¶24009 1992); City of Paterson, P.E.R.C. No. 92-89, 18 NJPER 131 (¶23061 1992); Mainland Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-12, 17 NJPER 406 (¶22192 1991); Aberdeen Tp., P.E.R.C. No. 90-24, 15 NJPER 599 (¶20246 1989); Newark Bd. of Ed., P.E.R.C. No. 85-25, 10 NJPER 549 (¶15255 1984); Piscataway.

After reviewing the new policy, I find that a number of the sections therein affect negotiable rights and, therefore, must be rescinded. Section I, Items 1, 3 and 4, require that employees be examined by a physician selected and paid for by the Borough. While the Borough is entitled to unilaterally determine whether an employee should be examined by a physician to verify sickness (which is addressed by the first parts of Items 1, 3 and 4), the fee for and selection of the physician are mandatorily negotiable. The Commission and the Court long ago held that the issue of who pays for a physician's exam and note is mandatorily negotiable, City of Elizabeth v. Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985), and the Commission recently held that the selection of the physician is also mandatorily negotiable. City of Elizabeth, P.E.R.C. No. 93-84, 19 NJPER 211 (¶24101 1993).^{5/} Thus, the physician part of Section I, Items 1, 3 and 4,

^{5/} The PBA did not contest the first part of Section I, Item 1, where it required verification after five absences in twelve months as long as it was only meant to be the trigger for the

must be rescinded from the policy, and physician selection and cost must be negotiated with the PBA.

The second sentence in Section I, Item 2, is inappropriate for inclusion in the verification policy as written. That sentence requires that the employee be available for contact by a supervisor during the time the employee is out sick. While the Borough has the right to require an employee on sick leave to, within reason, keep the Borough advised of his/her whereabouts or be available for contact during the time the employee would have been working, including reasonable home visitations, it does not have the right to unilaterally impose a requirement that the employee on sick leave be available for contact on a twenty-four hour basis. See Somerset Cty., P.E.R.C. No. 91-119, 17 NJPER 344 (¶22154 1991); City of E. Orange, P.E.R.C. No. 84-68, 10 NJPER 25 (¶15015 1983); Piscataway. The second sentence of Item 2, thus, is overbroad. It could be interpreted to require the employee to be available for contact during time the employee would not have been working. To that extent, the language is negotiable. If the sentence was limited to an employee's work time, it would be appropriate. Therefore, the last sentence of Item 2 must be rescinded from the policy and either

5/ Footnote Continued From Previous Page

verification procedure. Since the employees are contractually entitled to 15 sick days a year (and more if accumulated time is used), Item 1 cannot be used to limit the contractual time. But I agree with the PBA that the language in Item 1 is appropriate to trigger the implementation of the verification procedures.

re-written to comply herewith, or negotiated if broad language is desired.

Finally, Section I, Items 5(b), (c) and (d), must be rescinded from the policy. Those parts of Item 5 have nothing to do with sickness verification, they are penalties attached to the verification portion of the policy. Since penalties for violating such a policy are mandatorily negotiable, those penalties must be withdrawn from the policy and the Borough must engage in negotiations with the PBA over proposed penalties. See Teaneck; Paterson; Mainland; and Aberdeen.^{6/}

Item 5(a), standing alone, however, may be unilaterally implemented as part of an otherwise acceptable verification policy. While Item 5(a) is a penalty, the Commission has:

...distinguished situations where an employer announces a policy of denying sick leave benefits to employees who fail to comply with a verification requirement. Teaneck, at note 3.

Thus, the Commission has drawn a distinction between a penalty of denying sick leave because the employee did not comply with the verification policy, and penalties denying sick leave over whether the employee was sick, complied with medical orders, was out

^{6/} I note that Item 5(c) is also inappropriate because it places discretion in the Borough's selected physician to determine whether the employee's illness is sufficient to justify the absence. That is precisely why the PBA must have the opportunity to negotiate over who will select the physician and, even if the employer does, to give the union the opportunity to negotiate over whether the employee can also be examined by his/her own doctor.

sick due to circumstances unrelated to the employer, and similar reasons. The former is a managerial prerogative if the policy is otherwise appropriate, the latter are mandatorily negotiable subjects. But just as is true with any other penalty connected to sick leave verification, issues arising over whether an employee failed to comply with the verification policy may be grieved.

Finally, despite the general acceptance of the language in Item 5(a), that language cannot be implemented here until after the outstanding issues regarding Items 1, 2, 3 and 4 of the above policy have been negotiated.

CONCLUSIONS OF LAW

I find that the Borough violated subsections 5.4(a)(5) and, derivatively, (a)(1) of the Act by failing to negotiate with the PBA over negotiable aspects of a sick leave verification policy.

Accordingly, based upon the above findings, analysis and legal conclusions, I grant the PBA's motion in substantial part as a matter of law, and make the following:

RECOMMENDED ORDER

I recommend the Commission Order the Borough:

A. To cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the PBA over negotiable aspects of the Borough's sick leave verification policy.

B. To take the following affirmative action:

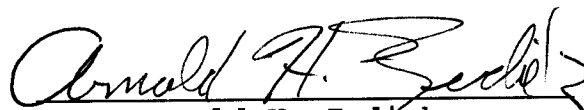
1. Rescind those portions of Section I, Items 1, 3 and 4, of Ordinance No. 1707 dealing with the selection and payment of a physician, and negotiate with the PBA over the selection and payment of physicians whose services and findings will be relied upon in the application of the sick leave verification policy.

2. Rescind the second sentence of Section I, Item 2, of the Ordinance and either redraft the sentence to apply only to any employee's work time for the day in question, or negotiate over broader language.

3. Rescind all of Section I, Items 5(b), (c) and (d), of the Ordinance, and negotiate with the PBA over any penalties the Borough proposes be included in the sick leave verification policy.

4. Delay the implementation of Section I, Item 5(a), of the Ordinance until a complete and legally acceptable policy can be implemented.

5. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Borough has taken to comply with this order.^{7/}


Arnold H. Zudick
Hearing Examiner

DATED: June 17, 1993
Trenton, New Jersey

^{7/} I am not recommending a posting in this case.