H.E. No. 2006-5

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

In the Matter of

CITY OF UNION CITY,

Respondent,

-and- Docket No. CO-2004-231

P.B.A. LOCAL 8,

Charging Party.

SYNOPSIS

A Hearing Examiner grants the Respondent's Motion to Dismiss the Complaint at the conclusion of the Charging Party's case. The Hearing Examiner finds that the City did not unilaterally alter employees' sick leave entitlement by setting a 15-day cap on sick leave usage and imposing automatic discipline. She also finds that the City has a prerogative to review an employee's attendance record in order to identify whether an employee has an excessive absenteeism problem and to initiate discipline, even if the employee has not exceeded the annual sick leave entitlement. Additionally, the Hearing Examiner determines that there was no unilateral change in procedures regarding the initiation of discipline or imposition of a new schedule of disciplinary penalties. Finally, the Hearing Examiner finds no a(3) violation. Specifically, she determines that officers were not disciplined in retaliation for the PBA rejecting the City's negotiations proposal regarding sick leave accrual. The timing of events in this instance mitigates against finding an inference of hostility.

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 which 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, Martin R. Pachman, P.C.
(Martin R. Pachman, of counsel)

For the Charging Party, Loccke & Correia, attorneys
(Michael A. Bukosky, of Counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION
ON MOTION TO DISMISS

On February 6 and March 19, 2004 PBA Local 8 (PBA) filed an unfair practice charge and amended charge against the City of Union City (City) (C-1)[1/]. The charge as amended alleges that the City violated the New Jersey Employer-Employee Relations Act,

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1/ "C" and "J" refer to Commission and Joint exhibits, respectively, received into evidence at the hearing in the instant matter. "CP" and "R" refer to Charging Party's exhibits and Respondent's exhibits, respectively, received into evidence at the hearing. The transcript of the respective days of hearing are referred to as "1T" and "2T". There was no witness testimony on the first day of hearing in this matter, because extensive settlement discussions took place. However, exhibits were marked and the attorneys presented opening statements.

N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (3), (4), (5), (6) and (7)[2/], by unilaterally altering employees' unlimited sick leave benefit. The PBA contends that the department set a 15-day cap on sick leave usage and imposed automatic discipline for any use of sick leave beyond the cap. It also asserts that the City changed disciplinary procedures arising from the sick leave cap by eliminating an investigation, notice of the charge and opportunity to be heard before imposing discipline, and changed the schedule of disciplinary penalties. The PBA contends that the City refused its demand to negotiate these changes. Additionally, the PBA asserts that the City's actions occurred during interest arbitration and that the 15-day cap and resultant discipline to its members were in retaliation for the PBA's

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2/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

rejection of the City's proposal in negotiations to limit the accrual of sick leave to fifteen days per year.

On November 4, 2004 the Director issued a Complaint and Notice of Hearing (C-1) concerning the alleged violations of subsections 5.4a(1), (3) and (5), but dismissed allegations asserting violations of subsections 5.4a(2), (4), (6) and (7). The Director assigned this matter to Kevin St. Onge for hearing. On April 4, 2005, pursuant to N.J.A.C. 19:14-6.4(a), the Director reassigned this matter to me for hearing.

On May 3, 2005 the City filed its Answer (C-2) denying that it violated the Act (C-2).

On June 14 and 16, 2005 I conducted a hearing. Charging Party introduced exhibits and its witnesses were examined and cross examined. At the conclusion of Charging Party's case-in-chief, Respondent moved to dismiss. Briefs and replies were filed by July 22, 2005.

On September 13, 2005 the PBA filed a motion to reopen the record to admit into evidence a memorandum of agreement dated April 17, 2001 which purportedly settled a charge under docket no. CO-2001-044. It also requested that I take administrative notice of the charge. The City filed its response in opposition to the motion on September 26, 2005. By letter decision dated October 3, 2005, I denied the motion to reopen the record, but

granted the PBA's request to take administrative notice of the charge.

Based upon the record, I make the following:

FINDINGS OF FACT

1. PBA Local 8 is the exclusive representative of all rank-and-file police officers employed by the City of Union City (J-1, J-2). Christopher Scardino is the current PBA President and has held that office since December 2004 (2T146).

2. The City and PBA are parties to a collective negotiations agreement effective from January 1, 2004 through December 31, 2007 (J-2). The following Articles are contained in the current agreement, but their wording is unchanged from the parties previous collective agreement effective from January 1, 1999 through December 31, 2003 (J-1).

Article XXI, "Sick Leave and Terminal Leave", sets out policies for the appropriate use of sick leave and provides in pertinent part:

> A. Sick leave policy for all members covered by this Agreement shall continue to be administered as in the past.
>
> * * *
>
> D. 1. All personnel shall be required to submit a PD-11 or a medical certificate explaining the nature of their illness after being out sick for either one (1) or two (2) days. If the illness or injury extends to a third day or beyond, the individual shall be required to report to the Police physician on his first day back on duty as well as provide a doctor's slip from his own physician.

The parties agree that the reference in paragraph A of Article XXI, that the sick leave policy will continue to be administered as in the past, means that unit members are entitled to unlimited sick leave or up to one year of paid sick leave (2T18, 2T117-2T118, 2T135-2T136, 2T147).

Article XIII, "Disciplinary Action", provides in whole:

> In the event that an investigation results in the institution of disciplinary action and if the investigated employee so requests, the PBA may designate an official to represent the employee at all stages of the proceedings. In addition, the PBA shall be provided with copies of the charges and specifications, recommendation and decisions. (J-2)

There is no schedule of disciplinary penalties - e.g. for chronic and excessive absenteeism or abuse of sick leave - set out in the parties collective agreement (J-1, J-2).

Article XXXVII, "Miscellaneous Provisions", provides in pertinent part:

> A. Appeal
>
> 1. After disciplinary proceedings have been concluded, if the PBA concludes that an employee has been unjustly punished or dismissed, it may appeal such judgment to arbitration as provided below. The Board of Arbitrators shall review the justness of the punishment imposed, upon the record made before the Hearing Officer.
>
> 2. If the Board of Arbitrators decides that the punishment imposed was unduly harsh or severe under all the circumstances, it may modify the findings and punishment accordingly. Nothing herein shall be deemed

> to limit the rights of the employee provided by Civil Service Laws or other applicable laws.
>
> 3. The appeal provided by this Article is in addition to any appeal or other remedy provided by the Civil Service Act or any other statute, rule or regulation. (J-2)

In addition to the above-quoted provisions, the current collective agreement and its predecessor contain a Management Rights clause reserving to the City the authority to make reasonable rules and regulations as it deems necessary for the effective operation of the department after advance notice to the employees (J-1, J-2). Chronic and excessive absenteeism is a cause for disciplinary action listed in the department's Rules and Regulations (2T154-2T155, 2T157-2T159).

The parties' collective agreement also sets forth a Maintenance of Standards clause preserving general working conditions at not less than the standards currently in effect (J-1, J-2). Finally, the collective agreement provides for a four-step grievance procedure ending in binding arbitration (J-1, J-2).

3. Chief Charles Everett has been a member of the department since 1976 and chief since October 2003, although he has been(2T17). In the beginning of 2004, Chief Everett, like chiefs before him, directed that a year-end review of the department's sick leave usage be conducted. The purpose of the review was to identify officers whose sick leave usage in 2003

was significantly above the department's average and, thus, to identify officers whose medical records warranted closer scrutiny for purposes of determining whether to initiate discipline. The year-end average was and is calculated based on sick leave usage for all department members including superiors, and the method of calculation has been used for a number of years for year-end reviews (2T23-2T26, 2T32, 2T86-2T87, 2T109).

For purposes of calculating the Department's annual sick leave average, however, injuries on duty (IOD) are treated differently than off-duty injuries (2T19-2T20). IODs are not counted toward the annual average nor are they counted against the individual officers sick leave usage for purposes of determining whether to charge an officer with excessive sick leave usage (2T19, 2T23-2T24). Off-duty injuries, however, even if medically documented, might trigger disciplinary charges for excessive sick leave usage depending on an officer's overall sick leave usage history (2T20-2T21).

Everett considered annual sick leave usage which exceeded twenty-percent of the department's yearly average to be significant. This percentage was also considered by previous chief's to be significant, thus, triggering a closer scrutiny of the records of individual officers ®-1; 2T23, 2T25-2T26, 2T33-2T34). In 2003 the departmental sick leave average plus twenty

percent was fourteen (14) days, the same number as in 2002 and previous years (2T26).

4. The 2003 year-end review was conducted by Lieutenant Prunez, the department's office manager (2T65, 2T84-2T85, 2T87, 2T103-2T104). As in previous years, after calculating the department's annual average and adding twenty percent, Prunez identified individual officers whose records needed closer scrutiny and forwarded the information to Lieutenant Martinez in Internal Affairs for further review (2T86-2T87)[3/]. Martinez did not conduct personal interviews with the officers being reviewed, rather he examined the medical history of each officer. Where an officer's history revealed that he/she was significantly above the department's average for the previous three or four years, the department considered that to constitute chronic and excessive absenteeism in conjunction with other factors (2T55, 2T63, 2T70-2T71).

For instance, Martinez reviewed any medical documentation provided by the officer in 2003 (2T25, 2T87, 2T111). Although a physician's note is not required for most sick leave usage - e.g. one or two day absences, all officers write a report (PD-11) explaining the nature of their illness upon returning from sick leave, and there is a report (PD-34) prepared by the desk officer

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3/ The Internal Affairs Unit operates under Attorney General guidelines which require an investigation as part of the disciplinary process (CP-2; 2T50-2T51, 2T53).

when the officer calls in sick documenting the illness (J-1, J-2; 2T112). Additionally, Martinez considered any patterns of sick leave usage in the current year and previous years (2T34).

Martinez also examined the officer's quarterly reviews (R-1, 2T33-2T34). Quarterly reviews were instituted by Chief Paul Hanak in 1997 "to scrutinize the use or abuse of sick leave on a regular basis - quarterly, at least." ®-1; 2T34, 2T38, 2T101, 2T103). In 1997 Chief Hanak issued a memorandum (R-1) to unit commanders instructing them to conduct interviews with officers based on the following criteria: officers who exceed three sick days in the first quarter of any given year, officers who exceed five sick days mid-year, officers who exceed seven sick days in the third quarter of any given year and officers who at the end of the year exceed nine days. The supervisor was instructed to fill out a PD-60 form at the end of the interview process, recording the officer's explanations for his/her illness(es). At the end of the interview, both the supervisor and the officer signed off on the form indicating that the interview had been conducted. Based on the interview and other factors, the memorandum instructed that further action might be taken (R-1).

Not all officers reviewed by Martinez in 2003 were charged with chronic and excessive absenteeism (2T90-2T91). For example, as a result of the 2003 year-end review, one officer who was significantly above the fourteen day figure and had a well

documented off-duty injury was not charged or disciplined because his previous history revealed a good sick leave record (2T104-2T105).

5. After completing their reviews and investigations, Prunez and Martinez followed the same procedures that had been followed previously in the department (2T104). Namely, if they determined that a major disciplinary action such as suspension was warranted, disciplinary charges were filed.[4/] A Preliminary Notice of Disciplinary Action was issued. The officer was given five days in which to request a hearing. If a hearing was requested, a hearing date was scheduled. If a hearing was conducted, the officer was entitled to representation at the hearing, and it was conducted before a neutral hearing officer selected by the parties. If charges were subsequently sustained, discipline ensued (CP-3; 2T34-2T36).

Where, as a result of the review, it was recommended that the officer be reprimanded, the officer was served with the reprimand by his immediate supervisor. The officer then had a right to object to the reprimand and provide any justification for the sick leave use either personally or in writing before Everett. The reprimand did not become final until reviewed and

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4/ Pursuant to N.J.A.C. 19:14-6.6(a), I take administrative notice that the City of Union City is a civil service employer and governed by civil service rules and regulations.

signed off on by Everett. This procedure was not new. Everett has discussed reprimands with individual officers in the past as well as various PBA officers, and Internal Affairs has explained to officers who objected to their own reprimands that they can speak to Everett (2T36-2T38, 2T71, 2T76, 2T83-2T84, 2T104, 2T113-2T114). All reprimands could also be appealed through the parties' contractual grievance procedures to binding arbitration (J-1, J-2).

6. On January 19, 2004, based on Prunez' year-end review and Martinez' review of the sick leave history of individual officers identified by Prunez's review, written reprimands for chronic and excessive absenteeism were issued to eight officers (CP-3). All reprimanded officers used at least fourteen days of sick leave in 2003 (CP-3). Before the reprimand was put in his/her personnel file, each officer had an opportunity to appear personally before Chief Everett or explain his actions in a written statement to Everett (2T68, 2T71). None of the officers filed grievances individually or through the PBA (2T162-2T163). Also, as a result of the year-end review, three other additional officers were charged with chronic or excessive absenteeism and served with Preliminary Notices of Disciplinary Action on January 30, January 31 and February 3, 2004 respectively. The three officers did not subsequently contest those charges. They agreed

to accept penalties ranging from one to three days suspension (CP-3).[5/]

7. Four PBA witnesses testified regarding whether the department had previously charged and disciplined officers for chronic and excessive absenteeism. Everett testified the January/February 2004 disciplines were not the first time that the department had charged and disciplined officers for chronic and excessive absenteeism (2T56, 2T91-2T92, 2T101). PBA State Delegate Gabriel Piomelli corroborated the Chief's testimony. He recalled two reprimands in the mid-nineties and one in 2000 or 2001. At least one of the disciplines was challenged by the PBA (2T137-2T138). Current PBA President Christopher Scardino testified generally that reprimanding officers for chronic and excessive absenteeism was a "new policy" (2T151). PBA Vice-President Richard D'Andrea testified that to his knowledge no one had ever been disciplined for chronic and excessive absenteeism (2T120), he conceded that while he did not know if anyone had been disciplined, he understood there was always a potential to discipline for excessive absenteeism (2T130-131).

Based on the Chief's testimony and Piomelli's specific recollections, I find that officers had been disciplined,

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5/ It is unclear from the testimony the exact number of disciplines for chronic and excessive absenteeism issued in January/February 2004. The number appeared to range from 11 up to 15 (CP-3; 2T56, 2T119). The specific number is not material to my decision.

including reprimands, for chronic and excessive absenteeism before the 2004 disciplines. Consequently, I could not rely on Scardino's and D'Andrea's testimony. However, the number of officers disciplined in 2004 appeared to be greater than in previous years.

8. D'Andrea also testified about a settlement agreement between the City and PBA in 2000 as a result of an unfair practice charge filed by the PBA concerning sick leave and discipline. I take administrative notice that on August 24, 2000 the PBA filed an unfair practice charge under docket no. CO-2001-044 alleging, in part, that the City unilaterally changed sick leave entitlements. N.J.A.C. 19:14-6.6(a).

D'Andrea said he was present when the parties allegedly reached the agreement which he characterized to mean that the City could only counsel officers for excessive absenteeism, but could not discipline them, including issuing reprimands (2T121-2T122, 2T131-2T132). D'Andrea explained that the alleged agreement was reduced to writing, but confirmed that neither he nor the PBA could produce a copy of the written agreement (2T129).

No other witness corroborated D'Andrea's testimony regarding the settlement agreement. Consequently, I am unable from that testimony to make any factual determinations regarding the parties' alleged 2000 settlement agreement as to discipline or

disciplinary penalties for excessive absenteeism. I can draw the inference therefrom, however, that the City has a history of taking action to discipline officers for chronic and excessive absenteeism including issuing reprimands.

9. In response to the January/February 2004 disciplines, the PBA, through its attorney, wrote a letter dated February 5, 2004 to Chief Everett (J-3). The parties at this time were in interest arbitration for a successor collective agreement (2T106). I take administrative notice that the PBA filed a petition for interest arbitration under Docket No. IA No. 2004-056 on January 26, 2004, listing its specific economic and non-economic demands pursuant to N.J.S.A. 34:13a-16(F)(2). N.J.A.C. 19:14-6.6(a). There were no proposals concerning sick leave or a schedule of disciplinary penalties identified as issues in dispute for interest arbitration.

The February letter, entitled "Request and Demand for Negotiations", however, listed as a subheading to the title four specific items: use of sick leave, penalties for abuse of sick leave, new policies for appropriate use of sick leave and improper use of discipline for sick leave usage (J-3). In the letter, the PBA asserted that the City implemented a new policy concerning sick leave and changed sick leave penalties and contended specifically that during the pendency of interest arbitration, the City unilaterally changed the following:

> . . . (1) the procedures, method and manner of use or granting of sick leave, (2) changes to the method and manner of disciplinary penalties for alleged abuse of sick leave and (3) unilateral establishment of arbitrary "triggers" concerning what the department considers inappropriate use of sick leave and (4) improper initiation of disciplinary charges against approximately twenty PBA members as a result of the new modifications to sick leave and penalties commensurate with potential abuse of sick leave. (J-3)

The PBA demanded negotiations on all issues including:

> . . . any elimination, alteration, modification, implementation, repudiation or change of the terms and conditions of employment agreed to, or which exist[ed] pursuant to past practice and custom by and between the parties relating to the terms and conditions of employment referenced herein, and other terms and conditions of employment which also may have been changed incident thereto. (J-3)

Finally, the PBA asserted that if the City claimed that any of its actions were attributable to the exercise of managerial prerogative, it demanded impact negotiations ". . . on any and all terms and conditions of employment which are impacted by the exercise of such managerial prerogative . . . " (J-3).

10. Chief Everett considered J-3 a grievance and felt that in any event, the City had a right to deal with excessive absenteeism. He met informally with the PBA President to discuss their positions. They could not agree as to how to handle the issues raised, so Everett forwarded J-3 to the City's attorney for review because the parties were already in negotiations for a

successor agreement (2T93-2T96, 2T107). The City did not subsequently respond to J-3 nor did the PBA introduce these negotiations demands as proposals during interest arbitration or subsequently during negotiations for the 2004-2007 collective agreement (2T106, 2T108, 2T152).

11. In preparation for negotiations for the 2004-2007 collective agreement, Chief Everett suggested to the Mayor that the amount of annual paid sick leave accrual be limited to fifteen days (2T29-2T30). On January 21, 2004, the City delivered its negotiations proposals to the PBA (CP-1; 2T27). Among numerous proposed modifications to the parties' expired collective agreement, the City sought to delete the language in Article XXI and replace it with, among other changes, accrued sick leave of fifteen days per year (Everett's proposal) (CP-1). The PBA rejected this proposal sometime after January 21, 2004 (2T125). When the parties eventually reached agreement on the 2004-2007 collective agreement (J-2), there was no change to sick leave entitlement (J-2; 2T128).

ANALYSIS

In New Jersey Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979), the Commission set forth the standards for determining whether to grant a motion to dismiss at the conclusion of the charging party's case as follows:

> . . . the Commission utilizes the standards set forth by the New Jersey Supreme Court in

> Dolson v. Anastasia, 55 N.J. 2 (1969). Therein, the Court declared that when ruling on a motion for involuntary dismissal the trial court "is not concerned with the worth, nature or extent . . . of the evidence, but only with its existence, viewed most favorably to the party opposing the motion". Id. at 198.

See also Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 535-542 (1995) and Cameco, Inc. v. Gedicke, 157 N.J. 504, 509 (1999).

The Dolson Court stated:

> The test is whether "the evidence, together with the legitimate inferences therefrom, could sustain a judgment in . . . favor" of the party opposing the motion, i.e., if, accepting as true all the evidence which supports the position of the party defending against the motion and affording him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied. Id. at 5.

The PBA asserts violations of 5.4a(1), (3) and (5) of the Act, specifically that the City unilaterally imposed new rules and/or modifications to the parties' sick leave policies and procedures without negotiations and that the discipline of officers for excessive absenteeism was in retaliation for the rejection by the PBA of the City's proposal during negotiations to cap the accrual of sick leave at fifteen days per year. Applying the Dolson standards, the facts demonstrate neither a change to existing sick leave rules nor modification of existing rules, thus, triggering a negotiations obligation. Moreover, the

timing of the adverse personnel actions - disciplines for chronic and excessive absenteeism - does not support the retaliation theory advanced by Charging Party.

Section 5.3 of the Act requires that "proposed new rules or modification of existing rules governing working conditions shall be negotiated with the majority representative." Employers may not unilaterally change prevailing terms and conditions of employment because to do so would circumvent the statutory duty to bargain. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25, 48 (1978). A term or condition of employment may be set by agreement or by past practice. Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd 25 NJPER 357 (¶30151 App. Div. 1999), aff'd 166 N.J. 112 (2000), 26 NJPER 453 (¶31177 Sup. Ct. 2000). However, an employer will not be found to have violated 5.4a(5) where the term or condition of employment is not mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J. 393 (1982).

Police officers and fire fighters have a broader scope of negotiations than other public employees. City of Paterson and Paterson Police PBA, 87 N.J. 78 (1981). Where a public employer and the majority representative of its police officers have negotiated over a subject that is not mandatorily negotiable, yet is not preempted by statute or regulation, that provision can be enforced unless doing so would substantially limit the employer

in attaining governmental policy goals. In addition, negotiability rulings are made on the facts of each case. City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998); Troy v. Rutgers, 168 N.J. 354, 383 (2001).

Here, the prevailing terms and conditions of employment set by the parties' past practice demonstrates that officers were entitled to up to one year paid sick leave. The PBA alleged that the City changed the contractual sick leave benefits by capping sick leave at fifteen days and automatically imposing discipline on officers who exceeded that number in 2003. The facts, however, demonstrate no capping of the sick leave benefit or automatic discipline. Rather the year-end review conducted by Chief Everett only identified officers who exceeded by a significant amount the departmental average for sick leave usage in 2003 and triggered a closer review of their individual medical records. Some officers who exceeded the number identified as twenty-percent above the 2003 departmental average were not disciplined based on this review. Additionally, Everett's review was no different than reviews conducted by chiefs who preceded him and, indeed, the fourteen day trigger was the same number used by the department in 2002 to identify officers for closer scrutiny.

Even if Everett's actions represented a departure from existing policy or practice, the Commission has held that an

employer has a prerogative to review an employee's attendance record. Further the employer has a prerogative to identify whether an employee has an excessive absenteeism problem and to initiate discipline even if an employee has not exceeded the annual sick leave entitlement. Newark Bd. of Ed., P.E.R.C. No. 85-26, 10 NJPER 551 (¶15256 1984); County of Morris, P.E.R.C. No. 2002-33, 28 NJPER 58 (¶33020 2001); City of Jersey City, P.E.R.C. No. 2003-57, 29 NJPER 108 (¶33 2003).

For instance, in City of Jersey City, 29 NJPER 108, the City changed the definition of excessive absenteeism to "repeated short periods of being absent on sick leave, or prolonged periods of absence" eliminating the phrase "without hospitalization and any valid form of medical documentation from a physician or another medical specialist". Id. at 109. The Commission determined that the change in definition was encompassed in the City's prerogative to initiate discipline. The Commission reasoned as follows:

> . . . while an employer must negotiate disciplinary review procedures, it has the exclusive power to determine whether to initiate discipline. City of Jersey City, P.E.R.C. No. 88-149, 14 NJPER 473 (¶19200 1988) (citing Sponsor's statement to A-706, which became L. 1982, c., 103, amending N.J.S.A. 34:13A-5.3). By allowing the City to charge an employee with excessive absenteeism even if the absences are medically verified or justified, the change alters the circumstances in which the City may initiate discipline. However, it does not affect the employees right, which the

> City recognizes, to arbitrate any minor discipline flowing from a determination that he or she has been excessively absent or an arbitrator's power to determine that a disciplinary sanction based on "excessive absenteeism", as defined by the employer was with or without just cause. We therefore conclude that the change is encompassed in the City's prerogative to initiate discipline. Id. at 110.

Citing Montville, NJPER Supp. 2d (¶140 1985), the PBA also asserts that using an arbitrary number of days over which sick leave is deemed excessive without taking into account legitimate illnesses is arbitrary on its face and unreasonable. Montville is inapposite. In Montville the Court reviewed on appeal a decision of the State Board of Education which considered the reasonableness of an attendance evaluation system under N.J.S.A. 18A:30-1, 2, 3 or 7, a different statutory scheme from the matter before me.

In any event, Montville is distinguishable. In Montville, any teacher taking more than twelve days annually or more than twenty-one days in two years automatically received an unsatisfactory evaluation. Here, in its year-end review of the department's sick leave usage, the City calculated twenty percent over the departmental yearly average or fourteen days as a trigger to review individual officer's medical history. The review was utilized to determine whether to initiate discipline. Unlike Montville, the City's actions were not arbitrary or unreasonable, because the review considered and took into account

legitimate illnesses. Moreover, some officers who were identified as exceeding the departmental average in 2003 received no discipline as a result of the review.

Next, the PBA contends that in January 2004 the City implemented a new minor disciplinary process concerning instances of sick leave abuse. It asserts, first, that the City had never reprimanded employees for excessive absenteeism. However, I found in part based on the PBA's own witnesses, employees were reprimanded in the mid-nineties and in 2000/2001. Even if the City had never previously disciplined employees for sick leave abuse, employers have a managerial prerogative to initiate discipline for such abuse, whether or not employees have exhausted their annual allotment of sick leave days. Jersey City, P.E.R.C. No. 88-149, 14 NJPER 473 (¶19200 1988). See also, Township of Montclair, P.E.R.C. No. 2000-107, 26 NJPER 310 (¶31126 2000).

The PBA also contends that there was a unilateral change in certain procedural aspects regarding the initiation of discipline, namely "knowledge of the rules, opportunity to be heard, and a legitimate review". The record does not support this contention. Since at least 1997, quarterly reviews were conducted by supervisors, and instances of specific sick leave usage were reviewed and discussed with individual officers. Explanations (including medical documentation) were considered,

and reports were generated and became a part of the officer's personnel file.

The record further reveals that reprimands for chronic and excessive absenteeism did not become final until reviewed by the Chief and after the officer had an opportunity to contest the reprimand in writing or personally before the Chief. Chief Everett had discussed reprimands with individual officers as well as various PBA officers, and Internal Affairs explained to individual officers who were not satisfied with their reprimands that they could discuss them with Everett. Moreover, the parties' collective agreement provides for notification to the PBA of disciplinary charges and disciplinary review of minor discipline through binding arbitration, including a hearing before a neutral designated by the parties, and with representation by counsel or the PBA. There is no evidence in the record that notification procedures were changed or that the PBA or individual officers filed grievances or were denied the right to do so.

In the case of major discipline, the City, as a civil service employer, was and is bound by civil service (Department of Personnel) rules and regulations to provide notice through the service of a preliminary notice of disciplinary action and the scheduling of a hearing if requested by the officer charged. These procedures were not new or a change of existing rules.

Finally, the PBA asserts that the City implemented a new schedule of disciplinary penalties without negotiations. The facts do not support this contention either. Although the parties' collective agreement is silent regarding a schedule of disciplinary penalties, the Department has disciplined officers for sick leave abuse, including issuing reprimands.

Since there was no change to the City's sick leave policy or disciplinary review procedures nor did the City unilaterally implement a new schedule of disciplinary penalties, there was no attendant negotiations obligation triggered by the actions of Chief Everett in initiating the 2004 disciplinary actions or any impact negotiations obligation where there was no change. The City acted consistently with how it had acted in the past. Therefore, the City did not violate the Act when it initiated discipline under the existing review procedures. Monmouth Cty. Sheriff, P.E.R.C. no. 93-16, 18 NJPER 447, 449 (¶23201 1992). The fact that a greater number of officers appeared to be disciplined for sick leave abuse in 2004 than in previous years did not constitute a modification of existing rules or working conditions.[6/]

6/ The Commission has determined that a schedule of penalties for abusing sick leave is negotiable. City of Elizabeth, P.E.R.C. No. 2000-42, 26 NJPER 22 (¶31007 1999). The City does not dispute that a schedule of disciplinary penalties is negotiable, but asserts that the PBA did not raise this issue or make any specific proposals on this issue during

(continued...)

Based on the foregoing, the 5.4a(5) allegations are dismissed.

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violated subsection 5.4a(3) of the Act. A charging party must prove by a preponderance of the evidence on the entire records that protected activity was a substantial or motivating factor in the employer's adverse action. This may be done by direct or circumstantial evidence which demonstrates that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected activity. If an illegal motive has been proved and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as

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6/ (...continued)
negotiations or before the arbitrator during interest arbitration for the 2004-2007 collective agreement. In fact, no proposal concerning a schedule of disciplinary penalties was put before the arbitrator even though the demand (J-3) to negotiate a schedule of disciplinary penalties was made in response to the January 19 reprimands and before the PBA filed for interest arbitration on January 26, 2004. Since I found there was no change in the parties' practice or procedure for reprimands and sick leave abuse, no negotiations obligation arose over the discipline implemented in this case. The PBA is not precluded, however, from raising a schedule of disciplinary penalties in negotiations for a successor agreement upon proper and timely demand.

pretextual, there is sufficient basis for finding a violation without further analysis.

If the record establishes that both motives unlawful under the Act and other motives contributed to a personnel action, then the employer will not have violated the Act if it can prove by a preponderance of the evidence on the entire record that the same action would have taken place even in the absence of the protected activity. This affirmative defense need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action.

The PBA asserts that officers were disciplined for chronic and excessive absenteeism in retaliation for it rejecting the City's negotiations proposal regarding sick leave accrual. Specifically, it contends that the City automatically disciplined officers who used more than fifteen days sick leave in retaliation for the PBA's rejecting its negotiations proposal to cap the accrual of sick leave at fifteen days. The record does not support a violation of 5.4a(3).

First, officers were not automatically disciplined if they used fifteen days or more sick leave in 2003. Not all officers who used fourteen days in 2003 were disciplined. Some officers with well over that number were not disciplined because their medical records did not warrant such action. Also, the number

utilized by the City to trigger a review of an officer's medical record, twenty-percent over the annual Departmental average, was not a fixed amount. The same percent had been used by previous chiefs in their year-end reviews to identify officers for further study. In 2003 the number utilized was fourteen days, coincidentally the same number as was used in 2002.

Timing in a(3) cases is a significant factor in determining whether or not hostility or union animus can be inferred. The timing of events in this instance mitigates against finding an inference of hostility. Tp. of West Orange, P.E.R.C. No. 99-76, 25 NJPER 128 (¶30057 1999). Eight out of eleven disciplines were issued on January 19, 2004, while three others were issued on January 31, 31 and February 3, 2004. The City submitted its proposals to the PBA on January 21, 2004. Sometime after January 21, the PBA rejected the proposal. Even assuming that the PBA rejected the City's proposal on January 21, 2004, the day it was received, a majority of the City's disciplinary actions were initiated before the City presented its negotiations proposal. The City's actions, therefore, do not support an inference of animus.

Consequently, the 5.4a(3) and derivative a(1) allegations are dismissed.

Based on the record developed by the PBA through witness testimony and documents and granting every reasonable inference to the PBA, I make the following:

RECOMMENDATION

The City did not violate N.J.S.A. 34:13A-5.4a(1), (3) or (5) as alleged, therefore, its Motion to Dismiss is granted, and the complaint is dismissed in its entirety.

Wendy L. Young
Hearing Examiner

DATED: Trenton, New Jersey
October 5, 2005

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 October 18, 2005.