

P.E.R.C. NO. 2016-31

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-2014-040

FRATERNAL ORDER OF POLICE,
LODGE NO. 62,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission reverses the Hearing Examiner's decision granting summary judgment in favor of the Fraternal Order of Police, Lodge No. 62 and grants summary judgment in favor of Rutgers, The State University of New Jersey. The charge alleges that Rutgers violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4(a)(5) and, derivatively, (a)(1), when it unilaterally implemented a sick leave verification policy requiring all unit employees to pay the cost of obtaining a medical certificate to verify sick leave. The Commission finds that although the parties' collective negotiations agreement is silent regarding who must pay for the cost of obtaining a medical certificate, Rutgers submitted undisputed evidence of numerous instances since 2003 when employees paid for medical certificates to verify sick leave and there is no evidence that the FOP objected or filed any grievance until Rutgers memorialized that practice in writing. Finding that past practices are binding for the life of a collective negotiations agreement, the Commission holds that the FOP must wait until negotiations for a successor agreement to negotiate the economic impact of Rutgers' sick leave verification policy.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Fox Rothschild, LLP, attorneys
(Kenneth A. Rosenberg, of counsel)

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

DECISION

On August 12, 2013, the Fraternal Order of Police, Lodge No. 62 (FOP) filed an unfair practice charge against Rutgers, The State University of New Jersey (Rutgers), alleging that Rutgers violated section 5.4(a)(5) and, derivatively, (a)(1)^{1/} of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1, et seq., by unilaterally implementing a sick leave verification

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act... (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."

policy requiring all unit employees to pay the cost of obtaining a medical certificate to verify sick leave.

On November 12, 2013, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On June 13, 2014, the FOP filed a motion for summary judgment. Also on June 13, Rutgers filed a cross-motion for summary judgment. On August 25, we referred the motions to a Hearing Examiner for a decision.^{2/} On October 9, the Hearing Examiner issued a Decision and Recommended Order concluding that Rutgers violated section 5.4(a)(5) and, derivatively, (a)(1), of the Act by refusing to negotiate in good faith with the FOP concerning the economic impact of its sick leave verification policy. H.E. No. 2015-5, 41 NJPER 235 (¶77 2014).

This matter now comes before the Commission on exceptions to the Hearing Officer's Decision and Recommended Order filed by Rutgers on November 17, 2014. The FOP filed opposition to the exceptions on January 12, 2015. Rutgers filed a reply brief on February 11, 2015.

Rutgers asserts the following exceptions:

A. The Hearing Examiner erred in his finding that "the holding and rationale in UMDNJ, [P.E.R.C. No. 2010-12, 35 NJPER 330, 332 (¶113 2009)] controls the outcome of this matter."

B. The Hearing Examiner erred in his reasoning that UMDNJ and Exxon [Research &

2/ N.J.A.C. 19:14-4.8.

Engineering Co., 317 N.L.R.B. 675 (1995), enforcement den. for other reasons, 89 F.3d 228 (5th Cir. 1996)] stand for the proposition that: "An employer violates the Act when it refuses to negotiate in good faith with a majority representative upon demand, even when the employer's conduct is consistent with a practice to which the majority representative has acquiesced for many years (until now)."

C. The Hearing Examiner erred in his conclusion that Rutgers violated Section 5.4a(5) and (1) of the Act based on his finding that "the holding and rationale in UMDNJ controls the outcome of this matter."

D. The Hearing Examiner erred in his ruling that Rutgers was required to negotiate with the FOP to change the status quo during the pendency of an interest arbitration proceeding where this issue had not been submitted to the interest arbitrator.

E. The Hearing Examiner erred in his finding that the FOP's demand to negotiate with Jay Kohl over the implementation of the SLPD was reasonable and effective and amounted to a demand on Rutgers.

F. The Hearing Examiner erred in his finding that: "Kohl's communications with Gries and DeFalco represent a refusal to negotiate in good faith over the SLPD's impact on unit employees, violating 5.4a(5) and (1) of the Act."

G. The Hearing Examiner erred by improperly buttressing his conclusion that Rutgers failed to negotiate with the FOP when he credited the FOP's assertion that it communicated its demand to negotiate to "several Rutgers' administrators."

H. The Hearing Examiner erred in his determination that Rutgers must "immediately reimburse all unit employees for their out-of-pocket costs for obtaining a medical

certificate under Rutgers' sick leave verification policy" for all employees represented by the FOP who were required to submit a medical certificate on or after August 8, 2013.

In opposition to Rutgers' exceptions, the FOP argues that Rutgers' undisputed failure to bargain over the mandatorily negotiable issue of which party should pay for a doctor's note constitutes a violation of the Act. The FOP contends that Rutgers modified the parties' status quo by making the doctor's note requirement mandatory, a change which the FOP anticipates will result in increased employee costs to obtain doctor's notes. The FOP also argues that its demand to bargain during an August 8, 2014 meeting was sufficient and that Rutgers' response was tantamount to a refusal to bargain.

In reply, Rutgers maintains that the FOP's arguments are fundamentally flawed because any alleged changes to the parties' status quo did not affect, alter or impact a negotiable term and condition of employment. Rather, Rutgers argues that the FOP lacked a valid basis to withdraw its acquiescence to the parties' longstanding practice regarding sick leave verification upon its written memorialization.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of facts, all of which are supported by the record. H.E. at 4-9.

FACTS

The FOP is the exclusive majority representative of non-supervisory, rank and file police officers in the Rutgers Police Department (Department). The Department is responsible for providing a full range of police and security services to the Rutgers community on all Rutgers campuses twenty four (24) hours per day, three hundred and sixty-five (365) days per year. H.E. at 4.

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

After the Agreement expired, the parties reached an impasse in collective negotiations. In early 2010, the FOP filed a petition to initiate compulsory interest arbitration. The interest arbitration award is still pending. IA-2010-044. H.E. at 4.

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

When an officer is to be required to submit a medical certificate when the officer's absence record shows a pattern of apparent abuse or of excessive use of sick leave, the officer will be so advised. The requirement shall be in effect for each subsequent absence until such time as the University determines that corrective action has been accomplished. When Rutgers directs an officer to have a physical examination, Rutgers will pay the cost of the examination.

The Agreement does not specifically address whether Rutgers or the unit employee pays the costs associated with obtaining a medical certificate, such as the cost of a doctor's visit. H.E. at 4-5.

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

Rutgers also requires officers to undergo physical examinations in cases of serious illness or injury to determine an officer's fitness for duty by an anticipated return date. In such cases, Rutgers either directs the officer to undergo an examination by a Rutgers physician or pays for the injured officer's personal physician to conduct the examination. H.E. at 5.

The Department has a longstanding past practice of requiring officers to submit a medical or physician's certificate when the officer has taken sick leave for three (3) or more consecutive days or has taken sick leave a fourth time in a given calendar year. H.E. at 5.

On at least sixteen (16) occasions since 2003, unit officers have submitted medical certificates at their own expense without reimbursement from Rutgers. In that period, the FOP did not

object to or grieve the requirement, nor demand to negotiate over whether Rutgers should cover the costs of providing a medical certificate. H.E. at 6.

On July 1, 2013, the University of Medicine and Dentistry of New Jersey (UMDNJ) merged with Rutgers. As a result of the merger, fifty six (56) of UMDNJ's police officers were added to the Department. H.E. at 6.

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

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

An employee who uses sick leave for personal reasons shall be required to provide a physician's certificate, at the employee's expense, when the employee is out for three or more consecutive days. This certificate must be submitted immediately upon returning to duty. On the fourth (4th) and subsequent occurrence in a calendar year without satisfactory justification, the employee is required to obtain and submit a physician's certificate at their expense. This medical certification must be submitted within five (5) calendar days upon returning to work.

H.E. at 6-7 (emphasis supplied).

On August 8, 2013, FOP President William DeFalco (DeFalco) and FOP Council representative Robert Gries (Gries) met with Rutgers' Vice President of Administration and Public Safety, Jay Kohl (Kohl). During the meeting, DeFalco and Gries expressed their concerns about the impact of the Directive on unit members and communicated the FOP's demand to negotiate with Rutgers regarding same. In response, Kohl stated that the Directive did not modify existing terms and conditions of employment but rather, memorialized and clarified a long-standing practice of requiring employees to submit a medical certificate at their own expense when taking three or more consecutive days of sick leave or taking sick leave a fourth time in a given calendar year. Kohl also told DeFalco and Gries that he did not have the authority to negotiate or change existing policies or practices without input from Rutgers' Office of Labor Relations (OLR). As such, Kohl advised DeFalco and Gries to contact OLR if they wished to negotiate regarding the Directive. H.E. at 7-8.

HEARING EXAMINER REPORT AND RECOMMENDED DECISION

The Hearing Examiner found that Rutgers has a managerial prerogative to establish a sick leave verification policy, but that the economic impact of that policy is mandatorily negotiable. The Hearing Examiner also found that there was a practice of requiring officers to submit a medical certificate to verify sick leave, and to have officers pay for the cost of obtaining it. H.E. at 5-6, 13.

The Hearing Examiner then analyzed whether the FOP had waived its right to negotiate over the economic impact of the sick leave policy. Relying on UMDNJ, P.E.R.C. No. 2010-12, 35 NJPER 330 (§113 2009), the Hearing Examiner found that the FOP had not waived its right to negotiate, and granted summary judgment in favor of the FOP. Specifically, he found that the FOP's acquiescence in the practice memorialized in the Directive ended when the FOP demanded to negotiate over its economic impact during the August 8, 2013 meeting between DeFalco, Gries and Kohl. As such, the Hearing Examiner concluded that Kohl's communications with Gries and DeFalco represented a refusal to negotiate in good faith over the Directive's economic impact on employees, thereby violating sections 5.4(a)(5) and (a)(1) of the Act. H.E. at 12-13.

ANALYSIS

We will consider Rutgers exceptions A, B and C collectively, and begin with a fundamental analysis of whether N.J.S.A. 34:13A-5.4(a)(5) and (a)(1) of the Act have been violated. N.J.S.A. 34:13A-5.3 authorizes a majority representative to negotiate terms and conditions of employment on behalf of unit employees. Section 5.3 also defines when an employer has a duty to negotiate before changing working conditions:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

The Commission has held that changes in negotiable terms and conditions of employment, therefore, must be addressed through the collective negotiations process, because unilateral action is destabilizing to the employment relationship and contrary to the principles of our Act. Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd, 166 N.J. 112 (2000). Employment conditions arise not only through the parties' collective agreement, but also through established practice. An established practice arises "from the mutual consent of the parties, implied from their conduct". Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536, 537 (¶10276 1979), aff'd in pt., rev'd in pt. 180 N.J. Super. 440 (App. Div. 1981). An employer violates its duty to negotiate when it changes an existing practice, unless the majority representative has waived its right to negotiate. Red Bank Reg. Ed. Assn. v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978); Middletown Tp. For instance, if the employee representative has impliedly accepted an established past practice permitting similar actions without prior negotiations, no violation will be found. Middletown Tp.

We have consistently held that a public employer has a managerial prerogative to use reasonable means to verify employee illness or disability. Carteret Bd. of Ed., P.E.R.C. No. 2009-71, 35 NJPER 213 (¶76 2009); see also Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982); State of New Jersey

(Dep't of Treasury), P.E.R.C. No. 95-67, 21 NJPER 129 (¶26080 1995). This includes the right to require that employees taking sick leave produce doctors' notes verifying their illness. North Hudson Reg. Fire & Rescue, P.E.R.C. No. 2000-78, 26 NJPER 184 (¶31075 2000); City of Elizabeth, P.E.R.C. No. 2000-42, 26 NJPER 22 (¶31007 1999). However, the cost of obtaining verification is mandatorily negotiable and the application of a sick leave verification policy may be challenged through contractual grievance procedures. Elizabeth and Elizabeth Fire Officers Ass'n, Local 2040, IAFF, P.E.R.C. No. 84-75, 10 NJPER 39 (¶15022 1983), aff'd, 198 N.J. Super. 382 (App. Div. 1985); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982); North Hudson Reg. Fire & Rescue, P.E.R.C. No. 2000-42, 26 NJPER 22 (¶31007 1999).

In this case, the Agreement is silent regarding whether Rutgers or the officers must pay for the cost of obtaining a medical certificate to verify sick leave. However, Rutgers submitted evidence of numerous instances since 2003 when employees paid for a medical certificate for sick leave verification. The FOP did not submit any rebuttal evidence. There is no evidence in the record showing that the FOP objected to officers paying for the medical certificate until Rutgers issued the Directive in July 2013. Rutgers believed based on the parties' past conduct that the Directive memorialized the practice of officers paying for the medical certificate. Based

on our review of the record, we believe that the Directive maintained the status quo with regard to the economic impact of the sick leave verification policy and did not result in any change to terms and conditions of employment.

We must now determine the impact of the FOP's demand to negotiate after the Directive was issued. While the Hearing Examiner relied on UMDNJ, its facts are distinguishable.

In UMDNJ, the American Association of University Professors (AAUP) demanded to negotiate over UMDNJ's setting and modifying of supplemental salaries for professors. There was a long history of UMDNJ unilaterally setting and modifying supplemental salaries, and the AAUP had previously filed grievances over UMDNJ's unilateral modifying and setting of supplemental salaries. The parties had a history of negotiating over supplemental salaries. However, their collective negotiations agreement did not address whether UMDNJ had the right to act unilaterally in making supplemental salary reductions or modifications, or whether AAUP had a right to challenge such actions. We found that because the AAUP had acquiesced in unilateral reductions and modifications under certain, but not all circumstances, it had not waived its right to negotiate every time a unilateral reduction or modification of a supplemental salary was made by UMDNJ. Therefore, we found that UMDNJ had a duty to negotiate with AAUP over the modifications to supplemental salaries that were at issue in that case.

Here, there was a long-standing practice of officers paying for the cost of medical certificates to verify sick leave. The FOP did not seek to negotiate over officers paying for medical certificates to verify sick leave until Rutgers issued the Directive, which memorialized the parties' practice. There is no history of the FOP filing grievances regarding officers paying for the medical certificates.

Generally, past practices are binding for the life of a collective negotiations agreement. Therefore, a party who desires to modify a past practice must wait until negotiations for a successor agreement to begin discussions over changing the practice. Middletown Tp. While the FOP's demand to negotiate over the economic impact of the sick leave verification policy concerns a mandatorily negotiable term and condition of employment, it must wait until negotiations for a successor agreement to seek changes to that practice.^{3/}

Given our decision with respect to Rutgers' exceptions A, B and C, we find exceptions D-H to be moot. The Hearing Examiner's decision granting summary judgment in favor of the FOP is reversed, and we grant summary judgment in favor of Rutgers.

^{3/} As discussed supra, the Agreement expired on June 30, 2009 and the parties are waiting for the issuance of an interest arbitration award. Depending on the term of that Award, the parties will likely be in negotiations for a successor agreement in the near future.

ORDER

The Hearing Examiner's decision granting summary judgment in favor of the Fraternal Order of Police is reversed, and Rutgers', the State University of New Jersey's motion for summary judgment is granted. The complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau and Eskilson voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Voos recused herself. Commissioners Bonanni and Wall were not present.

ISSUED: November 19, 2015

Trenton, New Jersey