I.R. No. 2011-47

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

CITY OF ATLANTIC CITY,

Respondent,

-and- Docket No. CO-2011-432

ATLANTIC CITY PBA LOCAL 24,

Charging Party.

CITY OF ATLANTIC CITY,

Respondent,

-and- Docket No. CO-2011-434

ATLANTIC CITY SUPERIOR
OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants an unopposed interim relief application based upon unfair practice charges filed by majority representatives of both patrol officers and superior officers alleging that the public employer unilaterally adopted a "medical policy and procedure" without negotiations. The new policy mandated among other things, that all officers disclose elective medical procedures and prescriptions to a "medical monitoring unit." The policy also reduced a certain health benefit.

In the absence of a response to the application by the public employer, the Designee determined that mandated disclosure of elective medical procedures and prescriptions is likely mandatorily negotiable and that the imposition met the irreparable harm requirement. The Designee determined that disclosure of such elective medical procedures and prescriptions implicated privacy concerns. See N.J. Transit PBA Local 304 v. N.J. Transit Corp., 151 N.J. 531 (1997). The Designee also granted the application on the alleged reduction of a health insurance benefit.

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Appearances:

For the Respondent, Glickman and Ruderman, attorneys (Steven Glickman, of counsel)

For the Charging Party, O'Brien, Belland & Bushinsky, LLC, attorneys (Mark E. Belland, of counsel)

INTERLOCUTORY DECISION

On May 13, 2011, Atlantic City PBA Local 24 and Atlantic City Superior Officers Association (Associations) filed respective unfair practice charges against the City of Atlantic City (City). The charges allege that on May 6, 2011, the City unilaterally adopted a "medical policy and procedure" without negotiations over affected terms and conditions of employment.

The City's conduct allegedly violates 54a(1), (3) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

On May 20, the Association filed an application for interim relief, together with a brief, certification and exhibits. The application seeks an Order restraining the City from implementing the "medical policy and procedure."

On May 25, I issued an Order to Show Cause specifying June 22, 2011 as the return date for argument in a telephone conference call. I also directed the City to file a response by June 14, together with proof of service upon the Associations. No response was filed.[2/] On the return date, the parties argued their cases. The following facts appear.

The Associations have negotiated separate collective negotiations agreements with the City, both extending from

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ N.J.A.C. 19:14-9.3(b) provides in a pertinent part: "If no answering brief is filed, the application may be considered to be unopposed."

January 1, 2008 through December 31, 2012. Article XXIX, Section 4 of the PBA agreement and Article XXVIII, Section 4 of the SOA agreement ("Sick and Injured") are identical and provide:

> In the event the illness or injury is not service connected, said employee shall have his or her injury or illness reviewed by the City for the purpose of determining the injury or illness to be major and thereby render the employee eligible for sick leave compensation in excess of either the yearly one hundred twenty (120) hours or accumulated sick leave which he or she may have exhausted, or if the City determines that the injury or illness requires convalescing. The sick leave shall not exceed one (1) year. In such event, said employee shall not have any accumulated sick time deducted.
>
> All excuses and notifications of illness shall be submitted to the City for its determination. Ordinary and nonconsecutive sick days after fifteen (15) days in any one year shall result in a loss of pay unless the employee uses his accumulated sick time.
>
> However, in no event shall any employee not be compensated if he is sick or injured and requires convalescing, notwithstanding the nature of the illness or injury, or whether or not the employee has exhausted his yearly or cumulative sick time.

Article XXIX, Section 7e of the PBA agreement and Article XXVIII, Section 7e of the SOA agreement provide: "If an illness continues beyond the balance of sick leave an employee has accumulated, the City may make a determination of a chronic illness or injury for purposes of granting extended leave."

On May 6, 2011, the City implemented an 18-page "medical policy and procedure" order, the designated purpose of which is

". . . to establish procedures regarding the reporting, treatment and evaluation of medical conditions for employees of the Atlantic City Police Department." It was written and implemented without ". . . the assistance and/or consent of the union[s]."

Section V (Submission of Medical Document/reporting Medical Information) provides in pertinent parts:

> B. The employee must furnish a Treating Physician's/Counselor's Consultation Report (A.C.P.D. MMU - 2) to all outside medical professionals or treatment centers.
>
> 1. The employee shall complete the top portion of the form. Employees shall specify the purpose of the visit, identifying the medications they are currently taking, and signing the form where applicable upon completion of the examination.
>
> C. If an employee visits a treating physician but is not required to visit a city physician, the employee will notify the Medical Monitoring Unit by forwarding the original treating Physician's/Counselor's Consultation Sheet directly to the Medical Monitoring Unit.
>
> D. When an employee is hospitalized, upon discharge, the employee will contact the Medical Monitoring Unit, who will contact Risk Management for directed care. The employee shall either obtain or have the treating hospital(s) forward to the Medical Monitoring Unit the discharge summary reports relative to the employee's hospitalization.
>
> E. Employee's who have a medical condition, elective surgery, illness or injury which does not result in use of sick leave or in absence from duty shall submit a special report directly to the Medical Monitoring Unit. The report should summarize the

> circumstances surrounding the injury/illness, treatment rendered and any prescription to be taken. The employee will also attach any/all available medical reports for this condition. This report shall be forwarded directly to the Medical Monitoring Unit.

Section X (Duty Status Review) provides in pertinent parts:

> A. The city physician is responsible for continually assessing the duty status of all employees, especially those who are in temporary off-duty status or transitional assignment status. The city physician shall also be responsible for making medical recommendations to the Public Safety Director, Chief of Police or designee regarding an employee's duty status and assignment.
>
> B. The city physician may consult with other employees of the Police Department including, but not limited to, the Chief of Police, Deputy Police Chief's or designee; the Medical Monitoring Unit or designee. The purpose of such consultation is to provide the city physician with relevant information pertaining to an employee's duties and assist them in making a complete and accurate recommendation to the Director of Public Safety, Chief of Police or designee regarding an employee's duty status.

Section I (Definition of Terms) provides in pertinent parts:

> A. Medical Monitoring Unit: The unit to which an employee is temporarily assigned, while sick or injured, when it is determined that the employee will be on temporary off-duty status at least fifteen (15) calendar days or when the member has been on temporary off-duty status fifteen (15) calendar days.
>
> G. Extended Sick Leave: Temporary off-duty status, due to sickness or injury, lasting for a period of fifteen (15) or more calendar days.

> K. Medical Information: Records from a treating physician, therapist, or other medical service provider that typically includes, but is not limited to diagnosis of an employee's condition; description of nature and severity of symptoms suffered; list of medications prescribed; name of all physicians and/or therapists from whom the employee is receiving treatment, the dates of last treatment; prognosis of condition proposed course of treatment; anticipated date of return to duty; and progress notes.
> Q. Treating Physician: Any medical professional providing care, treatment, or counseling to a Police Department employee.

Section II (Confidentiality of Medical Information) provides in pertinent parts:

> A. Information relating to an employee's medical condition is confidential. Medical records obtained by the Department will be maintained by the Medical Monitoring Unit, Administration Division, in files that are separate from any other personnel files. The only medical files maintained by the Department shall be those within the Medical Monitoring Unit.
>
> B. Medical Monitoring Unit personnel are prohibited from improperly disclosing confidential medical information. Disclosure of this information is authorized only in the following circumstances:
>
> 1. First aid and safety personnel may be informed, when appropriate, if the employee's medical condition require emergency treatment.
>
> 2. Government officials investigating compliance with various laws shall be provided relevant information on request.
>
> 3. Employees of the Medical Monitoring Unit may submit information to the City

> of Atlantic City Risk Manager or the Risk Manager's designee and workers' compensation insurance carriers in accordance with state workers' compensation laws and employers may use the information for insurance purposes.
>
> 4. To medical professionals conducting medical evaluations for the Department.
>
> 5. Pursuant to a valid authorization or release of medical records signed by the employee.
>
> 6. Under court order.
>
> NOTE: Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and/or necessary accommodations.

Section XIII (Compliance) provides in pertinent part:

> A. If an employee fails to comply with any of the provisions of this order, the Appointing Authority or designee may place them on leave without pay status and the employee's actions may be referred to the Internal Affairs Unit for review.

The PBA Local 24 president has filed a certification providing that Section V requires (for the first time) disclosure of health conditions unrelated to work or to an employee's performance of duties. Section V also mandates that employees provide forms completed by "treating physicians" to the "medical monitoring unit."

The current collective negotiations agreements do not require disclosure of a unit employee's medical condition to the Director of Public Safety, a civilian title. Section X of the

"medical policy and procedure" mandates the "city physician" to make medical recommendations to the Director, Chief or designee. The PBA president certifies that under the parties' collective agreements, unit employees are entitled to extended sick leave benefits after 10 consecutive absences.

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

The Associations contend that the unilaterally implemented "medical policy and procedure" imposes "restrictive rules governing sick and extended medical leaves and has required employees to disclose all medical conditions and prescriptions to the City, even though the conditions do not relate to the performance of their duties." The policy allegedly violates the

collective negotiations agreements and "the members' constitutional right to privacy" (brief at 5).

In City of Jersey City v. Jersey City POBA, 154 N.J. 555, 568 (1998), our Supreme Court held that the negotiability balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982) must be applied to determine whether the subject of a dispute is negotiable. That test provides:

> [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 regulation; 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]

The City's medical policy and procedure, in part mandating disclosure of unit employees' elective medical procedures and prescriptions to employer representatives (under penalty for non-disclosure), can affect whether an employee is paid and whether his or her privacy interests are unlawfully compromised. The disclosure requirement has not been fully or partially preempted by statute or regulation. Nor has any governmental policy

interest been proffered which is directly related to unit employees' abilities to perform police services. No facts indicate that the City is faced with managerial concerns arising from unit employees' elective medical procedures and prescriptions. I find based on the facts proffered at this juncture of the proceeding that the subject raised in this dispute appears to be mandatorily negotiable.

The Association's application is unopposed. The requirement in the unilaterally implemented policy that elective medical procedures and prescriptions must be reported to the City's "medical monitoring unit" (Section V.E.) appears to unjustifiably impinge upon privacy interests. See N.J. Transit PBA Local 304 v. N.J. Transit Corp., 151 N.J. 531 (1997). In N.J. Transit, our Supreme Court approved a "special needs test" for evaluating urine drug testing of police employees. If the government claims a "special need" (i.e., beyond the normal need for law enforcement), the courts ". . . must undertake a context-specific inquiry, examining closely the competing private and public interest advanced by the parties." Id., 151 N.J. at 548, 556.

In the absence of the City's response to the application, I find that no special need has been identified, nor public interest advanced by the imposed mandatory disclosure of elective medical procedures and prescriptions (Section XIII of the policy sets forth penalties for non-disclosure). Nor does the policy

itself specify a public interest in such disclosures. See City of Newark, H.E. No. 2001-18 27 NJPER 227 (¶32078 2001) (employer's unilaterally imposed policy compelling police officers to disclose all medications containing steroidal compounds impermissibly intrudes upon their reduced expectations of privacy and autonomy). I find that the PBA and SOA have demonstrated a substantial likelihood of prevailing on this portion of the charges.

A public employer that unilaterally reduces health insurance benefits without negotiations violates 5.4a(5) of the Act. City of New Brunswick. P.E.R.C. No. 85-61, 11 NJPER 24 (¶16012 1984). The Associations have demonstrated that the new medical procedure and policy increased the eligibility requirement for extended medical leave benefits from ten days' absence to fifteen.

Penalties for breaches of a policy are also mandatorily negotiable. Glassboro Bd of Ed., P.E.R.C. No. 77-12, 2 NJPER 355 (1976). Policy provisions which do not automatically impose discipline are lawful, however. See Newark Bd of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984); Hudson Cty, I.R. No. 91-3, 16 NJPER 463 (¶21200 1990). The compliance provision in the City's policy does not automatically impose penalties. Accordingly I find that the Associations have not demonstrated a substantial likelihood of success on the allegation that the

implementation of Section XIII of the policy, standing alone, violates 5.4a(5) of the Act.

I also find that employees will be irreparably harmed by their mandated disclosure of elective medical procedures and prescriptions which are unrelated to the performance of police duties. Disclosure of medical facts unrelated to job performance undermine privacy interests, including the matter of personal reputation.

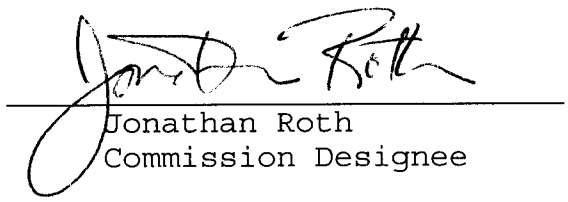
The City has not identified any hardship it would suffer by an order requiring it to negotiate any medical policy and procedure requiring disclosure of elective medical procedures and prescriptions. Nor would the City suffer a hardship by negotiating with the Associations any policy which would diminish the level of health benefits currently enjoyed by both police units.

Finally, no facts suggest that the public interest will be harmed by an order requiring the City to negotiate a policy and procedure mandating disclosure of elective medical procedures and prescriptions or reducing the level of medical benefits enjoyed by both police units.

ORDER

The City is restrained from implementing portions of the "medical policy and procedure" mandating disclosure of elective medical procedures and prescriptions and from reducing the level

of health benefits currently provided to employees in both rank-and-file and superior officers units. This order shall remain in effect until the unfair practice charge is resolved. The charge shall be processed in the normal course.



Jonathan Roth
Commission Designee

DATED: June 30, 2011
Trenton, New Jersey