

H.E. NO. 2015-5

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY  
OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-2014-040

FRATERNAL ORDER OF POLICE,  
LODGE NO. 62,

Charging Party.

SYNOPSIS

A Hearing Examiner grants a motion for summary judgment filed by Fraternal Order of Police, Lodge 62 and denies a cross-motion for summary judgment filed by Rutgers, The State University of New Jersey. The unfair practice charge alleges that Rutgers violated section 5.4a(5) and (1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. by refusing to negotiate over the impact of a sick leave verification policy. Rutgers admitted implementing the policy and denied violating the Act. It contends that for many years officers were required to submit a medical or doctor certificate at each officer's own expense without reimbursement when an officer has taken sick leave for three or more consecutive days or has taken sick leave a fourth time in a given calendar year.

The Hearing Examiner finds that for many years the FOP acquiesced to Rutgers' unilateral establishment of the contested term and condition of employment. He also found that on or about the alleged date set in the charge, the FOP demanded to negotiate over the (financial) impact of Rutgers requirement that unit employees produce a medical certificate upon their return from the specified absences and that Rutgers refused to negotiate. The Hearing Examiner determined that the employer's conduct violated its duty to negotiate as set forth in the rationale in UMDNJ, P.E.R.C. No. 2010-12, 35 NJPER 330 (¶113 2009).

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  
Fox Rothschild, LLP  
(Kenneth A. Rosenberg, of counsel and on the brief)

For the Charging Party  
Markowitz & Richman  
(Matthew D. Areman, of counsel and on the brief)

**HEARING EXAMINER'S DECISION ON MOTION FOR SUMMARY JUDGMENT  
AND CROSS-MOTION FOR SUMMARY JUDGMENT**

On August 12, 2013, the Fraternal Order of Police, Lodge No. 62 (FOP) filed an unfair practice charge against Rutgers, The State University of New Jersey (Rutgers). The charge alleges that on July 1, 2013, Rutgers violated section 5.4(a)(5) and derivatively, (a)(1)<sup>1/</sup> of the New Jersey Employer-Employee

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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; (5) Refusing to negotiate in good faith with a majority representative of  
(continued...)

Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by unilaterally implementing a sick leave verification policy requiring all unit employees to pay the cost of obtaining a medical or physician's certificate when taking three (3) or more consecutive days of sick leave. FOP also alleges that Rutgers violated the Act by refusing to negotiate upon demand over the impact of the sick leave verification policy.

On November 12, 2013, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On November 26, 2013, Rutgers filed an Answer, denying any violation of the Act and asserting several defenses. It admits adopting and implementing the disputed sick leave verification policy without providing the FOP an opportunity to negotiate over the policy's impact on unit employees.

On June 13, 2014, FOP filed a motion for summary judgment, together with a brief and certification of Robert Gries, a FOP Council representative. Also on June 13, 2014, Rutgers filed a cross-motion for summary judgment, together with a brief and certification of Michael Rein, a captain of the Rutgers police department. On June 27, 2014, Rutgers filed a reply brief

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1/ (...continued)  
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."

together with a certification of Jay Kohl, Rutgers Vice President of Administration and Public Safety.<sup>2/</sup> On August 25, 2014, the Commission referred the motions to me for a decision. N.J.A.C. 19:14-4.8.

Summary judgment will be granted:

if it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law. [N.J.A.C. 19:14-4.8(e)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), sets forth the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The fact-finder must ". . . consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the moving party." If that issue can be resolved in only one way, it is not a genuine issue of material fact. A motion for summary judgment should be granted cautiously -- the procedure may not be used as a substitute for a plenary hearing. Baer v. Sorbello,

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<sup>2/</sup> On June 23, 2014, a Commission designee granted the parties' joint request to file answering briefs in response to the motion and cross motion pursuant to N.J.A.C. 19:14-4.8. FOP filed a letter on June 27, 2014 expressing its intention to rely on the brief in support of its motion. Rutgers filed a letter brief on June 27, 2014.

177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

Applying these standards and relying upon the parties' submissions, I make the following:

**FINDINGS OF FACT**

1. FOP is the exclusive majority representative of non-supervisory, rank and file police officers in the Rutgers police department (RPD). The RPD is responsible for providing a full range of police and security services to the Rutgers community on all Rutgers campuses twenty four (24) hours per day, three hundred and sixty five (365) days per year.

2. Rutgers and FOP signed a collective negotiations agreement extending from July 1, 2006 through June 30, 2009 (agreement).

3. After the agreement expired, the parties reached an impasse in collective negotiations. The FOP then filed a petition to initiate compulsory interest arbitration, docket number IA-2010-044.<sup>3/</sup>

4. Article 13, Section 4 of the agreement, entitled, "Sick Leave" provides in a pertinent part:

When an officer is to be required to submit a medical certificate when the officer's absence record shows a pattern of apparent abuse or of excessive use of sick leave, the officer will be so advised. The requirement

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<sup>3/</sup> The interest arbitration award is pending.

shall be in effect for each subsequent absence until such time as the University determines that corrective action has been accomplished. When Rutgers directs an officer to have a physical examination, Rutgers will pay the cost of the examination.

The agreement does not address whether Rutgers or the unit employee pays the costs associated with obtaining a medical certificate, such as the cost of a doctor's visit.

5. A medical certificate is a doctor's note that Rutgers uses to verify that an employee is not abusing sick leave privileges. The requirement is typically used to verify relatively minor illnesses of short duration. Officers are not required to undergo a physical examination before submitting a medical certificate.

6. Rutgers also requires officers to undergo physical examinations in cases of serious illness or injury to determine an officer's fitness for duty by an anticipated return date. In such cases, Rutgers either directs the officer to undergo an examination by a Rutgers physician or pays for the injured officer's personal physician to conduct the examination.

7. The RPD has a longstanding past practice of requiring officers to submit a medical or physician's certificate when the officer has taken sick leave for three (3) or more consecutive days or has taken sick leave a fourth time in a given calendar year.

8. On at least sixteen (16) occasions since 2003, unit officers have submitted medical certificates at their own expense without reimbursement from Rutgers. In that period, the FOP did not object to or grieve the requirement, nor demand to negotiate over whether Rutgers should cover the costs of providing a medical certificate.

9. On July 1, 2013, the University of Medicine and Dentistry of New Jersey (UMDNJ) merged with Rutgers. As a result of the merger, fifty six (56) of UMDNJ's police officers were added to the RPD.

10. In order to clarify its sick leave verification practices for all officers, Rutgers adopted sick leave policy directive 3.5-6 (SLPD) on July 1, 2013. It was implemented immediately.

11. The SLPD memorializes the practice of requiring officers to submit medical certificates at their own expense in cases where an officer uses three (3) or more consecutive days of sick leave or uses a fourth day of sick leave in a given calendar year. The SLPD provides in a pertinent part:

An employee who uses sick leave for personal reasons shall be required to provide a physician's certificate, at the employee's expense, when the employee is out for three or more consecutive days. This certificate must be submitted immediately upon returning to duty. On the fourth (4<sup>th</sup>) and subsequent occurrence in a calendar year without satisfactory justification, the employee is required to obtain and submit a physician's

certificate at their expense. This medical certification must be submitted within five (5) calendar days upon returning to work (emphasis supplied).

12. In response to Rutgers' promulgated policy, FOP expressed verbally to several Rutgers' administrators its demand to negotiate over the impact of SLPD on unit employees, including the cost of SLPD compliance.

13. On or about August 8, 2013, FOP President William DeFalco and FOP Council representative Robert Gries met with Jay Kohl, Rutgers Vice President of Administration and Public Safety (VPA).

14. Kohl has served as VPA since November 1, 1999. As VPA, Kohl is responsible for supervising and overseeing operations of all three campus police departments in Camden, New Brunswick and Newark, New Jersey.

Kohl also works with the Rutgers Office of Labor Relations (OLR) on resolving grievances filed by FOP at the departmental level. Kohl meets with FOP representatives to discuss and address FOP issues or concerns regarding RPD policies and procedures and works in consultation with the OLR on any FOP proposal concerning terms and conditions of employment.

I take administrative notice of an August 2012 organizational chart in which Kohl is positioned as the highest



ranking administrative official in Rutgers' Administration and Public Safety Department.<sup>4/</sup>

16. During the August 8 meeting, DeFalco, Gries and Kohl discussed several FOP concerns, including FOP's concern over the impact of SLPD on unit members. Gries and DeFalco communicated to Kohl FOP's demand to negotiate with Rutgers over the economic impact of SLPD on unit members.

17. Kohl replied that the SLPD did not alter existing terms and conditions of employment, but rather memorialized and clarified a long-standing practice of requiring employees to submit a medical certificate at their own expense when taking three(3) or more consecutive days of sick leave or taking sick leave a fourth time in a given calendar year.

Kohl certifies that he reminded DeFalco and Gries that, ". . . the department had always required the FOP's members to obtain medical certificates or physician's certificates, at their own expense, as part of the sick leave verification process for as long as anyone in the department could remember and that directive 3:5 [SLPD] merely reduced to writing an existing practice."

18. Kohl also told DeFalco and Gries that he did not have the authority to negotiate or change existing policies or

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<sup>4/</sup> The chart is posted on the following Rutgers website:  
[http://publicsafety.rutgers.edu/BAS\\_AUGUST\\_2012.pdf](http://publicsafety.rutgers.edu/BAS_AUGUST_2012.pdf).

practices without the OLR's input and consent. Kohl informed Gries and DeFalco that, "if they wanted to negotiate a change to the longstanding practice/policy they should contact" OLR.

#### ANALYSIS

Rutgers contends that the SLPD is consistent with the parties' past practice governing sick leave verification and does not violate the Act. Rutgers also contends that the FOP waived its right to negotiate over the SLPD's impact by acquiescing to the practice for more than a decade.

FOP contends that Rutgers repudiated Article 13, Section 4 of the agreement by requiring unit employees to pay the costs of obtaining a medical certificate. The referenced section provides: ". . . [W]hen Rutgers directs an officer to have a physical examination, Rutgers will pay the cost of the examination." FOP also argues that Rutgers' directive was unilaterally implemented during negotiations for a successor collective negotiations agreement.

Rutgers has asserted facts (findings nos. 5 and 6) regarding its interpretation and/or application of the provision that raises material factual issues precluding summary judgment. Brill. Those facts likely implicate an appropriate mechanism for dispute resolution -- the parties' contractual grievance procedure. See State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

I find that FOP has not waived its right to negotiate. I grant FOP's motion for summary judgment and deny Rutgers' cross-motion for summary judgment.

A public employer has a managerial prerogative to establish a sick leave verification policy. The economic impact of a sick leave verification policy on employees is mandatorily negotiable. City of Elizabeth, P.E.R.C. No. 84-75, 10 NPER 39 (¶15022 1983), aff'd 198 N.J. Super. 382 (App. Div. 1985). The Commission and Appellate Division have held that an employer must negotiate in good faith over whether it or the employee pays for doctor visits required under a sick leave verification policy. City of Elizabeth; City of Newark, P.E.R.C. No. 85-13, 10 NJPER 505, 507 (¶15231 1984). As the Appellate Division explained:

Indeed, the question of who pays for doctor's visits does not impinge on the exercise of the managerial function in any material way and merely involves budgetary issues. Contrary to the arguments of the city, nothing in the Commission's decision precludes implementation of a verification program until the economic issue is resolved. In fact, these issues are for all practical purposes entirely severable.  
[City of Elizabeth, 198 N.J. Super. at 386-387]

A majority representative may waive its right to negotiate over the economic consequences of a sick leave verification policy, provided that its waiver is "clear and unmistakable" Bridgeton Bd. of Ed., P.E.R.C. No. 2011-64, 37 NJPER 72, 73 (¶27 2011). Waiver can be found where a subject has been thoroughly

discussed and explored during negotiations and the majority representative has consciously yielded its position on the issue. UMDNJ, P.E.R.C. No. 2010-12, 35 NJPER 330, 332 (¶113 2009); Bridgeton Bd. of Ed., 37 NJPER at 73 (majority representative waived the right to negotiate over concurrent use of sick leave with FMLA leave when the public employer proposed to negotiate over the issue at four separate negotiations sessions and the majority representative expressly refused to negotiate the subject). Waiver may also be found in cases where a majority representative has acquiesced to an employer's unilateral establishment of a term and condition of employment. UMDNJ, 35 NJPER at 332. When a majority representative acquiesces to an employer's setting of a term and condition of employment, no violation of the duty to negotiate will be found if the employer acts consistently with past practice. Id.

A ". . . waiver of the right to negotiate ends when the union's acquiescence ends." UMDNJ, 35 NJPER at 332; citing Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000). In UMDNJ, the Commission held that the employer violated the Act by unilaterally reducing faculty supplemental salaries after the majority representative demanded to negotiate over the reduction. The employer argued that the majority representative waived the right to negotiate over the reductions because it

acquiesced for more than two decades to the same types of reductions without objection. The Commission disagreed and determined that a ". . . failure to request negotiations in the past does not amount to a waiver of a present right to be notified of prospective changes and to be given the opportunity to request negotiations about them." UMDNJ, 35 NJPER at 332.

The Commission then distinguished cases in which a majority representative sought negotiations from cases in which a majority representative did not seek negotiations before filing an unfair practice charge. UMDNJ, 35 NJPER at 333; South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987) (finding clear and unmistakable waiver of right to negotiate salary reduction where majority representative did not seek to negotiate the disputed or any prior reduction). See also, Town of Secaucus, P.E.R.C. No. 87-104, 13 NJPER 258 (¶18105 1987). An employer does not violate the Act when acting consistent with a practice to which the majority representative has acquiesced and has not demanded to negotiate about. An employer violates the Act when it refuses to negotiate in good faith with a majority representative upon demand, even when the employer's conduct is consistent with a practice to which the majority representative has acquiesced for many years (until now). UMDNJ.

In my view, the holding and rationale in UMDNJ controls the outcome of this matter. FOP's acquiescence to the practice memorialized in the SLPD ended when the FOP demanded to negotiate over the impact of the SLPD. That demand to negotiate was communicated to several Rutgers' administrators, including VPA Jay Kohl. Kohl replied by explaining why he would not negotiate over the SLPD's impact, and denied his authority to negotiate with FOP, recommending that it contact OLR, instead. Considering the scope of Kohl's duties and role on behalf of Rutgers in the collective negotiations relationship with FOP, I find that the demand of him was reasonable and effective, amounting to a demand on Rutgers.<sup>5/</sup> Kohl's communications with Gries and DeFalco represent a refusal to negotiate in good faith over the SLPD's impact on unit employees, violating 5.4a(5) and (1) of the Act.

**RECOMMENDED ORDER**

I recommend that the Commission **ORDER:**

A. That Rutgers, the State University of New Jersey cease and desist from:

1. Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate in good faith with FOP

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<sup>5/</sup> In finding that Kohl was an appropriate representative of Rutgers upon whom a demand to negotiate could be made, I am not also finding that he had actual or apparent authority to bind Rutgers. See, e.g., City of Newark Housing Auth., P.E.R.C. No. 90-116, 16 NJPER 390 (¶21160 1990).

Lodge No. 62 over the economic impact of Rutgers' sick leave verification policy on unit employees.

2. 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, particularly by refusing to negotiate in good faith with FOP Lodge No. 62 over the economic impact of Rutgers' sick leave verification policy.

B. Respondent Rutgers, The State University of New Jersey take the following affirmative action:

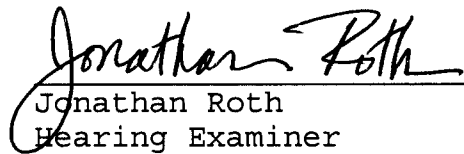
1. Upon adequate notice, immediately reimburse all unit employees for their out-of-pocket costs for obtaining a medical certificate under Rutgers' sick leave verification policy. Employees eligible for reimbursement are those employees represented by FOP Lodge No. 62 who were required to submit a medical certificate on or after August 8, 2013.

2. Negotiate in good faith with FOP Lodge No. 62 over the economic impact of Rutgers' sick leave verification policy.

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

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

4. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

  
Jonathan Roth  
Hearing Examiner

DATED: October 9, 2014  
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 October 20, 2014.





# 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 from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate in good faith with FOP Lodge No. 62 over the economic impact of Rutgers' sick leave verification policy on unit employees.

WE WILL cease and desist from 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, particularly by refusing to negotiate in good faith with FOP Lodge No. 62 over the economic impact of Rutgers' sick leave verification policy.

WE WILL, upon adequate notice, immediately reimburse all unit employees for their out-of-pocket costs for obtaining a medical certificate under Rutgers' sick leave verification policy. Employees eligible for reimbursement are those employees represented by FOP Lodge No. 62 who were required to submit a medical certificate on or after August 8, 2013.

WE WILL negotiate in good faith with FOP Lodge No. 62 over the economic impact of Rutgers' sick leave verification policy.

Docket No. CO-2014-040

Rutgers, The State University of New Jersey  
(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) 984-7372