P.E.R.C. NO. 2016-47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MERCER COUNTY CORRECTIONS,

Respondent,

-and-

Docket No. CO-2014-145

PBA LOCAL 167 & PBA LOCAL 167
SUPERIOR OFFICER'S ASSOCIATION,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's decision and dismisses a complaint alleging that Mercer County Corrections violated N.J.S.A. 34:13A-5.4a(1), (5) and (6) when it failed to reduce to writing an alleged agreement to reduce the reckoning period for lateness infractions (i.e., the time within which an employee would need to remain infraction-free in order to reset his placement on the negotiated progressive discipline steps). The Commission adopts with one correction the Hearing Examiner's findings of fact and agrees with the Hearing Examiner's legal conclusion that the parties did not reach an agreement to reduce the reckoning period.

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, Genova, Burns, Giantomasi & Webster (Joseph M. Hannon, of counsel)

For the Charging Parties, Law Offices of David Beckett (David Beckett, of counsel)

DECISION

This matter comes to us on the exceptions of PBA Local 167 and PBA Local 167 Superior Officer's Association (collectively, "Local 167") to a Hearing Examiner's Report and Recommended Decision. H.E. 2016-5, 42 NJPER 240 (¶68 2015). On January 9, 2014, Local 167 filed an unfair practice charge against Mercer County Corrections alleging that the parties reached an agreement to reduce the "reckoning period" (the period within which an employee must remain infraction-free to reset progressive discipline steps) for lateness infractions which the County failed to reduce to writing, violating the New Jersey Employer-

Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a (1), (5) and (6).[1/]

On May 5, 2014, a Complaint and Notice of Hearing issued. On May 15, the County filed an Answer, denying the PBA's allegations. Evidentiary hearings were conducted on December 3 and 22 before Hearing Examiner Jonathan Roth. Post-hearing briefs and replies were filed by March 16, 2015.

We adopt and incorporate the Hearing Examiner's findings of fact, which are recited below, (H.E. at 3 - 21), except as noted in Local 167's Exceptions to the Hearing Examiner's Findings of Fact, infra at 22-26.

FINDINGS OF FACT

1. Local 167 represents "rank and file" corrections officers employed by the County. Local 167 SOA represents all superior corrections officers (sergeants and lieutenants) employed by the County.

2. The County and Local 167 signed a collective negotiations agreement extending from January 1, 2009 through

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

December 31, 2014 (J-1).[2/] Article 6 ("Work Rules") provides: "The [County] may establish reasonable and necessary rules of work and conduct for employees. Such rules shall be equitably applied and enforced." Article 9 ("Grievance Procedure") provides a three-step grievance procedure ending in binding arbitration. Article 10 ("Discipline/Discharge") provides that the County has the right to discipline any employee for just cause; that the employee has the right to appeal discipline; and that discipline exceeding a five day suspension or suspensions of more than fifteen days cumulatively over one calendar year must be appealed to the Civil Service Commission (J-1).

The County and Local 167 SOA signed a collective negotiations agreement also extending from January 1, 2009 through December 31, 2014 (J-2). The agreement sets forth the same provisions identified in Articles 6, 9 and 10 of the agreement signed by the County and Local 167 (J-2). Both agreements are executed on behalf of the County by the County Executive, exclusively (J-1, J-2).

3. Charles Ellis has been Warden of the County Corrections Center since April, 2008 (1T139). On or about August 28, 2009,

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2/ "J" represents jointly-submitted exhibits; "C" represents Commission exhibits; "CP" represents Charging Party exhibits; "R" represents Respondent exhibits; and "T" represents the transcript, preceded by a "1" or "2" signifying the first or second day of hearing, followed by the page number(s).

Warden Ellis authored and/or modified and signed Standards and Operating Procedures Section 136: Lateness (SOP 136) (CP-1; 1T20). The declared "policy" of the Corrections Center in SOP 136 is that each correction officer is expected to report to duty on time, in uniform and prepared to perform his or her duties. "Lateness" results in "inconveniences to other staff" and unnecessary "overtime" liability.

SOP 136 defines "lateness" for unit employees on all three shifts as measured by the County's "official timekeeping system." Unit employees, ". . . who fail to scan in at the start of their assigned shift or who scan in after the start of their assigned shift will be considered late" (CP-1).

Enumerated instructions and declarations pertaining to lateness are set forth, followed by "scheduled sanctions" imposed on corrections officers having "unreasonable excuses" for lateness of less than and more than fifteen minutes. For example, SOP 136 prescribes a "step one" discipline of a "written reprimand" for a corrections officer arriving less than fifteen minutes late for a third time in less than six months. A fourth lateness (of less than fifteen minutes) results in a "step two" discipline of a three-day fine or suspension. Penalties increase through the seventh such lateness, which results in termination. A comparable schedule is set forth for officers reporting more than fifteen minutes late, except that the penalties before

termination are greater than those prescribed for "less than" fifteen minute latenesses (CP-1).

SOP 136 also specifies that a ". . . reckoning period of six months [shall apply] from the date of the first lateness. A new reckoning period will begin whenever six months pass and the employee remains infraction free (with no subsequent late charges)" (CP-1).

4. SOP 136 repeats the same penalties for the same lateness infractions set forth in the January, 2009 version of a County "Public Safety Table of Offenses and Penalties" (Table of Offenses). The Table of Offenses charts courses of discipline for various unit employee offenses regarding attendance, performance, personal conduct, and safety and security precautions (CP-2). Specifically, the disciplines for an "unreasonable" excuse for lateness of less than fifteen minutes (A-6) and for latenesses of "more than" fifteen minutes (A-7) match those set forth in SOP 136 (CP-2; CP-1). The "Table of Offenses" omits any reference(s) to disciplinary "steps."

5. Sometime in early May, 2012, Local 167 President Donald Ryland proposed to the Warden a "new lateness protocol" for the "Table of Offenses" (CP-3; CP-4; 1T28). In the "attendance" category, for example, Ryland proposed reductions in penalties for "unreasonable excuses for lateness" of less than fifteen minutes and for such latenesses of more than 15 minutes. He also

proposed increasing the number of infractions necessary for each discipline in both categories, culminating in termination after the tenth infraction within a six month reckoning period (CP-3).

6. On July 17, 2012, Local 167 Counsel wrote to Assistant County Counsel Kristina Chubenko, reiterating the need to revise the "lateness policy" and demanding to meet with County representatives that month regarding Local 167's proposal (CP-4). The letter notes that in February and March, 2012, the parties had agreed to pend hearings, ". . . on disciplinary cases involving lateness charges because a resolution with a new policy could then apply to those lateness charges." Local 167 Counsel wrote:

> It was part of [Local 167's] understanding that the parties would work to draft a policy with disciplinary steps that did not result in charges where major disciplinary suspensions were sought against officers who were, for example, late by a matter of minutes. In fact, we now have pending charges at certain steps (e.g., steps 5, 6, 7 and 8) where there is less than thirty (30) minutes in the aggregate and the County seeks major discipline and/or removal. [CP-4]

The letter acknowledges that, ". . . the disciplinary table [i.e., Table of Offenses] issues are also pressing but [Local 167] is willing, if that helps in moving this issue forward more quickly, to separate the two and handle the disciplinary policy table revision and lateness policy separately" (CP-4). Counsel wrote that the "lateness policy" should be, ". . . handled

first." I infer that the "lateness policy" refers to SOP 136 because the word "policy" appears in SOP 136 and does not appear in the Table of Offenses and because SOP 136 identifies penalties at "steps" one through five and "steps" are omitted from the Table of Offenses.

7. On August 22, 2012, Assistant County Counsel Chubenko wrote a letter to Local 167 Counsel, attaching a proposed "Table of Offenses and Penalties." The letter acknowledges receipt of Local 167's proposal and advises that the attached "counter-proposal" applies to both negotiations units, ". . . as the Table of Offenses must be uniform for all law enforcement at the Corrections Center." She wrote that the County will not amend ". . .any departmental charges which have been or will be issued prior to the resolution of this matter and therefore, no pending charges for which hearings have been requested will be held in abeyance" (CP-5).

The attached "Table of Offenses and Penalties" proposes at "A-6" ("lateness of 15 minutes or less") a 3-day suspension for a "2nd infraction;" a 5-day suspension for a "3rd infraction;" a 10-day suspension for a "4th infraction;" a 15-day" suspension for a "5th infraction;" a 20-day suspension for a "6th infraction;" and continuing to termination for a "9th infraction." The proposed scale at "A-7" (lateness of greater than 15 minutes) is a 3-day suspension for a "2nd infraction;" 8-

day suspension for a "3rd infraction;" 15-day suspension for a "4th infraction;" 20-day suspension for a "5th infraction;" 25-day suspension for a "6th infraction;" and continuing to termination for a "ninth infraction" (CP-5).

8. On August 30, 2012, Counsel for Local 167 wrote a reply to Chubenko, acknowledging that the letter, ". . . follows-up on conversations in which he advised that Local 167 is seeking a meeting with the County Administrator in early September to discuss the disciplinary policies and lateness issues raised in correspondence between this office, the PBA and the County" (CP-6). The letter also acknowledges that the County had "delivered its response" on the matters of "many lateness charges being issued;" officers seeking "major disciplinary sanctions for small amounts of time;" and Local 167's "concern about overuse of the violation of rule, regulation or policy change." Local 167 Counsel wrote that, ". . . the union [is not] asserting that the County must reach agreement on a revised Table of Offenses, [but] disciplinary policies and actions are proper topics for such a meeting" (CP-6).

9. On an unspecified date after August 30, 2012, the parties met at the County Corrections Center. On behalf of the County, Assistants County Counsel Chubenko and D'Amico, Administrator Andrew Mair, Assistant Human Resources Director Ollie Young, Warden Ellis and Captain Richard Bearden attended

(1T39). On behalf of Local 167 and Local 167 SOA, Presidents Ryland, Lieutenant Robert James, and Local 167 Counsel attended (1T39).

The parties discussed the "lateness" issues they had previously identified (1T39).

10. On or about February 19, 2013, Assistant County Counsel Chubenko sent a letter to Local 167 Counsel, together with the "most recent" proposed and revised "Table of Offenses and Penalties" (CP-7). The attached table sets forth the same offenses and penalties charted in CP-5 (see finding no. 7) and adds progressive penalties for the offense of "violating a rule, regulation, policy, procedure or administrative decision including those involving safety and security" (CP-7; see finding no. 8). This revision of the Table of Offenses refers to a "step" for the first time and concerns "progressive discipline" for violations of "safety and security precautions" (CP-7).

11. On or about March 13, 2013, Local 167 Counsel wrote a reply to Chubenko, in part proposing changes to "A-6" and "A-7" of the "Table of Offenses and Penalties" (unreasonable excuse for lateness of less than fifteen minutes and more than 15 minutes) (CP-8). Counsel proposed that the "step 2" discipline in A-6 be reduced from a two-day suspension to a one-day suspension; "step 3" discipline be reduced from a five-day suspension to a three-day suspension; and "step 4" discipline be reduced from a ten-day

suspension to a five-day suspension (CP-8). In boldface print, Counsel wrote:

> The Union’s counter is subject to agreement to changes to the reckoning period in SOP 136 including returning the employee to non-disciplinary status after a six-month infraction-free period and a system that does not call for discipline each time an officer is late. [CP-8]

Counsel reiterated:

> These changes are critical to the union’s agreement to proposed table/schedule and will be discussed with the Warden. If such issues cannot be resolved satisfactorily, then the unions authorized counter will be amended because it is the union’s position that there is no “just cause” for major discipline of an employee who is trying to get to work and is 3 minutes late on more than five occasions in a six-month time period, much less [than the] stronger sanctions of removal proposed by the County. [CP-8]

Counsel noted that the same concerns applied to disciplines charted at “A-7" (unreasonable excuse for lateness of more than fifteen minutes).

12. Sometime in late March, 2013, perhaps on March 26th, Local 167 and Local 167 SOA Presidents Ryland and James met with Warden Ellis and Captain Bearden in the Warden’s office (1T47; 1T93-1T94; 1T127-1T128; 1T141-1T142; 2T11).

Ryland testified that their discussion concerned the Table of Offenses and the “reckoning period” (1T94; 1T97). Ryland testified about an agreement on the Table of Offenses:

> And these were, I believe at this meeting, there [was] a minor tweaking in the penalties. But it was like minor tweaking of what the penalties were. But overall there was like an understanding. [1T94]

Ryland conceded on cross-examination that a change in the Table of Offenses and in the reckoning period [i.e., from six months to three months] would require agreement from the Warden (1T99).

Retired Lieutenant Robert James was employed by the County for many years and was Local 167 SOA President from 2012-2014 (2T8). James recalled the meeting in the Warden's office:

> The subject was to talk about the reckoning period in reducing it from six months to three months as closure to the overall disciplinary Table of Offenses. It was part of that discussion that we had with the County . . . that was the unions' interest i[n] having the reckoning period reduced from six months to three months. Our whole thing was leveraged on that reckoning period. [2T11-2T12]

Reducing the reckoning period was important to both unions because many employees were charged with escalating penalties for minor lateness offenses during the six-month period. Six months was a "very long period of time . . . you could never get out of the Table of Offenses"[3/] (2T12). James testified that in the meeting:

3/ For example, an officer at "step 5" in a lateness series could not incur another such infraction for 30 months (in the prevailing six-month reckoning period) in order to reach zero or "step down" to a status preceding eligibility for a written reprimand (1T65).

> We agreed that we would reduce the reckoning period from six months to three months. That was part of the overall agreement with the Table of Offenses. [2T12]

On cross-examination, he testified:

> I mean basically we had a meeting. That meeting [we] discussed the reckoning period. We believed we had an agreement in hand. [2T27]

Asked if he left the meeting with a written agreement reducing the reckoning period, James testified: "Well, it was incumbent upon the Warden to have it reduced to writing. We wouldn't make the policy. All we can do is agree upon it" (2T27-2T28). James described the reduction in the reckoning period as "a verbal agreement that was never reduced to writing" (2T28).

The Hearing Examiner found that James's cross-examination testimony stating his "belief" of an extant agreement reducing the reckoning period undercuts the certainty he espoused on direct examination. The Hearing Examiner inferred that no meeting participant mentioned an interest in or need for a writing memorializing an agreement to reduce the reckoning period from six months to three months, and that neither Local president sought or produced a writing confirming such an agreement on a term and condition of employment of great significance to the Locals suggests more strongly than not, that no agreement was reached on the item in the meeting in the Warden's office.

Captain Bearden testified that in the meeting in the Warden's office, the parties discussed the Table of Offenses and the reckoning period (1T128-1T129). He testified:

> . . . [T]he Table of Offenses was discussed. I believe we came up with an agreement, a basic agreement on what the sanctions would be for the charges. The reckoning period was mentioned by [Local 167] and [Local 167 SOA]. But nothing was ever resolved involving the reckoning period at this meeting. [1T128]

Bearden admitted that either Ryland or James mentioned, ". . . the reckoning period being changed. At that time, the Warden acknowledged his request, but nothing was ever resolved at that point" (1T129).

Warden Charles Ellis testified that in the meeting, the parties discussed the Table of Offenses, other [Local 167] business and finally, the reckoning period (1T142). He testified that, ". . . we mostly agreed on the different sanctions" in the Table of Offenses. He testified that the sanctions agreed-upon, including the lateness penalties, were later memorialized in an email issued on July 23, 2013, by Assistant County Counsel Chubenko to all the principals (1T143; CP-9). Ellis admitted that the penalties were "extended to give their officers more opportunities to correct their behavior" (1T144).

Ellis testified that Ryland raised the matter of the reckoning period and that,

> I said, 'you know what? I have to look at that. Because [the State Dept. of

> Corrections] does something a little bit different. And that's where I left it at. [1T145]

Neither Ryland nor James specifically denied in their testimonies that the Warden said that he was [effectively] deferring a decision. The Hearing Examiner credited the Warden's testimony.

13. On May 13, 2013, Local 167 President Ryland emailed Captain Bearden, acknowledging his receipt of three SOPs, including SOP 136, together with a memorandum asking Local 167 to review the SOPs and respond not later than May 15. Ryland's email requested an extension of time to review and reply until the close of business, May 20, 2013. Ryland emailed a copy of his reply to Warden Ellis (CP-10; 1T52-1T53). The SOPs from Bearden to which Ryland referred were not introduced together as an exhibit.

14. On May 18, Ryland emailed Warden Ellis Local 167's reply ". . . to SOP 136 as requested by Captain Bearden" (CP-11; 1T55-1T56). Ryland wrote:

> [Local 167] cannot agree with the proposed SOP 136 presented to the PBA in its current form because it completely nullifies the meetings held with the Correction Administration regarding the Table of Offenses. As you may recall, the last time the Unions met with you and Captain Bearden regarding the Table of Discipline, we had a tentative agreement to a revised discipline sanction for lateness of less than 15 minutes (A-6) and lateness of more than 15 minutes (A-7) and same should be clearly reflected in the revised SOP 136. [CP-11]

The Hearing Examiner inferred from Ryland’s email that the version of SOP 136 to which he referred is identical to the version marked in evidence (CP-1; see finding no. 3).

Ryland next wrote of Local 167’s understanding of the discipline progression for both offenses, “unreasonable excuse for lateness of less than fifteen (15) minutes” and “unreasonable excuse for lateness of more than fifteen (15) minutes.” He wrote enumerated ascending numbers of latenesses for both offenses, (e.g., “third lateness, fourth lateness,” etc.) concomitantly noting the ascending “steps,” one through nine (CP-11).

Ryland also wrote:

> The Unions also negotiated a tentative agreement to revise the current reckoning period from six (6) months to three (3) months from the date of the first lateness. [Local 167] proposes the revised SOP to reflect; any employee who has progressed in the discipline steps will regress in the discipline steps if the employee remains infraction-free (with no subsequent charges) beginning with the date of the last infraction and same should be reflected in the revised SOP. [CP-11]

Ryland testified in rebuttal that his May 18 email, “. . . reflects the discussion that we [Ellis, Ryland, James] had” (1T168).

15. On July 23, 2013, Assistant County Counsel Chubenko emailed a note to Local 167 Counsel, Local 167 President Ryland, Local 167 SOA President James and Warden Ellis, together with a

complete, updated version of the “Table of Offenses and Penalties” (CP-9). The note provides:

> Attached please find a copy of the revised Table of Offenses as requested. Please be advised that this is still being reviewed by Warden Ellis. Please be further advised that this Table of Offenses will only be put in effect if both [Local 167 and Local 167 SOA] mutually agree to all the revisions. [CP-9]

The attached five-page chart includes the same penalties for the same number of offenses at “A-6" and “A-7" that were set forth in the County’s August 22, 2012 “counter-proposal” to Local 167 Counsel (CP-9; CP-5; see finding no. 7).

16. On July 24, Chubenko emailed a revised Table of Offenses to all of the principals, clarifying that an “A-1" charge means “no call, no show” and that “A-2" means “late call-off.” Chubenko wrote that if her revision was acceptable, “. . . the intent is to have this table go into effect August 1, 2013" (CP-12).

On July 26, Chubenko emailed another revision of “A-2" to the principals, again requesting to be informed of their approval. She repeated the intention to implement the “[T]able” on August 1, 2013 (CP-12).

17. On July 31, shortly after 1 p.m., Local 167 President Ryland emailed Chubenko, (with copies to Ellis, Bearden, James, Local 167 Counsel and others), regarding the “revised Table of Offenses” (CP-12; 1T61). The email provides:

> Please allow this to confirm the acceptance of the revised Table of Offenses. I was granted authorization by Lt. Robert James, President SOA, to forward this acceptance on his behalf acknowledging acceptance by both unions. It is understood that SOP 136 lateness will be amended to reflect a 3 month reckoning period effective August 1, 2013.
>
> The PBA is grateful to all parties for their time and effort with this matter. Thank you.

Ryland testified that the last sentence of the first paragraph was part of Local 167’s agreement to the Table of Offenses (1T64). Asked on direct examination if he would have agreed to the revised Table without changing the reckoning period, Ryland testified:

> No. It was definitely an ongoing negotiation for a number of years. The reckoning period was definitely a sticking point with the overall table, the disciplinary table process. [1T66]

18. Ryland represented unit employees in disciplinary hearing “lateness” cases after August 1, 2013. He complained to Assistant Human Resources Director Ollie Young that some of those cases existed only because the reckoning period was not reduced to three months (1T73). Ryland admitted that the August 1, 2013 version of the Table of Offenses (generated on July 23, 2013 in CP-9) provided lesser penalties and more “steps” for the same lateness infractions than the January 8, 2009 version of the Table of Offenses (R-1; CP-2; 1T104-1T105). For example, Ryland admitted that a discipline imposed under the Table of Offenses

set forth in CP-9 and R-1 on a unit employee for lateness infractions in a May 27, 2014 "hearing officer report" was less than the discipline that would have been imposed under the January 8, 2009 version of the Table of Offenses (1T107-1T109; CP-14; R-1; CP-9; CP-2).

19. On October 1, 2013, Ryland emailed Ellis, Bearden, Chubenko, Local 167 Counsel and others a "forwarded correspondence regarding the Table of Offenses and the accepted amended policy changes," consisting of his July 31, 2013 email to the same principals (advising of both unions' acceptance of the revised Table of Offenses and that it is "understood" that the reckoning period will be reduced from six months to three months; see finding no. 17) (CP-12).

20. Later on October 1, Ellis replied in an email to Ryland, Bearden, Chubenko and James regarding "revised Table of Offenses." The email provides: "Yes, this is what we discussed but I am not sure we address this in the table of offenses. I believed that [Chubenko] said to address this issue in our SOPs" (CP-12). Ellis admitted on cross-examination that he spoke with Chubenko on or before October 1 and that his discussion with her prompted him to include in his email to Ryland and others her recommendation about the SOPs (1T160).

Ellis testified that his October 1 reply meant that, ". . . if I was going to change the issue about the six-month reckoning

period, that would have been changed in the SOPs, not in the Table of Offenses" (1T149). He testified that he neither agreed to change the reckoning period, nor changed it (1T149). He did not recall what prompted him to ". . . go into the system, find the email and then just respond to [Ryland]" (1T148). I credit Ellis's testimony regarding his intended meaning of his October 1, 2013 reply to Ryland, specifically that ". . . but I am not sure we address this in the Table of Offenses" means that (reducing) the reckoning period is not a matter set forth in the Table of Offenses.

On cross-examination, Ellis admitted that he never told or communicated to Ryland that his May 18, 2013 and July 31, 2013 emails confirming a changed reckoning period (to three months) were wrong (1T153; 1T154; see finding nos. 14 and 17). Similarly, he admitted that his October 1, 2013 reply to Ryland does not express disagreement with a three-month reckoning period (1T154-1T155).

21. On October 23, 2013, Ryland emailed Ellis, with copies to Bearden, Chubenko and the Local 167 SOA president regarding, "SOP 136: Lateness" (CP-16; 1T80). The email provides:

> I was inquiring about the SOP changes as discussed when the unions met with you and Captain Bearden and Lt. Chmura.[4/] I was made

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4/ Only Ellis testified of a possible meeting after March 26, 2013 (see finding no. 12) that a Lieutenant Chmura attended. (continued...)

> aware that the reckoning period will not be changed to reflect the agreed 3 month reckoning period but will remain at 6 months. Respectfully, I am requesting to have all parties meet again to discuss this matter prior to finalizing this matter. I am forwarding some prior emails regarding this matter however the agreement arose from a meeting held with unions. [CP-16]

Ryland attached his "prior" May 18, 2013 email to Ellis and others (CP-16; see finding no. 14).

22. On December 26, 2013, Ryland emailed Warden Ellis, advising that both Local 167 and Local 167 SOA, ". . . remain firm that all parties agreed to a 3 month reckoning period and same was to be effective upon acceptance of the Table of Offenses" (CP-17). Ryland also wrote that both majority representatives will file an unfair practice charge, ". . . regarding this matter should the position of the Correction Center administration remain the same."

Later that day, Ellis emailed Ryland, with copies to Local 167 SOA, Bearden and Chmura, acknowledging their "discussion" of the reckoning period and cautioning that, ". . . if you look closely at the final document that [Chubenko] sent to all of us [CP-9] it said nothing about reckoning periods. Because the

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4/ (...continued)
He testified: "There may have been a meeting that we had with Lieutenant Chmura. So I think in that meeting we may have had a discussion" (1T145-1T146). In the absence of other testimony on this record, I make no finding regarding any "discussion" that may have happened in the averred meeting beyond Ryland's and Ellis's written descriptions.

reckoning period is in our SOPs so noted by [Chubenko] when I mention it to her” (CP-17). His email continues:

> The order SOPs changes that we discuss and agreed on were to be changed by Lt. Chmura. I also spoke with him and you, stating that you should reach out to him and question h[im] about the proposal changes and I also call[ed] him and he said he would get his notes and get it done . . . For the record changing the SOP for a few would not be a benefit for the many that do come to work and would only help those that we just help[ed] by making changes to the Table of Offenses and at this point I am not will[ing] to make any more concession[s]. I will wait for your filing. [CP-17]

HEARING EXAMINER’S RECOMMENDED LEGAL CONCLUSIONS

The Hearing Examiner found that while the Table of Offenses and SOP 136 were related in that they both prescribed ascending disciplinary penalties for employee lateness infractions, they also differed substantively. He found that Local 167 Counsel treated them separately in his correspondence with Chubenko and that Chubenko never mentioned SOP 136 in her correspondence and only focused on the Table of Offenses. H.E. at 22-24. The Hearing Examiner also disagreed with Local 167 that the County acquiesced to a reduced reckoning period by implementing the revised Table of Offenses on August 1, 2013 after Ryland’s July 31 email stating that Local 167 was accepting the revised Table of Offenses and that it was “understood” that SOP 136 would be amended to reflect a three month reckoning period. The Hearing Examiner found that Chubenko never referenced SOP 136 in any of

the emails she authored, and Ryland did not inform the County that implementation of the revised Table of Offenses would equate to acquiescence of the reduced reckoning period. H.E. at 26-27. He further found that given that time was never "of the essence" in the parties' discussion or negotiations, it could not be reasonably ascertained that the County's implementation was an acceptance of Ryland's condition. H.E. at 25. He also found that acceptance did not occur by the County's silence in not disputing that the reckoning period would be reduced since the County did not benefit from the revised Table of Offenses, but rather the employees were the primary beneficiaries. H.E. at 27-28.

LOCAL 167's EXCEPTIONS TO THE HEARING EXAMINER'S FINDINGS OF FACT

Local 167 makes extensive exceptions to the Hearing Examiner's Findings of Fact. Local 167 asserts that the Hearing Examiner's Findings of Fact number 3 and 4 failed to recognize that the Table of Offenses and SOP 136 were an integrated whole and therefore any change to the Table of Offenses had to be followed by a change to the SOP 136. We reject this exception. The Hearing Examiner's Findings of Fact numbers 3 and 4 simply describe the Table of Offenses and SOP 136, and do not touch upon how these documents may or may not be connected. Local 167's arguments go well beyond the scope of these findings of fact.

Local 167 takes exception to the Hearing Examiner's Findings of Fact number 8, specifically his inference that counsel was asking to address the Table of Offenses first, and then SOP 136. After our review of the record, we agree that the inference that should have been drawn from counsel's letter is that he was suggesting that the lateness issues in the Table of Offenses be addressed first, and the other proposed changes to other categories of offenses listed in the Table of Offenses be dealt with second. However, we find this error to be harmless, having no bearing on the ultimate result of this matter.

Local 167 takes exception to the Hearing Examiner's Finding of Fact number 9 in that it only refers to lateness issues being discussed at the August 30, 2012 meeting, but does not add that a reduction in the reckoning period was also discussed. We find that this exception lacks merit. Local 167 cites to Ryland's testimony in which he stated that the reckoning period was discussed at each step of the negotiations. (1T 85-87). On direct examination, Ryland made a single general statement that the reckoning period had been discussed at each step of the negotiations. His statement contained no specific information about when and with whom the reckoning period was discussed, and Local 167's assertion is not corroborated in the record.

Local 167 takes exception to the Hearing Examiner's Finding of Fact numbers 12 and 14 in which he credits the Warden's

testimony about the March 26, 2013 meeting that no agreement was reached and that he specifically stated that he was deferring a decision on reducing the reckoning period. The Hearing Examiner discredited James's direct testimony that an agreement was reached regarding the reckoning period because he found that on cross-examination James did not exhibit as much certainty that an agreement had actually been reached. While Local 167 disputes the factual findings and credibility determinations surrounding the March 26, 2013 meeting, it does not point to any evidence which supports its position other than subsequent self-serving emails sent by Ryland stating that the parties had reached a "tentative" agreement on the reckoning period. We may not reject or modify any findings of fact as to issues of lay witness credibility unless we first determine from our review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence. N.J.S.A. 52:14B-10 (c). We find that the substantial credible evidence in the record supports the Hearing Examiner's Finding of Fact numbers 12 and 14 and his credibility determinations.

Local 167 disputes Findings of Fact numbers 15 through 18 because they fail to state that acceptance of the revised Table of Offenses was conditioned upon a reduction in the reckoning period. We reject this exception. These Findings of Fact

describe emails exchanged between Chubenko and Ryland in which the revised Table of Offenses was discussed reflecting the negotiated changes from the March 26, 2013 meeting. In response to one of Chubenko's emails, Ryland's July 31 email stated that Local 167 accepted the revised Table of Offenses and that it was "understood" that SOP 136 lateness would be amended to reflect a 3 month reckoning period effective August 1, 2003. Ryland's email standing alone does not support Local 167's position that acceptance of the Table of Offenses was conditioned upon a reduction in the reckoning period. Moreover, Local 167's members were the direct beneficiaries of the revised Table of Offenses as it is undisputed that the revisions resulted in reduced penalties and more steps for the same lateness infractions. Local 167 also asserts that the County benefitted from the revisions to the Table of Offenses, but provided no references to the record to support its claim. Whatever advantages the County received from the revisions (reduced litigation, improved employee morale) were minimal compared to the benefits received by Local 167's members.

Local 167 takes exception to Finding of Fact number 20 in that the Hearing Examiner credited the Warden's testimony that his October 1, 2013 reply to Ryland's email meant that the reckoning period had to be dealt with separately from the Table of Offenses. The Hearing Examiner made this determination after considering the Warden's testimony as a whole, and admissions

that he made on cross-examination. The Hearing Examiner's findings were made on his credibility determinations, and will not be disturbed unless they are not supported by substantial credible evidence in the record. N.J.S.A. 52:14B-10 (c). Our review of the record supports the Hearing Examiner's credibility determinations with regard to the Warden's testimony.[5/]

LOCAL 167's EXCEPTIONS TO THE HEARING EXAMINER'S LEGAL CONCLUSIONS

The focus of this case concerns whether the County violated N.J.S.A. 34:13A-5.4 (a)(6), which prohibits a public employer from refusing to reduce a negotiated agreement to writing and to sign such an agreement. It specifically presents a question of whether there was an agreement to reduce the reckoning period from six to three months. This requires us to consider the intentions of the parties. Kearny P.B.A. Local # 21 v. Town of Kearny, 81 N.J. 208, 221-222 (1979). In cases such as this where there is no writing memorializing the parties' intentions, we must look to the parties' conduct and customs to determine the parties' intent. Id. at 222. We affirm the Hearing Examiner's Recommended Report and Decision and find that the

5/ In its exceptions, Local 167 also includes a section which recites its proposed findings of facts that were submitted to the Hearing Examiner in its post-hearing brief. We find that the arguments raised by Local 167 in this section cover substantially the same issues it raises in its exceptions to the Hearing Examiner's findings of fact.

record is devoid of any evidence supporting that the County agreed to reduce the reckoning period.

In its exceptions, Local 167 asserts that the Table of Offenses and SOP 136 were inextricably linked, and any revisions made to the Table of Offenses meant that the County acquiesced to reducing the reckoning period. We disagree. The parties' conduct throughout negotiations treated the Table of Offenses and SOP 136 separately. Local 167's Counsel found it necessary to indicate in his March 13, 2013 letter to Chubenko that Local 167's acceptance of the revised Table of Offenses was conditioned upon the reckoning period being reduced to three months. Chubenko never mentioned SOP 136 in any of her correspondence, and only focused on revising the Table of Offenses. The Hearing Examiner credited the Warden's testimony that at the parties' March 2013 meeting he specifically stated that he was deferring a decision on reducing the reckoning period. The Hearing Examiner discredited James's testimony that the parties had reached an agreement at that meeting because on cross-examination James did not project the certainty that he had shown on direct examination that an agreement had been reached. We find these credibility determinations to be supported by substantial credible evidence and will not overturn them. N.J.S.A. 52:14B-10 (c). There was never a writing memorializing that the reckoning period would be reduced, rather, the first exchange noted in the record after the

March 26, 2013 meeting was on May 13, 2013, when Captain Bearden sent Ryland SOP 136 to review, which contained the same six-month reckoning period.

Local 167 also asserts that the County "accepted" its counter-offer that the revised Table of Offenses was acceptable if the reckoning period was reduced to three months. Relying on principles of contract law, Local 167 asserts that the County made an offer in late July 2013 when Chubenko emailed Ryland a revised Table of Offenses to be effective August 1, 2013, Local 167 made a counter-offer on July 31, 2013 when Ryland emailed Chubenko and stated that Local 167 was accepting the revised Table of Offenses and that it was "understood" that the reckoning period would be reduced to three months, and then the County accepted Local 167's terms by issuing the revised Table of Offenses and by its silence in not disputing that the reckoning period would be reduced. We disagree with Local 167's application of contract law to the facts herein. With regard to the County's issuance of the revised Table of Offenses on August 1, 2013 as acceptance, it is important to highlight that the County was not the primary beneficiary of the revised Table of Offenses- - rather Local 167's members were the primary beneficiaries. Local 167 does not dispute that the revised Table of Offenses resulted in lesser disciplinary penalties across the board for the same lateness infractions. Whatever benefit the

County received from implementation of the revised Table in the way of reduced litigation and improved employee morale was indirect and pales in comparison to the benefit received by Local 167's members, with or without the reduction of the reckoning period. Given that no direct benefit was received by the County in agreeing to the revisions in the Table of Offenses, we find that the contract law analysis asserted by Local 167 is inappropriate. Weichert Co. Realtors v. Ryan, 128 N.J. 427, 436 -437 (1992). We further find that the County did not accept the reduction in the reckoning period by its silence in not disputing Local 167's understanding that the reckoning period would be reduced. As support for its position that the parties had a practice of acceptance by silence, Local 167 cites to a May 19, 2013 email by Ryland discussing changes to SOP 136 in which he states that "I just did not want my silence to be considered as a no response regarding the proposed audit." This email shows that in this instance Ryland did not want a failure to respond to equate to him being non-responsive. It falls far short of establishing that the parties had a practice of acceptance by silence. Ibid.

Finally, Local 167 asserts that we should draw a negative inference from the County not producing Chubenko as a witness. For such an inference to be drawn, the witness testimony that was not produced should be superior to the testimony produced with

regard to the facts to be proved. State v. Hill, 199 N.J. 545, 560 (2009). The County produced the testimony of the Warden and the Captain at trial, the two primary actors in this matter from the County. The Warden was the ultimate decision maker on the issue of whether the reckoning period would be reduced. Chubenko represents the interests of the County and the Warden and the Captain, and acts at their direction. Her testimony would not have been superior to the testimony of Captain Bearden or Warden Ellis with regard to whether an agreement had been reached to reduce the reckoning period. We therefore draw no negative inference from Chubenko not testifying.

ORDER

The Hearing Examiner's Recommended Report and Decision is affirmed. The Complaint is dismissed.

BY ORDER OF THE COMMISSION

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

ISSUED: January 28, 2016

Trenton, New Jersey