

P.E.R.C. NO. 87-104

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF SECAUCUS,

Respondent,

-and-

Docket No. CO-86-308-7

SECAUCUS PBA LOCAL 84,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated by the full Commission, dismisses a complaint based on an unfair practice charge filed by Secaucus PBA Local 84. The charge alleged the Town of Secaucus violated the New Jersey Employer-Employee Relations Act when it unilaterally required employees to submit medical certifications of illness to receive sick leave. The Chairman, in agreement with a Hearing Examiner and in the absence of exceptions, finds that the Town did not violate the Act.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF SECAUCUS,

Respondent,

-and-

Docket No. CO-86-308-7

SECAUCUS PBA LOCAL 84,

Charging Party.

Appearances:

For the Respondent, Pachman & Glickman, P.A.
(Martin R. Pachman, of counsel)

For the Charging Party, Loccke & Correia, P.A.
(Manuel A. Correia, of counsel)

DECISION AND ORDER

On April 30, 1986 the Secaucus PBA Local 84 ("PBA") filed an unfair practice charge against the Town of Secaucus ("Town"). The charge alleges the Town violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1), (2), (5), (6) and (7),^{1/} when it unilaterally required employees to submit medical certifications

^{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; (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 the rules and regulations established by the commission."

of illness to receive sick leave and thereby imposed an economic expense on the employees.

On July 5, 1986 a Complaint and Notice of Hearing issued. The Town then filed its Answer. It admits requiring, under certain circumstances, a medical certification to receive sick leave, but denies that it violated the Act.

On October 1, 1986, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits.^{2/} They also filed post-hearing briefs.

On January 7, 1987, the Hearing Examiner issued his report and recommended the Complaint be dismissed. H.E. No. 87-41, 13 NJPER __ (¶ _____ 1987) (copy attached). He found that the Town had a managerial prerogative to require employees to verify their illness and that it was not obligated to negotiate the economic consequences since the PBA did not request negotiations on that issue.

The Hearing Examiner served his report on the parties and informed them that exceptions, if any, were due on January 21, 1987. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-7) are accurate. I adopt and incorporate them here.


^{2/} The Hearing Examiner denied the Town's motion to dismiss the Complaint after the charging party's case.

Under all the circumstances of this case, and acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I also adopt his recommendation that the Complaint be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
March 12, 1987

H.E. NO. 87-41

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

In the Matter of
TOWN OF SECAUCUS,

Respondent,

-and-

DOCKET NO. CO-86-308-7

SECAUCUS PBA LOCAL 84,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Town of Secaucus did not violate §5.4(a)(1), (2), (5), (6), and (7) of the New Jersey Employer-Employee Relations Act when it unilaterally established a sick leave verification program focusing on absences of less than three days duration. The Hearing Examiner finds that the establishment of a sick leave verification program is an exercise of the employer's inherent managerial prerogative. The Hearing Examiner also finds that under the facts presented in this case, the burden to seek negotiations concerning any severable, mandatorily negotiable issue(s) which may arise from the establishment of the sick leave verification program, lies with the employee representative.

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. 87-41

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

In the Matter of

TOWN OF SECAUCUS,

Respondent,

-and-

DOCKET NO. CO-86-308-7

SECAUCUS PBA LOCAL 84,

Charging Party.

Appearances

For the Respondent
Pachman & Glickman, Esqs.
(Martin R. Pachman, of counsel)

For the Charging Party
Loccke & Correia, Esqs.
(Manuel A. Correia, of counsel)

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on April 30, 1986, by the Secaucus Policemen's Benevolent Association, Local 84 ("PBA") alleging that the Town of Secaucus ("Town") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). Specifically, the PBA alleges that the Town violated §5.4(a)(1), (2), (5), (6), and

(7)^{1/} of the Act when it unilaterally implemented general order 85-7 entitled "Attendance, Excessive Absenteeism." (J-9)^{2/} The PBA alleges that the general order (J-9) unilaterally re-defined sick leave occasions from that contained in the parties' collective agreement and from that previously understood and agreed to between the parties in terms of when medical documentation of verifying sick leaves is required to be supplied by an employee. The PBA concludes that such unilateral implementation of the general order represents a change in a term and condition of employment without negotiations and has further resulted in imposing additional expenses on employees in order to obtain the medical documentation required pursuant to the general order.

The Town argues that it has not violated the Act. In addition to other arguments raised in its defense of the unfair

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; (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 the rules and regulations established by the commission."

2/ Material received in evidence marked with a "J" designation represent joint exhibits; documents marked "CP" represent material received in evidence from the charging party and documents marked "C" represent Commission exhibits.

practice charge, the Town argues that general order 85-7 represents the establishment or modification of a sick leave verification program which, under prior Commission and judicial decisions, has been held to be a non-negotiable managerial prerogative.

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 15, 1986 and a hearing date was scheduled for October 1, 1986. On August 15, 1986, the Town filed an Answer constituting a general denial of any wrongdoing. (C-3). A hearing was conducted in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. At the conclusion of the hearing a briefing schedule was established providing for the simultaneous submission of briefs on November 14, 1986. By the mutual agreement of the parties I granted an extension of time to file briefs until December 5, 1986. Reply briefs were due on December 12, 1986. The Town and the PBA filed their respective briefs on December 8, 1986. Neither party has submitted a reply brief.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, I make the following:

FINDINGS OF FACT

The Town of Secaucus is a public employer within the meaning of the Act, is the employer of the employees involved in the unfair practice charge and is subject to the provisions of the Act (T-7).^{3/} The Secaucus Policemen's Benevolent Association, Local 84, is an employee representative within the meaning of the Act and is subject to its provisions (T-7).

Robert Zych appeared as the PBA's only witness. Zych has been employed by the Town as a patrolman in its police department for 8 1/2 years. Zych has been the President of the PBA for 5 years (T-20).

Zych testified that general orders are considered a component part of the police department's rules and regulations (T-23). On November 12, 1981, Zych was given a copy of general order 81-8 (T-24; CP-2). General order 81-8 stated the following:

Effective this date, all personnel who are on sick or off-duty injured leave for three or more days will have their attending physician complete form SPD-19 [(J-10)], titled, "Verification of Sick Leave."

An officer who is injured on duty and requires medical attention will go, during that tour of duty, to Riverside General Hospital and will be examined by the emergency room physician or by a physician designated by the Department.

The attending physician will complete form SPD-19, regardless of any loss of work.

^{3/} T-1 refers to the transcript dated October 1, 1986, page 1; T-7 refers to page 7 of the October 1, 1986 transcript and so forth.

The officer will complete an operations report and will notify his superior and/or desk officer of the injury.

"SPD-19" may be obtained from the desk officer, and will be supplied to Riverside General Hospital for officers who are treated there.

The purpose of this form will be to insure uniformity and consistency, pursuant to the requirements of section 11:04 of the contract, due to the fact that all personnel do not use the same physician.

Since the issuance of general order 81-8 in 1981, the Town had made no change in the sick leave verification program until it issued general order 85-7 (J-9) on September 24, 1985 (T-25). General order 85-7 became effective on November 1, 1985. General order 85-7 reads as follows:

It is the policy of the Secaucus Police Department that good attendance on the part of its personnel is indispensable to the operation of an efficient, effective and disciplined department. Further, excessive absenteeism on the part of personnel tends to create manpower shortages and a resultant inability to provide adequate and proper police protection to the citizens and property of the Town of Secaucus. Therefore, in recognition of this policy the following procedures are adopted:

I. EXCESSIVE ABSENTEEISM

1. Unexcused Absences

Unexcused absences are those for which an appropriate medical certificate (SPD 19) has not been provided upon return to duty. This shall include any tour in which an officer, as a result of illness, absents himself from duty with more than two (2) hours remaining on his scheduled tour.

2. Excessive Absenteeism

Any employee accruing more than five (5) unexcused absences within one calendar year

shall be deemed to be guilty of excessive absenteeism pursuant to Chapter IV; Paragraph 1, Section 18 of the Departmental Rules and Regulations.

3. Mandatory Penalty^{4/}

Any employee found to have violated 4:1-18 of the Rules and Regulation as defined herein, shall face the following penalty:

- a) for the first occurrence: - a mandatory 2-day suspension;
- b) for the second occurrence, a mandatory 5-day suspension;
- c) upon the third occurrence, a mandatory suspension of thirty (30) days or discharge;
- d) if two or more penalties are applicable, the more severe applicable penalty will be sought.

IMPLEMENTATION:

This General Order will take effect on November 1, 1985, and the maximum number of unexcused absences between November 1, 1985 and December 31, 1985, shall not exceed two (2).

The Verification of Sick Leave provision contained in the Parties' 1981-1982 collective agreement (CP-3) has continued unchanged in their 1983-1984 agreement (J-7; T-19). The Verification of Sick Leave provision states the following:

Verification of Sick Leave

1. An employee who shall be absent on sick leave for three (3) or more consecutive work days shall be required to submit acceptable medical evidence substantiating the illness. The Town may require proof of illness of an

^{4/} The Parties stipulated that the issue of imposition of automatic disciplinary action is not before the Commission and not part of this case (T-19).

employee on sick leave, notwithstanding the limitation in the preceding sentence, whenever it is reasonably suspected that the employee is abusing it. Abuse of sick leave shall be cause for disciplinary action. The medical evidence shall indicate the nature of the illness, the extent to which it incapacitates the employee, the diagnosis and prognosis for recovery, all in the form of a physician's certification. In the event of any question concerning the above entitlement, the Town may require the employee to be examined by the Town's physician.

2. In case of leave of absence due to exposure to a contagious disease, a certificate from the Department of Health shall be required.

3. The Town may require an employee who has been out because of personal illness as a condition of his return to duty, to be examined at the expense of the Town, by a physician designated by the Town. Such examination shall establish whether the employee is capable of performing his normal duties and that his return will not jeopardize the health of the other employees.

The Town and the PBA did not negotiate concerning a modification of the sick leave verification program when it adopted general order 85-7 or negotiate regarding any other related issue(s) (T-28). The record is devoid of any indication that the PBA sought to undertake any negotiations concerning this matter with the Town.

ANALYSIS

The foregoing facts make clear the sequence of events occurring in this case. On or about November 12, 1981, the Town issued general order 81-8. General Order 81-8 details what is required of the employee when he/she is not at work due to illness or injury. In order to be on excused sick or injury leave pursuant to general order 81-8, the Town requires the employee to submit an SPD-19 form only when the employee is out for 3 or more days. The Parties' collective agreement serves to clarify that the SPD-19 must be submitted only when the 3 or more days are consecutive. The Town

obvious example of such severable, mandatorily negotiable issue, and one directly addressed in Elizabeth, is whether the employee or the employer pays for the doctor visit which, in effect, becomes required by the verification program in order for the employee to be granted excused leave time. The facts in this case show that there were no negotiations pertaining to the severable, mandatorily negotiable issues, however, neither were such negotiations ever sought by the PBA. The PBA alleges in its unfair practice charge and points out in its brief that additional economic expenses will be imposed on the employees as the result of the implementation of general order 85-7. Thus, the issue that arises is whether the burden to seek negotiations on such severable, mandatorily negotiable issues lies with the employer or the employee representative.

In Monroe Twp. Bd. of Ed., H.E. No. 84-66, 10 NJPER 400 (¶ 15186 1984) aff'd P.E.R.C. No. 85-35, 10 NJPER 569 (¶ 15265 1984) ("Monroe"), the Commission has addressed the issue of which party has the burden to seek negotiations. The facts in Monroe are as follows: During negotiations for a successor agreement the Monroe Board of Education advised the Monroe Township Education Association that it was considering subcontracting the school cafeteria service operations. Ultimately the negotiations culminated in a Memorandum of Understanding which contained language clearly indicating that the Board was contemplating subcontracting the cafeteria services. Subsequently, the employees were informed that the Board, indeed, decided to subcontract the cafeteria services. Shortly thereafter,

the Association filed an unfair practice charge alleging, in relevant part, that the employer failed to meet its negotiations obligation prior to making its decision to subcontract. The Association never requested to negotiate either substantive or procedural aspects of the subcontracting decision.

Relying upon Local 195, IFPTE v. State of New Jersey, 88 N.J. 303 (1982), the Hearing Examiner held that "...a public employer is not obligated to negotiate over its decision to subcontract." Monroe, 10 NJPER at 402. The Hearing Examiner noted, however, that procedural aspects, such as notice to employees who are going to be laid off, severance pay and recall rights are mandatorily negotiable.

In affirming the Hearing Examiner's decision, the Commisison stated the following:

...given the Board's non-negotiable managerial prerogative to subcontract its cafeteria operation; the Association; rather than the Board, had the burden of initiating negotiations over the severable issues of reemployment rights and severance pay for affected employees. This case does not present a situation in which an employer repudiated or unilaterally altered existing terms and conditions of employment, thus permitting the immediate filing of a charge without a prior demand to negotiate. We also agree with the Hearing Examiner that the filing of an unfair practice charge did not constitute a request to negotiate over severance pay and related matters in this case. This finding is especially so here since the instant unfair practice charge is silent with respect to such matters (except insofar as a remedy is concerned) and was never amended.

* * *

The important point here, however, is that the Association had the obligation to request

negotiations on severance pay and related matters, and the Board had the right to an opportunity to respond, before the filing of an unfair practice charge. Id. at 570.

The instant case is very similar to Monroe. In Monroe, the Board exercised its inherent managerial prerogative to subcontract a portion of its operation. As a result of that determination, certain severable, negotiable issues arose upon which the employee representative could have demanded negotiations, but did not. In this case, the Town's determination to establish a sick leave verification program focusing on non-consecutive days of employee absences is an exercise of its inherent managerial prerogative. Like Monroe, this case does not involve a repudiation or unilateral alteration of existing terms and conditions of employment. Consequently, the Commission's holding in Monroe is applicable here, in that the filing of the unfair practice charge does not constitute a demand to negotiate over the severable, negotiable issue(s). While the record developed in this matter shows that the PBA was cognizant of the potential increase in expense to employees as the result of the sick leave verification program, the charge and the record testimony are silent with regard to any demand made by the PBA upon the Town to enter into negotiations on any severable issue(s).

The timing in relation to the issuance of general order 85-7 and its effectuation is also important. While general order 85-7 did not become effective until November 1, 1985, it was issued on September 24, 1985, and provided to the PBA at that time. The PBA was afforded more than one month to review general order 85-7,

however, the PBA never sought negotiations prior to its effectuation. Thus, in this case, the Town provided the PBA with ample time to request negotiations and cannot be said to have refused or otherwise breached its obligation to negotiate with the PBA in violation of the Act.

The PBA alleged that the Town also violated §5.4(a)(2), (6) and (7). However, the PBA introduced no evidence showing that the Town dominated or interfered with the formation, existence or administration of any employee organization; refused to reduce a negotiated agreement to writing and sign such agreement; or violated any of the rules and regulations established by the Commission.

Accordingly, based upon the entire record and the analysis set forth above, I make the following:

CONCLUSIONS OF LAW

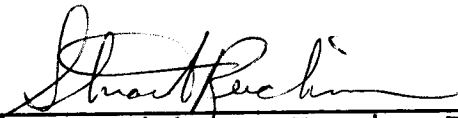
1. The Town of Secaucus did not violate N.J.S.A. 34:13A-5.4(a)(5) when it established and implemented its sick leave verification program (general order 85-7) without negotiating with Secaucus PBA, Local 84.
2. The Town of Secaucus did not violate the Act when it did not negotiate any severable, mandatorily negotiable issue(s) because the burden to demand negotiations on such issues is held by the employee representative and no demand for negotiations was ever made.
3. The Secaucus PBA, Local 84, did not prove, by a preponderance of the evidence, that the Town of Secaucus violated any

other section of the New Jersey Employer-Employee Relations Act as alleged in its unfair practice charge.

RECOMMENDED ORDER

I recommend that the Commission ORDER that the Complaint issued in this matter be dismissed.

Respectfully submitted


Stuart Reichman, Hearing Examiner

DATED: January 7, 1987
Trenton, New Jersey