P.E.R.C. NO. 84-68

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF EAST ORANGE,

Respondent,

-and-

EAST ORANGE FIRE OFFICERS ASSOCIATION & EAST ORANGE FMBA, LOCAL 23,

Charging Parties.

Docket Nos. CO-82-38-67
CO-82-118-68
CO-82-162-69
SN-82-13

SYNOPSIS

The Public Employment Relations Commission, in a scope of negotiations determination, holds that the City of East Orange's new sick leave verification policy is not mandatorily negotiable. The Commission also dismisses a Complaint based on unfair practice charges the East Orange Fire Officers Association and East Orange FMBA, Local 23 had filed against the City of East Orange. The charge had alleged that the policy was implemented in a discriminating manner, but the Commission finds that the charging parties have failed to prove this allegation by a preponderance of the evidence.

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EAST ORANGE FIRE OFFICERS ASSOCIATION & EAST ORANGE FMBA, LOCAL 23,

Charging Parties.

Appearances:
For the Respondent, Green & Dzwilewski, Esqs.
(Allan P. Dzwilewski, of Counsel)

For the Charging Parties, Fox & Fox, Esqs.
(David I. Fox, of Counsel)

DECISION AND ORDER

On August 25, 1981, the East Orange Fire Officers Association ("Association") filed an unfair practice charge against the City of East Orange ("City") with the Public Employment Relations Commission. The charge alleged that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1)-(7), [1/] when on August 6, 1981, it unilaterally adopted a new sick leave verification policy.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any
(continued)

On November 30, 1981, the Association filed a second unfair practice charge. This charge alleged that the City violated the Act when, on October 23, 1981, it issued an order requiring medical examinations of employees who had used short-term sick leave more than five times.

On January 6, 1982, the East Orange FMBA Local 23 ("FMBA") filed a third unfair practice charge. The charge alleged that the City violated the Act when it unilaterally, and in disregard of an interest arbitration award, issued an order requiring medical examinations of employees who used short-term sick leave more than five times.

On November 24, 1982, the FMBA filed an amended unfair practice charge. It alleged that the City violated the Act when it disciplined five members of the FMBA under the new sick leave policies.

On September 28, 1981, the City filed a Petition for Scope of Negotiations Determination. It requested a determination of the negotiability of the matters raised in the unfair practice charges.[2/]

1/ (continued)
employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; and (7) Violating any of the rules and regulations established by the commission."

2/ To the extent that deferral to arbitration might have been otherwise appropriate, the filing of a scope petition negated that possibility.

On January 28, 1983, the Director of Unfair Practices, consolidated the unfair practice charges and scope petition and issued Complaints and Notices of Hearing pursuant to N.J.A.C. 19:14-2.1.

On March 7, 1983, the City filed an Answer admitting it had adopted a new sick leave verification policy and the existence of the alleged arbitration award, but denying all other allegations.

On March 7 and 16, 1983, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses, presented exhibits and argued orally. The City and the charging parties filed post-hearing briefs by May 2, 1983.

On May 12, 1983, the Hearing Examiner issued his report and recommendations, H.E. No. 83-39, 9 NJPER 311 (¶14142 1983) (copy attached). He concluded that the City's sick leave verification policy was not mandatorily negotiable, that the City did not violate subsections 5.4(a)(1) and (5) when it adopted its new sick leave verification policy, and that the City did not violate subsections 5.4(a)(1) and (3) when it implemented this new policy in a non-discriminatory manner. Accordingly, he recommended dismissal of the Complaint.

On May 27, 1983, the charging parties filed exceptions and a brief.[3/] They argue that the City's sick leave verification policy was mandatorily negotiable and that the unilateral change in

3/ On May 16, 1983, the charging parties filed a written request to have the affidavit of Margaret Kinney stricken from the record as being out of time. Neither the Hearing Examiner nor this Commission has considered this affidavit.

this policy violated the City's statutory obligation to negotiate over terms and conditions of employment; contravened an interest arbitration award; deviated from the parties' practice of negotiating sick leave; and was implemented in a harassing and retaliatory manner.[4/]

We have reviewed the record. The Hearing Examiner's findings of fact are supported by substantial evidence. We adopt and incorporate them here.

We first consider whether the establishment of the City's new sick leave verification policy was mandatorily negotiable. In In re Piscataway Twp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982) ("Piscataway I"), the Commission determined that "[t]he mere establishment of a verification policy is the prerogative of the employer. [See also, Bd. of Ed. of Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980)]. The application of the policy, however, may be submitted to contractual grievance procedures."[5/] [Emphasis in original]. See also In re Piscataway Twp. Bd. of Ed., P.E.R.C. No. 83-111, 9 NJPER 152 (¶14072 1983) ("Piscataway II").

4/ The charging parties requested oral argument. We granted this request and oral argument was held on October 19, 1983. Additionally, the charging parties question whether the Hearing Examiner's report was consistent with a tentative resolution of the matters at an exploratory conference. We do not address this question. The Commission's rules provide, in unfair practice cases, for an exploratory conference conducted by a PERC staff agent, at which "the possibility of [a] voluntary resolution and settlement of the case may be explored" (emphasis added), by the parties notwithstanding the possibility of an ultimate ruling, by the full Commission, on the issue[s] involved. N.J.A.C. 19:14-16(c). If no settlement is reached, the litigation continues and no significance whatsoever attaches to the exploratory conference.

5/ There is no indication in the record that the charging parties have sought to use their contractual grievance procedures to contest any denials or withdrawals of sick leave benefits.

We agree with the Hearing Examiner that the City's new sick leave verification policy was not mandatorily negotiable under Piscataway I and II. See also In re City of Elizabeth, P.E.R.C. No. 84-__, 9 NJPER ___ (¶_____ 12/9/83) ("Elizabeth").

The charging parties argue that the new sick leave verification policy was mandatorily negotiable because the City did not prove that employees had actually abused sick leave. Piscataway I, however, did not predicate the formulation of a sick leave verification policy upon a showing of an abuse in the taking of sick leave benefits.

The charging parties further attempt to distinguish Piscataway I on the ground that there the regulation requiring the production of a physician's certificate did not change the parties' negotiated terms and conditions of employment, whereas here the City's new verification policy allegedly contravened the parties' agreements and interest arbitration award. This argument is without merit. As the Supreme Court recognized in Paterson City Police, PBA Local 1 v. City of Paterson, 87 N.J. 78, 88 (1981), a subject which is not mandatorily negotiable in the abstract does not become mandatorily negotiable because it has been negotiated in the past. See also, In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975).[6/]

6/ We express no opinion on whether the policy might be permissively negotiable. We also note that the charging parties have not alleged or proved that the City unilaterally required employees to pay for any mandated examinations. We believe that the question of whether the employer should pay for such examinations is a mandatorily negotiable term and condition of employment. Elizabeth.

We now consider whether the City violated subsections 5.4(a)(1) and (5) when it adopted its new sick leave policy. The charging parties argued that the parties' previous practice, negotiations history, and interest arbitration award made the adoption of the new sick leave verification policy illegal under these subsections. We disagree.

Given our finding that the formulation of a sick leave verification policy is not mandatorily negotiable, we cannot conclude that the City's adoption of such a policy constituted an unfair practice. Subsection 5.4(a)(5) only prohibits unilateral changes in mandatorily negotiable terms and conditions of employment. See, In re Township of Jackson, P.E.R.C. No. 82-79, 8 NJPER 129 (¶13057 1982). Even if we assume arguendo that the City violated its contract and its sick leave verification policy was permissively negotiable, it did not change a mandatorily negotiable term and condition of employment and thus did not violate subsection 5.4(a)(5) or, derivatively, subsection 5.4(a)(1). Accordingly, we dismiss those portions of the Complaints alleging violations of these subsections.[7/]

We finally consider whether the City violated subsection 5.4(a)(3) when it implemented its new policy. We agree with the Hearing Examiner that it did not.

The charging parties allege that the Hearing Examiner erred when he found that the implementation of the new policy and promulgation of a "hit list" were not illegal acts of retaliation

7/ We hold only that the contractual provisions on sick leave verification policies are not enforceable in this proceeding. We also reiterate our holding in Piscataway I and II that employees may grieve the application of these policies insofar as they adversely affect their terms and conditions of employment.

against the employees' exercise of protected rights. However, the record lacks any evidence supporting a claim of harassment or retaliation. The so-called "hit list" did not single out individuals, but instead contained the name of every employee in the department on a tour-by-tour basis. Accordingly, we agree with the Hearing Examiner's conclusion that the charging parties failed to demonstrate harassment or retaliation and dismiss those allegations of the Complaints alleging a violation of subsection 5.4(a)(3).

ORDER

The City's new sick leave verification policy is not mandatorily negotiable. The Complaints are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Newbaker and Suskin voted in favor of this decision. Commissioners Graves and Hipp voted against the decision.

DATED: Trenton, New Jersey
December 9, 1983
ISSUED: December 12, 1983

H. E. No. 83-39

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

In the Matter of

CITY OF EAST ORANGE,

Respondent,

-and-

EAST ORANGE FIRE OFFICERS ASSOCIATION
& EAST ORANGE FMBA, LOCAL 23,

Charging Parties.

Docket Nos. CO-82-38-67
CO-82-118-68
CO-82-162-69
SN-82-13

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent City did not violate Subsections 5.4(a)(1) through (7) of the New Jersey Employer-Employee Relations Act when the Chief of the Fire Department unilaterally and without negotiations with the Charging Parties promulgated a sick leave verification policy on August 6, 1981. It is well settled under Commission precedent that public employers have a managerial prerogative to adopt a sick leave verification policy: Piscataway Township Board of Education, P.E.R.C. No. 82-64, 8 NJPER 95 (1982). The application of such policies may be the subject of the grievance procedure and binding arbitration under Piscataway. However, the Charging Parties did not avail themselves of their contractual grievance-arbitration procedures, notwithstanding that a group of employees had either been docked pay for sick days improperly taken or for reprimands under the sick leave verification policy. The Hearing Examiner concluded that it would not be appropriate to defer the matter to arbitration inasmuch as no grievances had been filed nor had arbitration been pursued.

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

H. E. No. 83-39

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

In the Matter of

CITY OF EAST ORANGE,

Respondent,

-and-

EAST ORANGE FIRE OFFICERS ASSOCIATION
& EAST ORANGE FMBA, LOCAL 23,

Charging Parties.

Docket Nos. CO-82-38-67
CO-82-118-68
CO-82-162-69
SN-82-13

Appearances:

For the City of East Orange
Green & Dzwilewski, Esqs.
(Allan P. Dzwilewski, Esq.)

For the Charging Parties
Fox & Fox, Esqs.
(David I. Fox, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter "Commission") on August 25, 1981 in Docket No. CO-82-38-67 by the East Orange Fire Officers Association (hereinafter the "Charging Parties" or the "Association") alleging that the City of East Orange (hereinafter the "Respondent" or the "City") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that, inter alia,[1/] the Fire Department on August 6, 1981 issued a Special Order which stated, in part, that any member remaining on sick leave for more than two consecutive working days shall obtain

1/ It was also alleged that the Respondent refused to reduce to writing and sign a negotiated collective agreement for 1980-81, but this was withdrawn during the hearing. Further, it was alleged that on August 9, 1981 the Respondent unilaterally discontinued a practice regarding the manner in which replacements are made when more than two Captains are absent from assigned duties, but this, was severed and put on "hold" during the hearing.

verification from a physician, and further, that any member on sick leave shall not leave his place of residence without notice to the Department, and further, that the Chief or his designee may visit the residence of any member on sick leave to verify his presence or cause a telephone check to be made, all of which was contrary to the prior practice and orders of the Fire Department, and finally, said Special Order of August 6, 1981 was adopted unilaterally and without negotiations with the Association, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4 (a)(1), (2), (3), (4), (5), (6) and (7) of the Act.[2/]

A second Unfair Practice Charge was filed with the Commission on November 30, 1981 by the Association in Docket No. CO-82-118-68 alleging that the Respondent has engaged in further unfair practices within the meaning of the Act, in that on October 23, 1981 the Fire Department unilaterally and without negotiations with the Association issued an Order requiring members who had used short-term sick leave more than five times to submit to a medical examination, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) through (7) of the Act, supra.

A third Unfair Practice Charge was filed with the Commission on January 6, 1982 in Docket No. CO-82-162-69 by the East Orange FMBA, Local 23 (hereinafter the "Charging Parties" or the "FMBA") alleging that the Respondent has engaged in unfair practices within the meaning of the Act, in that on October 23, 1981 the

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2/ These Subsections prohibit public employers, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(2) Dominating or interfering with the formation, existence or administration of any employee organization.

"(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act.

"(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act.

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

"(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement.

"(7) Violating any of rules and regulations established by the commission."

Fire Department unilaterally and without negotiations with the FMBA, and contrary to an interest Arbitration Award, issued an Order requiring members who had used short-term sick leave more than five times to submit to a medical examination, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) (5), (6), (7) of the Act, supra.

An amended Unfair Practice Charge, was filed with the Commission on November 24, 1982 by the FMBA alleging that the Respondent has engaged in additional unfair practices within the meaning of the Act, in that, following the issuance of the Orders of the Fire Department, supra, the Respondent has disciplined the following firefighters: James F. Gerraty, Neil Haffi, Lawrence LaFragola, Earl Rowland and Eugene M. Southwick, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4 (a)(1) through (7) of the Act, supra.

Finally, a Petition for Scope of Negotiations Determination was filed with the Commission on September 28, 1981 in Docket No. SN-82-13 by the Respondent, which requested a determination of the negotiability of all of the items raised by the Association in its two Unfair Practice Charges, supra. This Petition was consolidated for hearing with the foregoing Unfair Practice Charges on January 28, 1983.

It appearing that the allegations of the Unfair Practice Charges, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 28, 1983. Pursuant to the Complaint and Notice of Hearing, hearings were held on March 7 and March 16, 1983 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was heard and the parties filed post-hearing briefs by May 2, 1983.

Unfair Practice Charges, as amended, having been filed with the Commission, and a Petition for Scope of Negotiations Determination having been consolidated therewith, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the oral argument and briefs of the parties, the

matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The City of East Orange is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The East Orange Fire Officers Association and the East Orange FMBA, Local 23 are public employee representatives within the meaning of the Act, as amended, and are subject to its provisions.

3. Article 26, "Sick Leave," of the rules and regulations of the Fire Department, issued in 1965 (R-1), provides, in pertinent part, as follows:

> "Section 3: Any member of the Department becoming sick or injured while off duty whereby he is unable to report for duty at the regularly scheduled time shall cause the fact to be reported to the Company Captain on duty at least one hour prior to the expiration of his leave...
>
> "Section 7: Members failing to properly report their sickness or injuries or who are not at home when visited by the Department Surgeon or feign sickness or injury, and attempt to deceive a Department Surgeon or Superior Officer as to their real condition, or whose sickness or injury is the result of improper, immoral, intemperate or vicious habits, shall be subject to disciplinary action...
>
> "Section 9: Any Member of the Department who may suddenly become seriously ill or is otherwise disabled or hospitalized while out of the City, shall promptly cause to have his attending physicianissue a written statement attesting to the nature of the disability and forward it to the Department Surgeon.
>
> "Section 10: No convalescent Member shall leave or absent himself from the City except by permission of the Chief of Department on recommendation of the Department Surgeon.
>
> "Section 11: All Members on sick leave shall be subject to the orders of the Department Surgeon. They shall not leave their place of residence without permission of the Department Surgeon.....They shall submit a physician's Certificate to the Chief of Department within twenty-four hours after reporting on sick leave and each week while on sick leave, unless otherwise directed..."

4. On November 1, 1977 the Chief of the Fire Department issued a Special Order (CP-1) in connection with the abuse of sick leave and cited the "flagrant abuse" of Section 9 and 11 of the rules and regulations of the Fire Department, supra, in

particular the failure of those on sick leave to submit a physician's certificate within a 24-hour period in each week thereafter. Disciplinary action was threatened for failure to comply.

5. On March 1, 1978 the Chief of the Fire Department issued a Special Order (CP-2), which stated that, effective March 1, 1978, any member of the Department on sick leave who does not submit a sick leave slip from a physician will not be paid for the day absent from work.

6. On June 19, 1978 an Unfair Practice Charge was filed with the Commission, Docket No. CO-78-304 (CP-3), alleging that four firefighters were docked for failure to comply with Article 26 of the rules and regulations of the Fire Department, supra, and further alleged that distinctions in treatment were made between those residing out-of-City and those residing in the City, and which, in referring to the Special Order of March 1, 1978 (CP-2, supra), alleged that it would only be enforced as to "gross violators." This unfair practice was settled with the four firefighters, who were docked, being made whole.

7. On September 10, 1980 Interest Arbitrator John M. Stochaj issued an Opinion and Award setting forth the terms and conditions for the 1980-81 collective negotiations agreement (CP-6). In the proceedings prior to the issuance of the Arbitrator's Award, the City, in a proposal to the Interest Arbitrator on "Sick Leave Verification," set forth the City's problems in attempting to enforce its sick leave policy (CP-4). In this submission the City acknowledged that it had settled the Unfair Practice Charge (CP-3, supra), and added that a new sick leave procedure was to be negotiated. Further, the City proposed to the Interest Arbitrator that an Article XIII, Section 4, "Miscellaneous Leaves Of Absence," be amended to read, in part, that any firefighter absent from duty due to illness for more than one day is to submit to the Chief a physician's certificate. Also, the Chief may require such a certificate for illness for less than one sick day if it appears that the firefighter had made unusual or questionable use of sick leave. (See CP-5).

8. Reference to the Opinion and Award of Interest Arbitrator Stochaj discloses that on page 3, under the FMBA's non-economic Issue No. 1, the union sought a provision in the collective negotiations agreement that no firefighter would be required to submit to the Chief a physician's certificate unless the firefighter had been absent from duty for more than two working days or nights (CP-6, p. 3). The Award of the Interest Arbitrator adopted this proposal of the FMBA, stating that "...the sick leave program as stated by the FMBA (non-economic issues) is to be adopted..." (CP-6, p.6).

9. Thereafter the City implemented the Interest Arbitrator's Opinion and Award regarding short-term sick leave of less than three days, both as to the FMBA, which was a party to the Interest Arbitration, and as to the Association by practice. No physician's certificates were required of either the Association or the FMBA members for sick leave of less than three days duration regardless of the number of times that a unit member took or incurred short-term sick leave.

10. On April 6, 1981 the Acting Chief of the Fire Department, Elliot C. Peterkin, issued a directive, which stated, in part, as follows:

> "Effective immediately, in accordance with Arbitration Decision (sic), when a member of the Department is out on sick leave, he is required to turn in a Physician's Certificate to the Tour Chief, after the third working day..." (CP-7). 3/

11. By August 1981 Acting Chief Peterkin had observed a "dramatic increase" in the use of short-term sick leave since January 1981. This had caused an increase in overtime expenditures to the extent that the 1981 budget for overtime, $180,000, had been exhausted. This had also caused a manning problem, which resulted in a memo to all members of the Fire Department on August 6, 1981 (R-2). Also, on August 6, 1981, Peterkin issued a Special Order to all members of the Fire Department regarding sick leave, which superceded all previous orders (CP-11). This Special Order may be summarized as follows:

3/ On April 8, 1981 Acting Chief Peterkin issued a correction changing the word "after" to "upon" the third working day. On April 9, 1981 Acting Chief Peterkin issued a Special Order, stating that it is the responsibility of the individual member to submit a sick slip after the second working day. (See CP-8 and CP-9).

a. Any member remaining on sick leave for more than two consecutive working days shall provide a physician's certificate in accordance with a previous order. Failure to do so shall result in the removal of the member from the payroll and the preferring of written charges.

b. No member on sick leave shall leave his place of residence without the permission of the Chief or the Tour Chief.

c. The Chief, or his designee, may visit the residence of any member on sick leave to verify his presence, or may cause a telephone check to be made. If the member is not at his residence or cannot be reached by telephone after repeated attempts, written charges shall be preferred.

d. The Chief, or his designee, shall review the attendance record of every member. If the review reveals "unusual or excessive use" of short-term sick leave, the Chief, or his designee, shall meet with the member. If the Chief determines that the member has not presented a satisfactory explanation for his use of sick leave, the Chief may require the member to present medical verification of the validity of "any subsequent absence" (emphasis supplied).

12. On October 23, 1981 now Chief Peterkin issued an Order to all Tour Chiefs, effective October 26, 1981, which provided, in part, that when a member calls in sick, the Tour Chief must check to see if the member has used short-term leave more than five (5) times; if so,then the member is to be examined by either of two physicians designated by the Fire Department (CP-12). The foregoing order was reiterated with slight modification on February 11, 1982 (CP-13).

13. On May 12, 1982 the Board of Fire Commissioners issued a Special Order to all members of the Fire Department (CP-14), which advised that the Commissioners had met on May 11, 1982 and unanimously endorsed and reaffirmed the Special Order Chief Peterkin dated August 6, 1981 (CP-11, supra).

14. A list of all members of the Fire Department, characterized at the hearing as the "hit list," was issued for each tour on July 13, 1982. The list for Tour No.

4 was received in evidence as Exhibit CP-16 and noted beside the name of each member the number of sick leave days used and, also, the number of times that short-term sick leave had been used.[4/]

15. Chief Peterkin acknowledged that neither he nor anyone else from the City had negotiated with the Charging Parties regarding the issuance of the Special Order on August 6, 1981 (CP-11, supra).[5/] He cited as reasons for the August 6th Special Order the reduced manpower levels, due to absence, and the exhaustion of the 1981 overtime budget. He also cited as authority for his action Article 26 of the 1965 Rules and Regulations of the Fire Department (R-1, supra).

16. The following employees represented by the Charging Parties have been "disciplined" under the Fire Department sick leave policy, supra, either by being docked one to four days sick leave, or by being reprimanded: James F. Gerraty; Neil Haffey; Earl Rowland; Lawrence Holder; Lawrence La Fragola; Eugene M. Southwick; Leroy Shack; Charles Wright (pending); and Brian Hayes (pending).

4/ Chief Peterkin acknowledged that his policy of counting the number of times that a member takes short-term sick leave dates back to January 1, 1981 and continues into the future without limitation. Thus, when any member has utilized short-term sick leave more than five times since January 1, 1981, the mandatory medical examination by a designated physician for the Fire Department becomes and remains operative. See, for example, the testimony of Charging Parties' witness Captain Francis Farrell and Exhibits CP-18 and CP-19.

5/ Chief Peterkin in May or June 1981 did disclose to the Presidents of the Association and the FMBA and did discuss the policies and procedures that he was contemplating, which ultimately were embodied in the August 6th Special Order (CP-11).

THE ISSUES

1. Did the Respondent City violate Subsections(a)(1) and (5) of the Act[6/] when it unilaterally, and without negotiations with the Charging Parties, issued a Special Order on August 6, 1981 (CP-11), which sets forth the short-term sick leave verification policy for absences of more than two consecutive working days.

2. Did the Respondent City violate Subsections(a)(1) and (3) of the Act when it issued the so-called "hit list" in July 1982 and thereafter docked pay or reprimanded employees under the sick leave verification policy?

DISCUSSION AND ANALYSIS

The Respondent City Did Not Violate Subsections(a)(1) And (5) Of The Act When It Unilaterally And Without Negotiations Issued A Short-Term Sick Leave Verification Policy.

The Commission decision, which requires the dismissal of allegations that the Respondent violated the Act by unilaterally promulgating its sick leave verification policy on August 6, 1981, is Piscataway Township Board of Education, P.E.R.C. No. 82-64, 8 NJPER 95 (1982). In that case the Commission, after first citing City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975), referred to several decisions of the New York State Public Employment Relations Board, which had concluded that a public employer was not required to negotiate over a sick leave verification policy. The Commission said:

> "...The mere establishment of a verification policy is the prerogative of the employer. The application of the policy, however, may be subject to the contractual grievance procedures... Thus, if an employee believes that the Board erred in determining that the employee was not actually sick, the Association may file a grievance and, if necessary, take the matter to binding arbitration. In short, the Association may not prevent the Board from attempting to verify the bona fides of a claim of sickness..." (8 NJPER at 96) (Emphasis by the Commission).

The Commission concluded its decision in Piscataway with the statement that establishing sick leave verification policy "...serves a legitimate and non-negotiable management

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6/ The Charging Parties failed to adduce any evidence of violations by the Respondent of Subsections(a)(2), (4), (6) and (7) of the Act. Accordingly, the Hearing Examiner will recommend dismissal of these allegations.

need to insure that employees do not abuse contractual sick leave benefits..." (8 NJPER at 97).

To the same effect, see Freehold Regional High School Board of Education, P.E.R.C. No. 83-10, 8 NJPER 438 (1982); Rahway Valley Sewerage Authority, P.E.R.C. No. 83-80, 9 NJPER 52 (1982); and Demarest Bd. of Ed. v. Demarest Educ. Ass'n, 177 N.J. Super. 211, 216 (1980).

The Charging Parties argue strenuously that the Respondent is somehow precluded from unilaterally establishing a short-term sick leave verification policy by reason of the willingness of the Respondent in earlier years to negotiate such a policy. Further, the Charging Parties point to the Interest Arbitration Award of September 10, 1980 (CP-6) as precluding the City from unilaterally promulgating a sick leave verification policy. The Hearing Examiner is constrained to hold that a public employer cannot waive a managerial prerogative and that this is the law of the State of New Jersey in the public sector: State v. State Supervisory Employees Association, 78 N.J. 54, 67 (1978). Chief Peterkin, who was Acting Chief at the time of the issuance of CP-11, testified that he acted after observing a "dramatic increase" in the use of short-term sick leave since January 1981, which had exhausted the overtime budget for 1981 and had also caused manning problems. Thus, Peterkin provided a valid rationale for promulgation of the Special Order of August 6, 1981.

Thus, not only did the Special Order of August 6, 1981 constitute the valid exercise of a managerial prerogative, but so too did the subsequent orders of October 23, 1981 (CP-12), February 11, 1982 (CP-13) and May 12, 1982 (CP-14). For that matter, the so-called "hit list," which was issued on July 13, 1982 (CP-16), is not the villainous act of the City to visit retribution upon members of the Fire Department, as claimed by the Charging Parties, but rather the "list" is a method of keeping track of those members of the Department who have used short-term sick leave more than five times since January 1, 1981. The Hearing Examiner

is persuaded that if the City has the right to promulgate a sick leave verification policy then it clearly had the concomitant right to issue a "list" to tally and keep track of infractions of the policy.

For the foregoing reasons, the Hearing Examiner will recommend dismissal of allegations by the Charging Parties that the Respondent City violated Subsections (a)(1) and (5) of the Act.

The Respondent City Did Not Violate Subsections (a)(1) And (3) Of The Act By The Issuance Of The So-Called "Hit List" And Thereafter Docked Pay Or Reprimanded Employees Under The Sick Leave Verification Policy

The Hearing Examiner has previously recognized the right of the Respondent to compile a "list" in connection with the administration of its sick leave verification policy, which was unilaterally adopted on and after August 6, 1981. Thus, the issuance of the so-called "hit list" of July 13, 1982 did not violate the Act.

There remains, however, the allegation that the City violated the Act when it docked pay and reprimanded certain employees of the Fire Department in the course of administering the sick leave verification policy. Inasmuch as there was no evidence adduced by the Charging Parties, which would substantiate the allegation that employees were interfered with, coerced or restrained in the exercise of the rights guaranteed by the Act, no independent violation of Subsection(a)(1) can be found: New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550, 551 (1979). Additionally, the Charging Parties have failed to establish a violation by the City of Subsection(a)(3) of the Act since there was no evidence adduced to demonstrate that any employee was docked or reprimanded as a result of discriminatory motivation by the City in retaliation for the exercise of protected activities: East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (App. Div. 1981).

Although deferral to arbitration regarding the application of the City's sick leave verification policy might be appropriate in a proper case, there is nothing in the record to indicate that grievances have been filed and arbitration

sought such as the Commission indicated might be done in Piscataway, supra. It is noted, however, that final and binding arbitration provisions exist in the agreements between the Charging Parties and the City.

Thus, the Hearing Examiner will recommend dismissal of the allegations that the City violated Subsections(a)(1) and (3) of the Act by the docking of pay and reprimanding of the employees named in Finding of Fact No. 16, supra.

* * * *

Upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent City did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) when it unilaterally, and without negotiations with the Charging Parties, issued a Special Order on August 6, 1981, which sets forth a short-term sick leave verification policy for absences of more than two consecutive working days.

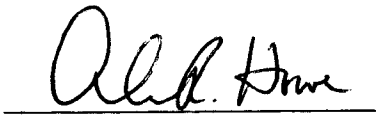
2. The Respondent City did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when it issued the so-called "hit list" on July 13, 1982 and thereafter docked pay or reprimanded employees under the sick leave verification policy.

3. The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(2), (4), (6) and (7) by its conduct herein.

4. The Respondent's Petition for Scope of Negotiations Determination is granted.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety and that the Petition for Scope of Negotiations Determination be granted.



Alan R. Howe
Hearing Examiner

Dated: May 12, 1983
Trenton, New Jersey