

H.E. NO. 2023-9

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

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-2018-194,  
CO-2018-195, CO-2018-196,  
CO-2018-197, CO-2018-198,  
CO-2018-200, CO-2018-204

TRENTON BUSINESS AND TECHNICAL  
ASSOCIATION et al.,

Charging Parties.

**SYNOPSIS**

A Hearing Examiner grants the Associations' motion for summary judgment and denies the Board's cross-motion for summary judgment. The Hearing Examiner finds that the Board violated subsections 5.4a(5) and 5.4a(1) derivatively by unilaterally imposing a regime of four disciplinary memoranda automatically distributed to unit members absent and/or late on three occasions, seven occasions, ten occasions, and more than ten occasions; and that the Board violated subsections 5.4a(5), and derivatively 5.4a(1), by unilaterally eliminating half-day leave.

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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TRENTON BUSINESS AND TECHNICAL  
ASSOCIATION et al.,

Charging Parties.

Appearances:

For the Respondent,  
Adams, Gutierrez & Lattiboudere, LLC, attorneys  
(Derlys M. Gutierrez, of counsel)

For the Charging Parties,  
Selikoff & Cohen, PA, attorneys  
(Keith Waldman, of counsel; Hop Wechsler, of counsel)

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

On February 20-22, 2018, Trenton Business and Technical Association (TBTA), Trenton Educational Secretaries Association (TESA), Trenton Education Association (TEA), and Trenton Paraprofessionals Association (TPA) (collectively, Associations) filed unfair practice charges against the Trenton Board of Education (Board). The charges allege that the Board violated

subsections 5.4a(1), (3), and (5)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when it sent a memorandum dated August 23, 2017 to the Associations that unilaterally imposed significant changes to the Board's attendance/lateness policies including the following:

- imposition of a regime of four disciplinary memoranda that will be distributed to unit members absent and/or late on three occasions, seven occasions, ten occasions, and more than ten occasions; and
- elimination of half-day leave.

On November 19, 2019, the Director of Unfair Practices (Director) consolidated these matters and issued a Complaint and Notice of Pre-Hearing with respect to the Associations' 5.4a(1) and (5) allegations; declined to issue a Complaint with respect to the Associations' 5.4a(3) allegations; and assigned the matter to me as Hearing Examiner. On February 21, 2020, the Board filed an Amended Answer denying that it violated the Act and asserted the following:

. . .[T]he Board denies that Ms. Johnson's

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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"; "(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"; and "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

[August 23, 2017] letter unilaterally imposes significant changes to the Board's attendance policies. The letter advises the parties of the procedure that will be used to inform employees of their use of sick days throughout the school day. Ms. Johnson's letter reminds the parties of the various Board policies and regulations that are implicated. The Board maintains that it has the managerial prerogative to issue said "Attendance and Tardiness Notices" to employees, to document employees' use of sick days, and to otherwise manage the use of sick days for all employees. The Attendance and Tardiness Notices to employees are required to maintain orderly attendance in the school district.

\* \* \*

The Board denies that Ms. Johnson's letter dated August 23, 2017 unilaterally imposes significant changes to the Board's attendance policies or that it changes the terms and conditions of employment . . . . [The Board] has no legal obligation to negotiate the use of half sick days with any of the Associations . . . .

[Board's Amended Answer; Associations' Br., Ex. C.]

On February 6, 2023, the Associations filed a motion for summary judgment, together with a brief, exhibits, and the Joint Certification (Joint Certification) of Tanisha Smith, Marizol Tirado, Naomi Johnson-LaFleur, and Betty Glenn. On February 16, 2023, the Board filed opposition to the Associations' motion for summary judgment and a cross-motion for summary judgment, together with a brief. On February 27, 2023, the Associations filed a reply brief.

On February 28, 2023, the Commission referred the

Associations' motion for summary judgment and the Board's cross-motion for summary judgment to me for a decision. See N.J.A.C. 19:14-4.8(a).

Accordingly, I have reviewed the parties' submissions. The following material facts are not disputed by the parties. Based upon the record, I make the following:

**FINDINGS OF FACT**

1. TBTA represents Board employees classified as accounts payable clerk, attendance officers, attendance officers/field monitor, auto/bus mechanic, case manager, communications assistant, communications & supply clerk, communications & supply clerk specialist, compliance specialist, data processing specialist, employee specialist, foreman/garage mechanic, human resources analyst, information technology analyst, information management assistant, junior accountant, mail clerk, media communications assistant, payroll clerk, payroll specialist, principal benefits analyst, senior accountant, senior information system control specialist, shop clerk, stock clerk, storekeeper I, storekeeper II, technical support specialist, trainer/locker room attendant, transportation dispatcher, and truck driver/supply. See 2012-2015 TBTA CNA, Art. II.
2. The Board and TBTA are parties to an expired collective

negotiations agreement (CNA) in effect from July 1, 2012 through June 30, 2015. See 2012-2015 CNA, Art. XX. The parties are in negotiations for a successor agreement.

3. Article VI of TBTA's expired 2012-2015 CNA, entitled "Leave Policies," provides in pertinent part:

Section 1. All twelve (12) month employees shall be allowed twelve (12) sick days with full pay annually. All ten (10) month employees shall be allowed ten (10) sick leave days with full pay annually. No employee shall accumulate more than fifteen (15) unused sick days per year as per N.J.S.A. 18A:30-7.

Section 2. In the event that an employee exhausts all accumulated and earned sick leave benefits, he/she may request additional sick leave, which request shall be considered by the Board of Education on a case-by-case basis.

\* \* \*

Section 6. Personal Business or Religious Holidays

Four (4) days for twelve (12) month employees and three (3) days for ten (10) month employees with no loss of pay shall be allowed for either personal business or religious holidays. Personal business days shall be approved two full work days in advance by the immediate supervisor over the division except in cases of demonstrated emergencies.

4. Article VIII of TBTA's expired 2012-2015 CNA, entitled "Holidays & Vacations," provides in pertinent part:

Section 6. Annual vacations allowances for all twelve (12) month employees covered by this agreement hired December 31, 1993 or earlier, shall be made in accordance with the schedule below:

0-24 years        20 days per year  
After 25 years 25 days per year

Annual vacation allowance for twelve (12) month employees hired effective January 1, 1994 and up to ratification of this agreement shall be made in accordance with the schedule below:

1-5 years        12 days per year  
6-15 years       15 days per year  
16-24 years     20 days per year  
25 years         25 days per year

Annual vacation allowance for new twelve (12) month district employees hired after ratification date of this agreement shall be made in accordance with the schedule below:

1-5 years        12 days per year  
6-15 years       15 days per year  
16+ years        20 days per year

All employees shall fall under the provision of Section 6 when it comes to vacation time.

5. TESA represents certain secretarial employees employed by the Board, excluding attendance officers, security officers, executive secretarial unit, business and technical unit, cafeteria, para-professional unit, mechanics and laborers, and custodian unit. See 2009-2012 TESA CNA, Art. I.
6. The Board and TESA are parties to an expired CNA in effect from July 1, 2009 through June 30, 2012 (see 2009-2012 CNA, Art. 21) and an expired memorandum of agreement (MOA) in effect from July 1, 2012 through June 30, 2016 (see 2012-2016 MOA, Section 1). The parties are in negotiations for a successor agreement.

7. Article 13 of TESA's expired 2009-2012 CNA, entitled "Leave Policies," provides in pertinent part:

A. SICK LEAVE

Employees shall be allowed eighteen (18) days for leave for personal illness.

\* \* \*

H. PERSONAL BUSINESS OR RELIGIOUS HOLIDAYS

Four (4) personal business days shall be allowed for either personal business or religious holidays. For all employees, personal business days not utilized during the year shall be added as an unused sick day for retirement purposes only and reimbursed as sick days under Section Q of this Article.

8. Article 14 of TESA's expired 2009-2012 CNA, entitled "Vacations & Holidays," provides in pertinent part:

A. Vacations may be taken during any time of the year at times approved by the immediate supervisor.

B. The number of annual vacation days allowed to employees shall be based on the total number of years of employment with the Trenton Public School System. However, leave time granted by the Board of Education shall not be calculated in years of employment for vacation purposes.

C. Annual vacation allowances for employees shall be made in according to the following schedule:

The first to the 11th month - 1 day per month of service

- 1 year to 5 years - 12 days
- 5 years to 15 years - 15 days
- 15 years to 25 years - 20 days
- 25 years and over - 25 days

All vacation days are accrued.

D. Employees attaining their years of service during the months of July or August shall be eligible for vacation days that year.



E. In any calendar year, where the vacation or any part thereof is not granted by reason of pressure of business, such vacation periods or parts thereof not granted shall accumulate and shall be granted during the school year as mutually agreed by the employee and immediate supervisor.

9. TEA represents all employees of the Board holding the position of classroom teacher, pre-kindergarten teacher, reading teacher, elementary music teacher, elementary physical education teacher, home instruction teacher, social worker, librarian, school counselor, psychologist, nurse, weight training instructor, ROTC instructor, career development counselor, media specialist, teacher on leave of absence, audio-visual teacher, teacher-coordinator cooperative industrial education, speech therapists, learning consultant, long term substitute, elementary art teacher specialist, provisional teacher, helping teacher, reading resource teacher, associate educational media specialist, facilitator, teacher leader, technology facilitator, family service worker, teacher tutor, early childhood liaison teacher and those certified employees in similar categories, teachers in the school for foreign born and evening school, coaches, and extra-curricular/co-curricular sponsors. See 2015-2018 TEA CNA, Art. I.
10. The Board and TEA are parties to an expired CNA in effect from September 1, 2015 through August 31, 2018 (see 2015-

2018 TEA CNA, Art. XXIX), an expired MOA in effect from September 1, 2018 through August 31, 2021 (see 2018-2021 TEA MOA, Section 1), and an expired MOA in effect from September 1, 2021 through August 30, 2022 (see 2021-2022 TEA MOA, Section 2). The parties are in negotiations for a successor agreement.

11. Article VII of TEA's expired 2015-2018 CNA, entitled "Leave Policies," provides in pertinent part:

A. SICK LEAVE

1. Effective September 1, 2010, teachers shall be allowed twelve (12) days for leave because of personal illness per year. The unused portion of such leave at the end of any year shall be cumulative.

2. In the event a teacher exhausts all accumulated and earned sick leave benefits, he/she may request additional sick leave, which request shall be considered by the Board of Education on a case-by-case basis. (See also Sick Leave Bank Addendum).

\* \* \*

E. Personal Business or Religious Holidays

1. Three (3) days per year shall be allowed for either personal business or religious holidays. Teachers shall not be required to state the reasons for personal business day requests except in the case of days immediately preceding or immediately following a vacation or during any state-mandated testing.

12. TPA represents parent liaisons (salaried), 10-month paraprofessionals, and 12-month paraprofessionals employed by the Board. See 2019-2023 TPA CNA, Art. II.
13. The Board and TPA are parties to a CNA in effect from September 1, 2019 through August 31, 2023. See 2019-2023

TPA CNA, Art. XX.

14. Article XIII of TPA's 2019-2023 CNA, entitled "Leave Policies," provides in pertinent part:

A. SICK LEAVE

1. Paraprofessionals shall be allowed twelve (12) days leave because of personal illness per year. The unused portion of such sick leave at the end of any year shall be cumulative, but not more than twelve (12) days of the unused portion of sick leave shall be cumulative in a given year.

\* \* \*

E. PERSONAL BUSINESS OR RELIGIOUS HOLIDAYS

1. Three (3) days per year shall be allowed for either personal business or religious holidays. Personal business days shall be approved, in advance, by the Superintendent, or his designee. In no case shall this clause be interpreted to allow accumulation of unused personal days from one year to the next other than set forth herein.

15. Article XVIII of TPA's 2019-2023 CNA, entitled "Vacations & Holidays," provides in pertinent part:

A. Paraprofessionals who work as twelve (12) month employees annually, shall take their annual vacation between the close of school in June through the Friday preceding Labor Day, at times approved by their immediate supervisor. Exceptions due to seasonal necessities in school business must have the approval of the immediate supervisor.

B. The number of annual vacation days allowed to Paraprofessionals who work as twelve (12) month employees shall be based on the total number of years of employment with the Trenton Public School System. However, leave time granted by the Board of Education shall not be calculated in years of employment for vacation purposes.

C. Annual vacation allowance for

Paraprofessionals who are twelve (12) month employees shall be made according to the following schedule:

LENGTH OF EMPLOYMENT	NUMBER OF ANNUAL VACATION DAYS
6 months to 1 year	6 days
1 year to 5 years	10 days
5 years to 15 years	15 days
Over 15 years	20 days

16. I take administrative notice<sup>2/</sup> that on May 16, 2011, the Board promulgated District Policy 3212, entitled "Attendance (M)," which provides:

The regular and prompt attendance of teaching staff members is an essential element in the efficient operation of the school district and the effective conduct of the educational program. Staff member absenteeism disrupts the educational program and the Board of Education considers attendance an important component of a staff member's job performance.

A teaching staff member who fails to give prompt notice of an absence, misuses sick leave, fails to verify an absence in accordance with Board policy, falsifies the reason for an absence, is absent without authorization, is repeatedly tardy, or accumulates an excessive number of absences may be subject to appropriate consequences, which may include the withholding of a salary increment, dismissal, and/or certification of tenure charges.

In accordance with N.J.S.A. 18A:30-1, sick leave is defined to mean the absence from work because of a personal disability due to injury or illness or because the staff member has been excluded from school by the school

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<sup>2/</sup> See N.J.A.C. 19:14-6.6(a) ("[n]otice may be taken of administratively noticeable facts").

medical authorities on account of contagious disease or of being quarantined for such a disease in the staff member's immediate household. No teaching staff member will be discouraged from the prudent, necessary use of sick leave and any other leave provided for in the collective bargaining agreement negotiated with the member's majority representative, in an individual employment contract, or provided in the policies of the Board. In accordance with N.J.S.A. 18A:30-4, the Superintendent or Board of Education may require a physician's certificate to be filed with the Secretary of the Board in order to obtain sick leave.

The Superintendent, in consultation with administrative staff members, will review the rate of absence among the staff members. The review will include the collection and analysis of attendance data, the training of teaching staff members in their attendance responsibilities, and the counseling of teaching staff members for whom regular and prompt attendance is a problem.

17. I also take administrative notice that on May 16, 2011, the Board promulgated District Regulation 3212, entitled "Professional Staff Attendance Review and Improvement Plan," which provides in pertinent part:

A. Review of Attendance Data

1. A record shall be kept of the attendance of each teaching staff member, including teachers, educational services personnel, and administrators. Any absence, for part or all of a school day, shall be recorded along with the reason for the absence. The record will distinguish sick leave, professional days, unpaid leaves of absence, personal leave, and other approved leaves. The employee's

attendance record will include notation of verification of an absence where such verification is required by Policy No. 3432. The employee's rate of absence shall be calculated every pay period and entered on his/her attendance record. An employee's attendance record shall be part of the employee's personnel file.

2. At the end of each year, a cumulative attendance record shall be assembled for each school and for the district.

3. An attendance summary shall be prepared from the cumulative attendance record. The attendance summary shall show the rate of absence for each school and for the district. The attendance summary shall be posted in each school of the district.

4. A record shall be made of the appointment of substitutes for absent employees and the wages paid to substitutes.

B. It is the expectation and goal of the Trenton Board of Education that all Trenton School District employees shall report on time to their assigned duties whenever scheduled to work in order to effectuate the continuous delivery of the education services (for which the Board has contracted). A prerequisite for the efficient performance of a staff person's assigned duties is regular and punctual attendance.

Therefore, any employee who is tardy, in reporting to work according to the schedule of the school or department to which he/she is assigned without approval, two times in a school year shall have a conference with his/her immediate supervisor regarding such tardiness. On the third time an employee is

tardy in a school year without approval, he/she shall receive from his/her immediate supervisor a written communication indicating (setting forth) the dates of the tardies (tardiness) and a notification that continuation of such tardiness shall result in disciplinary action. This written communication shall be copied to the teaching staff's personnel file.

Once an employee is tardy the fourth time without approval, the employee's salary shall be deducted at fifteen minute intervals for every fifteen minutes or less that an employee is tardy. For example, an employee shall be docked fifteen minutes for being late between one through fifteen minutes, docked thirty minutes for being late between sixteen through thirty minutes, docked forty-five minutes for being late between thirty-one through forty-five minutes, docked one hour for being late between forty-six minutes through one hour, etc. Similar deductions shall be made for each additional incident of tardiness, in any given year. Approval of tardiness must be in writing and state the reason. All tardiness must be recorded. The calculations shall be as follows:

#### 10-Month Employee

Daily salary (annual salary/185) :  $6 \frac{1}{2}$  hours  
 (daily work hours) x (amount of 15 minute intervals tardy) = deduction

#### 12-Month Employee

Daily salary (annual salary/260-261) :  $6 \frac{1}{2}$  hours  
 (daily work hours) x (amount of 15 minute intervals tardy) = deduction

#### 10 Month Employee

Daily salary (annual salary/185) : 7 hours  
 (daily work hours) x (amount of 15 minute intervals tardy) = deduction

12 Month Employee

Daily salary (annual salary/260-261) : 7  
hours (daily work hours) x (amount of 15  
minute intervals tardy) = deduction

10 Month Employee

Daily salary (annual salary/185) : 8 hours  
(daily work hours) x (amount of 15 minute  
intervals tardy) = deduction

12 Month Employee

Daily salary (annual salary/260-261) : 8  
hours (daily work hours) x (amount of 15  
minute intervals tardy) = deduction

Exceptions to this policy may be granted only  
by the Superintendent of Schools based upon  
regulations.

In addition to docking an employee's salary  
for tardiness, the Board has the right to  
take other disciplinary action that it deems  
necessary.

C. Attendance Improvement Plan

1. Planning

The Superintendent will meet with  
Building Principals and appropriate  
administrators to discuss the  
attendance summary. The attendance  
summary shall be analyzed for  
patterns of absence, such as  
excessive absenteeism in a given  
school or work place, among certain  
groups of employees, for certain  
specific causes, or on certain days  
of the week, month, or year.  
Specific strategies for reducing  
the rate of absence shall be  
developed.

2. Implementation



a. The Building Principal shall be responsible for implementing the district's plan for the improvement of professional staff member attendance in his/her school building.

b. The Principal shall encourage the regular attendance of the teaching staff members in his/her building. He/She shall maintain contact with absent employees and confer personally with each employee who returns from an absence of any duration, impressing upon employees the district's concern for their health and well-being. The Principal shall, by appropriate means, recognize teaching staff members whose attendance is exemplary.

c. The Principal shall incorporate, and shall direct other supervisors to incorporate, a teaching staff member's attendance record in his/her evaluation.

d. The Principal may require teachers to evaluate the work done by substitutes in their absence.

e. The Principal shall report to the Superintendent any teaching staff member whom he/she suspects of misusing sick leave or falsifying the reasons for absence.

### 3. In-service Training

The Principal shall meet with the teaching staff members assigned to his/her building at the beginning of each school year to inform employees of Board policy and district regulations on attendance, to familiarize employees with the forms to be used in reporting and verifying absences, to review with employees the cost of absenteeism to the

district and the value of accumulated sick leave to the employee, and to acquaint employees with the degree to which attendance will affect evaluation reports.

4. Counseling

a. The Building Principal may, in his/her discretion, call a conference with a teaching staff member where the number and/or pattern of the member's absences or the reasons offered for the member's absences indicate a misunderstanding of the teaching staff member's responsibility to the school district or the possible misuse of the privilege of paid leave.

b. Prior to the giving of any admonition or reprimand or imposition of discipline of any kind, the Principal shall determine the nature of the absences and consider any extenuating circumstances.

c. A written report of any attendance conference shall be prepared and retained with the teaching staff member's evaluations. The member shall, in accordance with Board policy on teaching staff member evaluation, be permitted to examine the report and affix his/her comments, if any, to the report.

d. A letter to the personnel file will be generated by the immediate supervisor when a teaching staff member is absent four consecutive days in one month or if a pattern of abuse exists, a letter will be generated by the Assistant Superintendent of Human Resources if the abuse of absence continues.

18. I take administrative notice that on May 16, 2011, the Board promulgated District Policy 4211, entitled "Attendance," which provides:

The regular and prompt attendance of support staff members is an essential element in the efficient operation of the school district and the effective conduct of the educational program. Staff member absenteeism disrupts the educational program and the Board of Education considers attendance an important component of a staff member's job performance.

A support staff member who fails to give prompt notice of an absence, misuses sick leave, fails to verify an absence in accordance with Board policy, falsifies the reason for an absence, is absent without authorization, is repeatedly tardy, or accumulates an excessive number of absences may be subject to appropriate consequences, which may include the withholding of a salary increment, dismissal, and/or certification of tenure charges.

In accordance with N.J.S.A. 18A:30-1, sick leave is defined to mean the absence from work because of a personal disability due to injury or illness or because the support staff member has been excluded from school by the school medical authorities on account of contagious disease or of being quarantined for such a disease in the staff member's immediate household. No support staff member will be discouraged from the prudent, necessary use of sick leave and any other leave provided for in the collective bargaining agreement negotiated with the member's majority representative, in an individual employment contract, or provided in the policies of the Board. In accordance with N.J.S.A. 18A:30-4, the Superintendent or Board of Education may require a physician's certificate to be filed with the Secretary of the Board in order to obtain sick leave.

The Superintendent, in consultation with administrative staff members, will review the rate of absence among the staff members. The review will include the collection and analysis of attendance data, the training of support staff members in their attendance responsibilities, and the counseling of support staff members for whom regular and prompt attendance is a problem.

19. I also take administrative notice that on May 16, 2011, the Board promulgated District Regulation 4211, entitled "Support Staff Attendance," which provides:

A. Reporting Intended Absence

1. A support staff member who anticipates absence from work will call the immediate supervisor two hours prior to commencement of work shift, whenever possible.

2. The following information will be given by the caller:

a. The employee's name, job title, assigned school, and shift (if applicable);

b. The day and date of the intended absence; and

c. The reason for the absence.

3. Employees must call in daily each intended absence unless absence for more than one day has been approved in advance by the immediate supervisor or the Board if applicable.

B. Analysis of Absence

1. Each intended absence of a

support staff member shall be reported to his/her immediate supervisor, who shall determine whether or not a replacement is required for the period of absence.

2. The immediate supervisor shall determine whether the absence is acceptable or requires further verification. Reasons for verification include, but are not limited to the following:

a. A pattern of absences on the same day(s) of the week;

b. A pattern of absences before or after nonworking days;

c. The exhaustion or near exhaustion of accumulated sick leave; and

d. The habitual exhaustion of personal leave.

#### C. Review of Absence

1. If the immediate supervisor deems any reason for absence to be unacceptable or if a staff member has been absent on sick leave for four consecutive school days, the immediate supervisor shall conduct a discussion with the employee to help the employee improve his/her performance. A representative shall be present. A letter to the personnel file will be generated.

2. If the abuse of absence continues the Assistant Superintendent of Human Resources shall:

a. Notify the employee in writing of the date and time for a formal conference and the reason for the conference,

b. Confer with the employee and, if the employee so chooses, his/her representative as well, the employees supervisor shall be present,

c. Document the reasons for the absences and offer the employee the opportunity to verify or rebut the documentation, and

d. Prepare a report of the conference to be placed in the employee's file and provide the employee with the opportunity to attach written comments and documents thereto.

D. Staff Attendance Patterns - Tardiness

It is the expectation and goal of the Trenton Board of Education that all Trenton School District employees shall report on time to their assigned duties whenever scheduled to work in order to effectuate the continuous delivery of the education services (for which the Board has contracted). A prerequisite for the efficient performance of a staff person's assigned duties is regular and punctual attendance.

Therefore, any employee who is tardy, in reporting to work according to the schedule of the school or department to which he/she is assigned without approval, two times in a school year shall have a conference with

his/her immediate supervisor regarding such tardiness. On the third time an employee is tardy in a school year without approval, he/she shall receive from his/her immediate supervisor a written communication indicating (setting forth) the dates of the tardies (tardiness) and a notification that continuation of such tardiness shall result in disciplinary action. This written communication shall be copied to the teaching staff's personnel file.

Once an employee is tardy the fourth time without approval, the employee's salary shall be deducted at fifteen minute intervals for every fifteen minutes or less that an employee is tardy. For example, an employee shall be docked fifteen minutes for being late between one through fifteen minutes, docked thirty minutes for being late between sixteen through thirty minutes, docked forty five minutes for being late between thirty-one through forty-five minutes, docked one hour for being late between forty-six minutes through one hour, etc. Similar deductions shall be made for each additional incident of tardiness, in any given year. Approval of tardiness must be in writing and state the reason. All tardiness must be recorded. The calculations shall be as follows:

10-Month Employee

Daily salary (annual salary/185) :  $6 \frac{1}{2}$  hours  
 (daily work hours) x (amount of 15 minute intervals tardy) = deduction

12-Month Employee

Daily salary (annual salary/260-261) :  $6 \frac{1}{2}$  hours  
 (daily work hours) x (amount of 15 minute intervals tardy) = deduction

10-Month Employee

Daily salary (annual salary/185) : 7 hours  
 (daily work hours) x (amount of 15 minute

intervals tardy) = deduction

12-Month Employee

Daily salary (annual salary/260-261) : 7  
hours (daily work hours) x (amount of 15  
minute intervals tardy) = deduction

10-Month Employee

Daily salary (annual salary/185) : 8 hours  
(daily work hours) x (amount of 15 minute  
intervals tardy) = deduction

12-Month Employee

Daily salary (annual salary/260-261) : 8  
hours (daily work hours) x (amount of 15  
minute intervals tardy) = deduction

Exceptions to this policy may be granted only  
by the Superintendent of Schools based upon  
regulations.

In addition to docking an employee's salary  
for tardiness, the Board has the right to  
take other disciplinary action that it deems  
necessary.

#### E. Record of Attendance

1. A record shall be kept of the  
attendance of each support staff  
member, including administrators.  
Any absence, for part or all of a  
school day, shall be recorded along  
with the reason for the absence.  
An employee's attendance record  
shall be part of the employee's  
personnel file.

2. The record will distinguish paid  
leave, such as sick leave, personal  
days, family illness, jury duty,  
and vacation, from unpaid leave,  
such as excessive sick or personal  
leave. The employee's attendance  
record will include notation of



verification of an absence where such verification is required by Policy No. 4432.

3. The record will include each employee's rate of absence as calculated monthly.

4. At the end of each month, a cumulative attendance record shall be assembled for each school and for the district. An attendance summary shall be prepared from the cumulative attendance record. The attendance summary shall show:

a. The rate of absence for the district and each school in the district,

b. The rate of absence for each employee in rate order showing highest rate first and average rate for the district,

c. Reasons for absence in the case of employees whose rate is more than five percent above the average for the district, and

d. The appointment of substitutes for absent employees and the wages paid to substitutes.

F. Attendance Improvement Plan

1. The attendance summary shall be analyzed for patterns of absence, such as excessive absenteeism in a given school or work place, among certain groups of employees, for certain specific causes, or on certain days of the week, month, or year.

2. Specific strategies for reducing the rate of absence shall be developed and submitted to the Assistant Superintendent of Human Resources.

3. The Principal shall be responsible for implementing the approved plan for the improvement of staff member attendance in his/her school building.

G. In-service Training

The Principal or immediate supervisor shall meet with the support staff members assigned to his/her building at the beginning of each school year to:

1. Inform employees of Board policy and district regulations on attendance;

2. Familiarize employees with the procedures to be used in reporting and verifying absences;

3. Review with employees the cost of absenteeism to the district and the value of accumulated sick leave to the employee; and

4. Acquaint employees with the degree to which attendance will affect evaluation reports.

20. On August 23, 2017, Chief Talent Officer Lissa S. Johnson (Johnson) sent a memorandum to the Associations regarding "Trenton Board of Education Attendance and Tardiness Policies/Regulations" that provides:

As you are aware, the Trenton Board of Education previously adopted Policy 3212 (Attendance for Teaching Staff Members),

Regulation 3212 (Professional Staff Attendance Review and Improvement Plan), [Policy] 4211 (Support Staff Attendance) and Regulation 4211 (Support Staff Attendance). Attached are the aforementioned policies and regulations which have remained unchanged since the Board's adoption in 2011.

Kindly allow this memorandum to serve as formal notice that going forward, the District will be vigorously enforcing the Board's attendance policies and regulations. The District expects all staff members to attend work regularly, to arrive on time, and to follow procedures to report absences. Indeed, as set forth in Policy 3213, "[t]he regular and prompt attendance of teaching staff members is an essential element in the efficient operation of the school district and the effective conduct of the education program." Moreover, as set forth in Policy 4211, "[e]mployee attendance is an important factor in the successful operation of any school district and in the maintenance of the continuity of the educational program."

In order for staff members to be on clear notice of the District's expectations and the possible consequences for excessive absenteeism and tardiness, I have also attached the four (4) memoranda which will be issued to all staff members absent and/or late on three (3) occasions, seven (7) occasions, ten (10) occasions, and more than ten (10) occasions. The memoranda are self-explanatory, and address notice, conferences and possible disciplinary action.

In addition, please note that effective September 1, 2017, employees will no longer be permitted to take half day leave. Options for absences will be limited to a full day.

If you have any questions or need additional clarification, please do not hesitate to contact me. Thank you in advance for your cooperation.

[Associations' Br., Exhs. E-F (emphasis added).]

21. On September 20, 2017, the Associations' counsel Keith Waldman (Waldman) sent a letter to then-Superintendent Dr. Fredrick H. McDowell, Jr. (McDowell) alleging that the Board's unilateral changes to the attendance policies constituted an unfair practice and violated the parties' negotiated contract language as well as Board Policy 3212A.1; alleged that an attendance policy that imposes discipline based on the number of absences alone without considering the reason for any absence violates education laws and could in theory result in an employee's receiving a disciplinary memorandum for using contractual bereavement days; and demanded that the Board rescind its unilaterally-imposed attendance policies and restore the status quo. See Associations' Br., Ex. G.
22. On February 20-22, 2018, the Associations filed the underlying unfair practice charges. See TBTA, TESA, TEA, TPA Charges.

#### **STANDARD OF REVIEW**

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); see also, Judson v. Peoples Bank & Trust Co., 17

N.J. 67, 73-75 (1954).<sup>3/</sup> In determining whether summary judgment is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523. "Although summary judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial" and "should be denied unless the right thereto appears so clearly as to leave no room for controversy." Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1995); see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

While a party is not required to file an affidavit or certification in support of summary judgment, where a "party opposing the motion [for summary judgment] does not submit any affidavits or documentation contradicting the moving party's

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<sup>3/</sup> N.J.A.C. 19:14-4.8(e) provides:

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 that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

affidavits and documents, then the moving party's facts may be considered as true, and there would necessarily be no material factual issue to adjudicate unless, per chance, it was raised in the movant's pleadings." State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020) (citing CWA Local 1037 (Schuster), H.E. No. 86-10, 11 NJPER 621, 622 (¶16217 1985), adopted P.E.R.C. No. 86-78, 12 NJPER 91 (¶17032 1985); City of Hoboken, H.E. No. 95-17, 21 NJPER 107 (¶26065 1995), adopted P.E.R.C. No. 95-91, 21 NJPER 184 (¶26117 1995); Nutley Tp., H.E. No. 99-18, 25 NJPER 199 (¶30092 1999) (final agency decision); N.J.A.C. 1:1-12.5(b) ("[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined by an evidentiary proceeding"). As the New Jersey Supreme Court explained in Judson:

[I]f 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 7.]

Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights

guaranteed to them by this Act.” N.J.S.A. 34:13A-5.4a(1). “It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.” State of New Jersey (Corrections), H.E. 2014-9, 40 NJPER 534 (¶173 2014) (citing New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978)). The Commission has held that a violation of another unfair practice provision derivatively violates subsection 5.4a(1). Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Public employers are also prohibited from “[r]efusing 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. . . .” N.J.S.A. 34:13A-5.4a(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010). The Commission has held that “a breach of contract may also rise to the level of a refusal to negotiate in good faith” and that it “ha[s] the authority to remedy that violation under subsection a(5).” State

of New Jersey (Dep't of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

### **ANALYSIS**

#### **I. Absenteeism/Tardiness Memoranda**

The Commission has held that "while . . . [a public employer] has a [managerial] prerogative to establish attendance and sick leave verification policies, the application of such policies, including issues pertaining to whether just cause existed for the imposition of disciplinary penalties for policy violations, may be challenged through contractual grievance procedures." Monroe Tp. Bd. of Ed., P.E.R.C. No. 2020-51, 46 NJPER 518 (¶115 2020) (citing City of Burlington Bd. of Ed., P.E.R.C. No. 2019-27, 45 NJPER 242 (¶64 2019), aff'd 46 NJPER 226 (¶52 App. Div. 2019), certif. den. 241 N.J. 82 (2020); Cliffside Park Bor., P.E.R.C. No. 2010-61, 36 NJPER 48 (¶22 2010); Teaneck Tp., P.E.R.C. No. 93-44, 19 NJPER 18 (¶24009 1992)); see also Piscataway Tp. Ed. Ass'n v. Piscataway Tp. Bd. of Ed., 307 N.J. Super. 263, 276 (App. Div. 1998) (holding that "the mere connection between the exercise of a managerial prerogative and the impact of that exercise on employee does not render the impact issue non-negotiable"); Gloucester City Bd. of Ed., P.E.R.C. No. 2021-4, 47 NJPER 110 (¶27 2020).

The Commission has distinguished disciplinary reprimands from non-disciplinary (informational) notices related to



time/attendance policies. The Commission has held that the following are indicia of a disciplinary notice:

- characterizing an employee's absenteeism as excessive and/or consistently poor;
- threatening to withhold an employee's increment;
- disciplinary or accusatory in wording;
- warning of future discipline; and/or
- triggering a schedule of discipline.

See Shrewsbury Bor. Bd. of Ed., P.E.R.C. No. 94-73, 20 NJPER 65 (¶25027 1994); Franklin Tp., P.E.R.C. No. 94-96, 20 NJPER 193 (¶25090 1994). The Commission has also held that "the criteria in [an] Attendance and Punctuality section of [an] evaluation form to be mandatorily negotiable . . . [when they] concern the mandatorily negotiable issues of employee leave time and eligibility for merit salary increments more than they concern the [employer's] need to use them to evaluate employee performance" and are applied "us[ing] a mechanical computation, assigning negative ratings for employees based solely on number of absences . . . unaffected by the reasons for the absences and mak[ing] no distinction between approved and unapproved absences . . . [which] might discourage employees from utilizing their negotiated and earned leave time." Cumberland Cty. (Div. of Social Services), P.E.R.C. No. 2019-5, 45 NJPER 84 (¶22 2018); see also Hudson Cty., I.R. No. 91-3, 16 NJPER 463 (¶21200 1990); Montville Tp. Bd. of Ed., NJPER Supp.2d 159 (¶140 App. Div. 1985) (holding that an automatic rating system infringes upon an employee's statutory sick leave rights because the assigned

rating is merely a mathematical consequence and unaffected by the reason for the absence; that in such system, an unsatisfactory rating adversely prejudices a staff member's legitimate interest in a satisfactory evaluation and that prejudicial consequence contravenes the statutory allowance for sick leave in the event of illness or disability).

The Commission has held that the following are indicia of a non-disciplinary (informational) notice:

- record of an employee's absenteeism statistics;
- quotation of applicable regulation;
- informing an employee that he or she will be monitored during the next year;
- requiring an employee absent a certain number of days to attend a conference and a neutral reference to same;
- inviting questions;
- neutral tone;
- no triggering a withholding of any benefits;
- no implication of a schedule of discipline;
- no warning of any misconduct or future discipline;
- and/or
- informative in nature.

See Town of Kearny, P.E.R.C. No. 92-40, 17 NJPER 481 (¶22233 1991); Hillside Bd. of Ed., P.E.R.C. No. 94-33, 19 NJPER 547 (¶24259 1993); Franklin Tp., P.E.R.C. No. 94-96, 20 NJPER 193 (¶25090 1994).

Here, it is undisputed that the Board's unilaterally-issued August 23, 2017 memorandum provided notice that "going forward, the [Board would] be vigorously enforcing . . . attendance policies and regulations"; and unilaterally specified that, "[i]n order for staff members to be on clear notice of the [Board's]

expectations and the possible consequences for excessive absenteeism and tardiness", the "attached . . . four (4) memoranda which will be issued to all staff members absent and/or late on three (3) occasions, seven (7) occasions, ten (10) occasions, and more than ten (10) occasions" which the Board described as "address[ing] notice, conferences and possible disciplinary action." See Ass'n Br., Exhs. E-F (emphasis added); Joint Certification, ¶¶2-4. Moreover, despite the Associations' September 20, 2017 demand that the Board rescind its unilaterally-issued August 23, 2017 memorandum (and four attached memoranda) and restore the status quo ante (see Ass'n Br., Ex. G), the Board has failed to do so (see Joint Certification, ¶¶5-8).

The Associations have conceded that they are not challenging "the Board's ability to verify an employee's absence or lateness"; rather, they are only challenging "the Board's application of its attendance policies and its impact on employees". See Ass'n Br. at 11. Specifically, the Associations maintain that "[a]ttendance policies that consider the number of days alone, but which fail to consider the reasons for the absences have been found to violate the . . . law[]." See Associations' Br., Ex. G; Ass'n Br. at 11.

Although the Board maintains that the four memoranda attached to its August 23, 2017 memorandum "are not discipline .

. . [and] simply serve to notify employees of their recorded absences" (see Board Br. at 7), a review of same in tandem with the Board's August 23, 2017 memorandum demonstrates that they bear the indicia of disciplinary notices (see Associations' Br., Ex. F). More specifically, the four memoranda and the August 23, 2017 memorandum include the following features:

-warning of future discipline and threatening to withhold an employee's increment (e.g., "[p]lease be advised that continued absenteeism/tardiness may result in disciplinary action, including but not limited to increment withholding/non-renewal and/or tenure charges"; "[p]lease be advised that the District is considering the appropriate level of disciplinary action . . . [which] may include, but is not limited to non-renewal, termination of your employment contract") (see Associations' Br., Ex. F);

-disciplinary or accusatory in wording (e.g., "[a] conference to discuss your attendance [tardiness] will be held on DATE" and "[y]ou are entitled to Union representation"<sup>4/</sup>; "Notice of Recommended Disciplinary Action for Attendance and Tardiness"; "possible consequences for excessive absenteeism and tardiness"; possible disciplinary action") (see Associations' Br.,

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<sup>4/</sup> This indication by the Board implies, or it can be reasonably/objectively inferred, that such conference may be construed as disciplinary in nature. See, e.g., NLRB v. Weingarten, 420 U.S. 251 (1975); Union Cty. Voc. Tech. Bd. of Ed., P.E.R.C. No. 2022-8, 48 NJPER 135, n.1 (¶34 2021) (citing UMDNJ and CIR, 144 N.J. 511 (1996); State of New Jersey (Dep't of Treasury), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001)); Sterling Reg. Bd. of Ed., D.U.P. No. 2023-12, 49 NJPER 190 (¶45 2022) (citing State of New Jersey (Division of State Police), P.E.R.C. No. 93-20, 18 NJPER 471 (¶23212 1992)); Dover Municipal Util. Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984); State of New Jersey (Div. of Taxation)/Kupersmit, D.U.P. No. 91-2, 16 NJPER 421 (¶21177 1990), aff'd NJPER Supp.2d 279 (¶226 App. Div. 1992); State of New Jersey (Dep't of Public Safety), P.E.R.C. No. 2002-8, 27 NJPER 332, 335 (¶32119 2001)).

Exhs. E-F);

-characterizing an employee's absenteeism as excessive and/or consistently poor (e.g., "[i]t is our hope that this memorandum will immediately result in an improvement in your daily attendance"; "[w]e expect to see an immediate improvement in your daily attendance . . ."; "[y]ou have failed to show the expected improvement in the areas of attendance and tardiness") (see Associations' Br., Ex. F); and

-triggering a schedule of discipline (i.e., the four memoranda are issued to all staff members absent and/or late on three (3) occasions, seven (7) occasions, ten (10) occasions, and more than ten (10) occasions) (see Associations' Br., Exhs. E-F).

See Shrewsbury Bor. Bd. of Ed., P.E.R.C. No. 94-73, 20 NJPER 65 (¶25027 1994); Franklin Tp., P.E.R.C. No. 94-96, 20 NJPER 193 (¶25090 1994). Moreover, a review of the Board's August 23, 2017 memorandum in tandem with the attached memoranda indicates that the Board is applying its time/attendance policies "us[ing] a mechanical computation, assigning negative ratings for employees based solely on number of absences . . . unaffected by the reasons for the absences and mak[ing] no distinction between approved and unapproved absences . . . [which] might discourage employees from utilizing their negotiated and earned leave time." Cumberland Cty. (Div. of Social Services); Hudson Cty.; Montville Tp. Bd. of Ed. More specifically, the four memoranda are automatically issued to all staff members absent and/or late on three (3) occasions, seven (7) occasions, ten (10) occasions, and more than ten (10) occasions and the Board has failed to provide any evidence that the reasons for absence/lateness are considered

as part of its rubric. See Associations' Br., Exhs. E-F; Board Br. 1-13.

Under these circumstances, I find that the Associations have established that aspects of the Board's unilaterally-issued August 23, 2017 memorandum (and the four attached memoranda) go beyond an informational purpose and are disciplinary in nature. Therefore, the Board had an obligation to negotiate with the Associations regarding any proposed change(s) to the range of potential disciplinary penalties that could be imposed for time/attendance violations.<sup>5/</sup> Even when viewed in the light most favorable to the Board, the competent evidential materials presented are insufficient to permit a rational factfinder to resolve this issue in its favor. See Brill, 142 N.J. at 523; Judson, 17 N.J. at 75; State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020); N.J.A.C. 1:1-12.5(b). Accordingly, I find that summary judgment must be granted in the Associations' favor regarding this aspect of the charges.

## **II. Half-Day Leave**

New Jersey courts and the Commission have held that "[public

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<sup>5/</sup> See City of East Orange, H.E. No. 2020-1, 46 NJPER 62 (¶14 2019), adopted P.E.R.C. No. 2020-36, 46 NJPER 318 (¶78 2020) ("the record shows that the [employer] made changes to the range of potential disciplinary penalties that could be imposed . . . , a mandatorily subject, without negotiations" and "[t]his violated subsection 5.4a(5), and derivatively 5.4a(1)").

employers] must negotiate on terms and conditions of employment . . . matters directly and intimately affecting [public employees'] working terms and conditions, such as compensation, hours, work loads, sick leaves, personal and sabbatical leaves, physical accommodations, grievance procedures, etc." Burlington Cty. Coll. Faculty Ass'n v. Board of Trustees, 64 N.J. 10, 14 (1973); see also Lumberton Tp. Bd. of Ed., P.E.R.C. No. 2002-13, 27 NJPER 372 (¶32136 2001), aff'd 28 NJPER 427 (¶33156 App. Div. 2002) ("[i]n general, paid and unpaid leaves of absence intimately and directly affect employee work and welfare and do not significantly interfere with the determination of governmental policy"); Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance and Custodial Ass'n, 152 N.J. Super. 235, 243 (App. Div. 1977) ("[u]nquestionably, sick leave or other leaves of absence are matters that directly and intimately affect the terms and conditions of employment . . . and, as such, would ordinarily be a subject of mandatory negotiation between a public employer and the duly authorized representative of its employees").

However, the Commission has also consistently held that "(1) scheduling of vacation leave or other time off is mandatorily negotiable, provided the employer can meet its staffing requirements; (2) the employer may deny a requested leave day to ensure that it has enough employees to cover a shift, but it may also legally agree to allow an employee to take leave even though

doing so would require it to pay overtime compensation to a replacement employee; and (3) an employer does not have an inherent prerogative to unilaterally limit the number of employees on leave or the amount of leave time absent a showing that minimum staffing requirements would be jeopardized." State of New Jersey (Dep't of Corrections), P.E.R.C. No. 2004-77, 30NJPER 208 (¶78 2004); see also Pennsauken Tp., P.E.R.C. No. 92-39, 17 NJPER 478 (¶22232 1991); City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982); Watchung Bor., P.E.R.C. No. 2016-49, 42 NJPER 351 (¶99 2016) (noting that an employer "has a reserved prerogative to deny or revoke leave when necessary to ensure that it will have enough employees to meet its staffing needs and to deploy the specific number and type of employees required for a particular shift or respond to emergencies"); Somerset Cty. Sheriff's Office, P.E.R.C. No. 2019-17, 45 NJPER 199 (¶51 2018); Gloucester Cty. Sheriff's Office, P.E.R.C. No. 2019-19, 46 NJPER 205 (¶53 2018); Fairfield Tp., P.E.R.C. No. 2014-73, 40 NJPER 514 (¶166 2014); City of Vineland, P.E.R.C. No. 2013-43, 39 NJPER 250 (¶86 2012); West Paterson Bor., P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000); City of Linden, P.E.R.C. No. 95-18, 20 NJPER 380 (¶25192 1994). However, "if an agreed upon system for scheduling time off prevents an employer from meeting its staffing requirements, the system is no longer mandatorily negotiable." Teaneck



Firefighters Mutual Benevolent Ass'n, Local No. 42, P.E.R.C. No. 2013-60, 39 NJPER 423 (¶135 2013), aff'd 41 NJPER 293 (¶97 App. Div. 2015).

Here, it is undisputed that the Board's August 23, 2017 memorandum unilaterally eliminated a pre-existing mandatorily negotiable term and conditions of employment - i.e. half-day leave. See Ass'n Br., Ex. E; Joint Certification, ¶¶2-4. Moreover, despite the Associations' September 20, 2017 demand that the Board rescind its unilateral policy change and restore the status quo ante (see Ass'n Br., Ex. G), the Board has failed to do so (see Joint Certification, ¶¶5-8).

Although the Board asserts that it had the right to unilaterally eliminate half-day leave based upon various managerial prerogatives (e.g., "to determine service hours and requisite staffing needs necessary to providing educational services . . . intrinsically intertwined with enforcing attendance policies"; "ensuring that an educator or its supporting staff is present during the times instruction is provided to students"; "educational policy in deterring the abuse of half-day leaves which may jeopardize minimum staffing requirements in consideration of what is best for its students"), the Board has failed to provide any evidence demonstrating that it is unable to meet minimum staffing needs due to half-day leave and/or how any particular staffing need implicates educational

policy. See Board Br. at 10-12; see also State of New Jersey (Dep't of Corrections); Pennsauken Tp.; City of Elizabeth; Watchung Bor.; Teaneck Firefighters Mutual Benevolent Ass'n, Local No. 42.

Under these circumstances, I find that the Associations have established that the Board's August 23, 2017 memorandum unilaterally eliminated a pre-existing mandatorily negotiable term and conditions of employment - i.e., half-day leave. Even when viewed in the light most favorable to the Board, the competent evidential materials presented are insufficient to permit a rational factfinder to resolve this issue in its favor. See Brill, 142 N.J. at 523; Judson, 17 N.J. at 75; State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020); N.J.A.C. 1:1-12.5(b). Accordingly, I find that summary judgment must be granted in the Associations' favor regarding this aspect of the charges.

#### **CONCLUSION**

For these reasons, I grant the Associations' motion for summary judgment and deny the Board's cross-motion for summary judgment. I find that the Board violated subsections 5.4a(5) and derivatively 5.4a(1) by unilaterally imposing a regime of four disciplinary memoranda automatically distributed to unit members absent and/or late on three occasions, seven occasions, ten

occasions, and more than ten occasions; and that the Board violated subsections 5.4a(5), and derivatively 5.4a(1), by unilaterally eliminating half-day leave.

**RECOMMENDED ORDER**

I recommend that the Commission order the Board to:

A. 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 unilaterally imposing a regime of four disciplinary memoranda automatically distributed to unit members absent and/or late on three occasions, seven occasions, ten occasions, and more than ten occasions and by unilaterally eliminating half-day leave.

2. Refusing to negotiate in good faith with the Associations concerning mandatorily negotiable terms and conditions of employment of employees in those units, specifically the range of potential disciplinary penalties that can be imposed for time/attendance policy violations and elimination of half-day leave.

B. Take this affirmative action:

1. Restore the status quo ante by rescinding those aspects of the August 23, 2017 memorandum that unilaterally imposed a regime of four disciplinary memoranda distributed to unit members absent and/or late on three occasions, seven

occasions, ten occasions, and more than ten occasions (including the four attached memoranda) and by rescinding those aspects of the August 23, 2017 memorandum that unilaterally eliminated half-day leave.

2. Negotiate in good faith with the Associations over any proposed change(s) to the range of potential disciplinary penalties that can be imposed for time/attendance policy violations and any proposed change(s) to half-day leave.

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

4. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

/s/ Christina Gubitosa  
Hearing Examiner

DATED: April 17, 2023  
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**

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. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by April 27, 2023.



RECOMMENDED



# 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 its employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally imposing a regime of four disciplinary memoranda automatically distributed to unit members absent and/or late on three occasions, seven occasions, ten occasions, and more than ten occasions and by unilaterally eliminating half-day leave.

**WE WILL** cease and desist from refusing to negotiate in good faith with the Associations concerning mandatorily negotiable terms and conditions of employment of employees in those units, specifically the range of potential disciplinary penalties that can be imposed for time/attendance policy violations and elimination of half-day leave.

**WE WILL** restore the status quo ante by rescinding those aspects of the August 23, 2017 memorandum that unilaterally imposed a regime of four disciplinary memoranda distributed to unit members absent and/or late on three occasions, seven occasions, ten occasions, and more than ten occasions (including the four attached memoranda) and by rescinding those aspects of the August 23, 2017 memorandum that unilaterally eliminated half-day leave.

**WE WILL** negotiate in good faith with the Associations over any proposed change(s) to the range of potential disciplinary penalties that can be imposed for time/attendance policy violations and any proposed change(s) to half-day leave.

Docket No. CO-2018-194, -195,  
-196, -197, -198,  
-200, -204

Trenton Board of Education  
(Public Employer)

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

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

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

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