Pellettieri Rabstein and Altman

COUNSELLORS AT LAW

2653 Nottingham Way
Hamilton, New Jersey 08619
(609) 890-1900 • Fax (609) 890-1800
Email: pra@pralaw.com
www.pralaw.com

PR&A

John A. Hartmann, III
Andrew M. Rockman
Bruce P. Miller
Edward Slaughter, Jr.
Anne P. McHugh
Neal S. Solomon
Gary E. Adams
E. Elizabeth Sweetser
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Andrew L. Watson
Frank M. Crivelli

Special Counsel
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Elyse C. Herman
Kristen J. Vidas
Sherri L. Warfel
Kendall W. Medway
Kimberly A. Engan
Jennifer R. Rubin
Justin R. Callow
Donald C. Barbati
Francis P. Masterson
Robyn N. Howlett

Counsel
Ira C. Miller
Arthur Penn
W. Barry Rank
Craig H. Livingston
Annamaria Arpaia

Richard Altman (Retired)
George Pellettieri (1929-1980)
Ruth Rabstein (1934-2005)
George L. Pellettieri (1961-1973)
Mel Narol (1989-2002)

August 23, 2010

VIA FACSIMILE & FIRST CLASS MAIL

James McGonigal, President
New Jersey Law Enforcement Supervisors Association
201 Delaware Avenue
Roebling, New Jersey 08554

Re: NJ/State (Corrections) and NJLESA
Docket No.: CO-2010-360

Dear Jim:

Enclosed, please find a copy of the opinion rendered by Charles Tadduni, Esq. of PERC regarding our petition for interim relief in the above referenced matter. Unfortunately, for the reasons stated within the body of the opinion, the application was denied. At this juncture, the snow day unfair practice charge will be processed in the normal course. Upon receipt, kindly review and retain for your records.

Thank you for your consideration in this matter. Should you have any questions or concerns, please feel free to contact this office.

Sincerely,

PELLETTIERI RABSTEIN & ALTMAN

By: _____
FRANK M. CRIVELLI, ESQ.

FMC/db
Enclosure

I.R. No. 2011-13

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS)
Respondent,

-and- Docket No. CO-2010-343

PBA LOCAL 105,
Charging Party.

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),
Respondent,

-and- Docket No. CO-2010-360

NEW JERSEY LAW ENFORCEMENT
SUPERVISORS ASSOCIATION,
Charging Party.

Appearances:

For the Respondent: Paula T. Dow, Attorney General of New Jersey (Geri Benedetto, Deputy Attorney General)

For the Charging Parties: Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Robert A. Fagella, Esq., and Colin M. Lynch, Esq., of counsel); and Pellettieri, Rabstein & Altman, attorneys (Frank M. Crivelli, Esq., of counsel)

INTERLOCUTORY DECISION

On March 5, 2010, PBA Local 105 (PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission); the charge was amended on March 29, 2010; and on March 19, 2010, the New Jersey Law Enforcement Supervisors Association (Association) (Charging Parties) filed an unfair

practice charge with the Commission. Charging Parties allege that the New Jersey Department of Corrections (DOC) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), when it unilaterally altered and refused to negotiate in good faith concerning certain terms and conditions of employment. More specifically, Charging Parties contend that DOC violated subsections 5.4a(1) and (5)1/ of the Act when, in February 2010, it unilaterally implemented and refused to negotiate concerning elements of a new sick leave verification policy, including various procedures and penalties.

DOC denies that its actions in this matter violated the Act and contends that it acted pursuant to its managerial prerogative and Civil Service statutes and regulations in implementing certain sick leave verification policy matters in February 2010.

The charges were accompanied by an application for interim relief. Orders to Show Cause were executed on June 24, 2010 (in Docket No. CO-2010-343) and June 28, 2010 (in Docket No. CO-2010-360), scheduling a return date for a hearing on the Orders to Show Cause for July 28, 2010; a second return date for

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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."

a hearing on the Orders to Show Cause was scheduled for August 13, 2010.[2/] The parties submitted briefs, certifications and exhibits and argued orally on August 13, 2010.

* * *

In these charges, PBA Local 105 and the New Jersey Law Enforcement Supervisors Association contend that in February 2010, DOC issued communications requiring all unit employees (correction officers and correction officer sergeants) who utilized sick time on specified dates (February 9, 10, 11, 25 and 26, 2010) to submit medical documentation upon their return to work. Subsequent to the dates specified, DOC began issuing notices of discipline to all employees who did not submit medical documentation. As departmental disciplinary proceedings were completed, DOC began imposing monetary fines on employees who did not submit the medical documentation.

Charging Parties assert that the parties' collective negotiations agreements and past practices provide specific penalties for attendance infractions, including improper use of sick leave. Charging Parties argue that those agreements and Civil Service regulations prohibit the penalties (fines) being unilaterally imposed by DOC. Charging Parties further argue that

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2/ On July 28, 2010, the parties participated in discussions in attempting to resolve this matter. No resolution was reached; a second return date for a hearing on the Orders to Show Cause was then scheduled for August 13, 2010.

by unilaterally imposing fines on employees who did not provide the mandated documentation, DOC repudiated the parties' collective negotiations agreements and past practices, and thus violated subsections 5.4a(1) and (5) of the Act. In accordance with the foregoing, Charging Parties contend they have demonstrated a substantial likelihood of success on the merits of the charges.

While conceding that monetary harm, per se, might not be irreparable, Charging Parties argue that they will suffer irreparable harm in the absence of the interim relief sought, because allowing the employer's conduct to stand pending a final Commission decision would create a chilling effect and thus irreparably harm Charging Parties' ability to negotiate and enforce their collective negotiations agreements.

DOC contends it had a reasonable belief that employees were abusing sick leave based upon the unusually high rate of sick leave call-offs during an early February, 2010 weekend snowstorm. DOC argues that it then acted within its managerial prerogative in requiring medical documentation from employees who called off sick in two subsequent February 2010 snowstorms. DOC also argues that Civil Service regulations allow for the imposition of fines in circumstances such as these -- where the employer demonstrates that employee suspensions would be detrimental to the public health, safety or welfare. DOC thus argues that interim relief

should be denied because in these circumstances, Charging Parties have failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on the legal and factual allegations of the charge.

DOC further argues that Charging Parties have failed to demonstrate that, absent interim relief, they will suffer irreparable harm. DOC asserts that Charging Parties seek to stay and reverse monetary fines; DOC argues that monetary damages do not equate to irreparable harm. Thus, DOC argues that because Charging Parties have failed to demonstrate they would be irreparably harmed absent the requested interim relief, Charging Parties' application should be denied.

* * *

After an early February 2010 weekend snowstorm, DOC observed what it deemed was unusually high sick leave usage; the high sick leave usage led to large amounts of overtime worked by other employees to cover the shifts of absent employees. In order to prevent what it believed to be sick leave abuse, prior to two subsequent February 2010 snowstorms, DOC issued departmental communications requiring employees who would call in sick during those storms to provide medical documentation of illness upon their return to work. Many employees (900) complied with the requirement; approximately 650 did not supply the required medical documentation. DOC brought disciplinary charges against

the 650 employees for failure to provide required medical documentation. As the internal departmental disciplinary procedures were completed, employees found to have violated the documentation requirement were fined between $175 and $250 per employee per infraction. The fines were and are being immediately imposed regardless of any pending appeals or other litigation.

The collective negotiations agreements, Civil Service regulations and the parties' past practice regarding sick leave verification and penalties for improper use of sick leave provide a specific progressive disciplinary procedure. This disciplinary procedure provides: official written reprimand for the 1st infraction; 3-day suspension for a 2nd infraction; 5-day suspension for a 3rd infraction; 15-day suspension for a 4th infraction; and discharge for a 5th infraction.

There is no provision for a fine in the parties' collective negotiations agreement, the parties' past practice or in DOC's sick leave verification policy. Civil Service regulations discourage the use of fines as a disciplinary mechanism. N.J.A.C. 4A:2-2.4. Given these circumstances, Charging Parties contend DOC repudiated the parties' agreements, and unilaterally changed the sick leave policy to provide for disciplinary fines in place of the progressive disciplinary procedure agreed upon and utilized by the parties. Charging Parties sought DOC's

recision of the documentation order, pending negotiations over the impact of the order.

During these unfolding events, DOC made several offers to meet with Charging Parties to "discuss this matter." There were on-going discussions regarding these events which led to several significant adjustments - - the time for employees to produce medical documentation was extended by seven days; employees were permitted to convert existing sick calls to administrative leave (AL) time; and employees were permitted to use compensatory or vacation time in lieu of AL time. Further, approximately one month after the last event requiring medical documentation, DOC submitted a specific "settlement concept" to the Association.

N.J.A.C. 4A:2-2.4(c)(2) provides that fines may be imposed in lieu of suspensions where the employer has established that suspensions would be detrimental to the public interest.

[redacted] number of sick leave call-offs when a number of employees attended a protest rally. In that circumstance, although DOC initially imposed disciplinary fines, the parties ultimately negotiated a voluntary settlement of the matter.

ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations

and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1983); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

The Commission has articulated the interplay of prerogatives and rights in sick leave verification policy matters.

In City of Paterson, P.E.R.C. No. 92-89, 18 NJPER 131 (¶23061 1992), the Commission stated:

> The implementation of a sick leave verification policy is a managerial prerogative. Piscataway Tp. Bd. Of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). This right . . . includes requiring employees to submit a doctor's note verifying that the employee was really sick. Elizabeth and Elizabeth Fire Officers Ass'n Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985); Town of Kearny, P.E.R.C. No. 92-40, 17 NJPER 481 (¶22233 1991); Ridgefield Park Bd. Of Ed., P.E.R.C. No. 91-51, 17 NJPER 4 (¶22002 1990). However, the application of a policy, the denial of sick leave pay, sick leave procedures, penalties for violating a policy, and the cost of a required doctor's note are all mandatorily negotiable. Elizabeth; Piscataway; Mainland Reg. H.S. Dist., P.E.R.C. No. 92-12, 17 NJPER 406 (¶22192 1991); Newark Bd. Of Ed., P.E.R.C. No. 85-25, 10 NJPER 549 (¶15255 1984).
>
> Paterson at 132.

In Township of Montclair, P.E.R.C. No. 2000-107, 26 NJPER 310 (¶31126 2000), the Commission held that the issue of what disciplinary penalties will be imposed for abusing sick leave is mandatorily negotiable. The Commission stated:

> While an employer has a prerogative to establish a sick leave verification policy, those portions of a policy which provide for fines, warnings, suspensions or termination after a specific number of absences move beyond verification and into the area of discipline. Those elements of a sick leave policy may therefore be negotiated and arbitrated absent an applicable exception in 5.3.

Montclair at 312; see also City of Elizabeth, P.E.R.C. No. 2000-42, 26 NJPER 22 (¶31007 1999); and UMDNJ, P.E.R.C. No. 95-68, 21 NJPER 130 (¶26081 1995).

Here, DOC acted within its managerial prerogative to require medical documentation from employees utilizing sick leave during a snowstorm. However, when it then imposed a blanket fine on all employees who did not produce the medical documentation, it moved beyond verification and into the area of discipline, a mandatorily negotiable term and condition of employment. Montclair, supra.

In their application for interim relief, Charging Parties do not contest DOC's implementation of the sick leave verification policy - - DOC's requirement that employees using sick leave in these circumstances submit medical documentation verifying appropriate use of the sick leave. Rather, they are contesting

the unilateral imposition of disciplinary penalties - - fines - - for alleged sick leave abuse, without negotiations and in contravention of the parties' collective negotiations agreements, applicable Civil Service regulations and the parties' practice.

DOC argues that negotiations were not required here because the subject matter was preempted by regulation and because it was following a practice wherein it imposed fines for another instance of high sick leave call-offs when employees attended a protest rally in 2008 (supra. at 7).

N.J.A.C. 4A:2-2.4(c)(2) provides that fines may be utilized in lieu of suspension where the employer has established that suspensions would be detrimental to the public health, safety or welfare. DOC also cites a Civil Service case, In re DiMemmo, OAL Docket No. CSV 920-08, 2008 NJ AGEN LEXIS 1068, Final Decision (11/6/08), where the Civil Service Commission held that a corrections officer was properly fined in lieu of a suspension because proper employee attendance was so critical to the correction center's operations that a suspension could not have been imposed without disrupting operations and thereby creating a risk to public health, safety or welfare. However, the Civil Service Commission there also noted that in determining the propriety of the penalty, several factors must be considered - - the nature of the offense, the concept of progressive discipline and the employee's prior record. The Civil Service Commission

upheld a fine of 10 days' pay, given the employee's prior disciplinary history - - attendance-related suspensions of 10 and 20 days.

The Civil Service Commission further stated that a blanket imposition of a fine in lieu of suspension is not permitted under the regulatory standard; that fines should not be utilized as a tool to address staffing shortages; that situations in which fines are imposed are generally restricted and the employer must make a specific showing to justify utilization of fines; and that the standard for the imposition of fines must be reviewed on a case-by-case basis.

Assuming without deciding that DOC properly invoked the fine-in-lieu-of-suspension disciplinary modality, that decision does not appear to preempt negotiations regarding various issues of discipline, such as utilization of the concept of progressive discipline and the amounts of the fines to be imposed in the circumstances.

Charging Parties contend that allowing flagrant violations of the parties' agreements to stand pending the Commission's decision after a plenary proceeding will create irreparable harm by undermining their ability to negotiate and enforce their collective negotiation agreements.

Absent exigent circumstances, the Commission has determined that changes in or withholdings of compensation do not rise to

the level of irreparable harm. Union Cty., I.R. No. 99-15, 25 NJPER 192 (¶30088 1999).

In County of Union, I.R. No. 92-4, 17 NJPER 448 (¶22214 1991), Charging Parties sought interim relief in related cases jointly submitted to both this Commission and the New Jersey Department of Personnel, challenging the County's unilateral implementation of a five-day involuntary furlough of all employees in three County-wide units of sheriffs officers, Division of Welfare employees and all blue collar and white collar employees. There, the charging parties alleged that the County violated the Act when it repudiated the compensation, work year and other provisions of the applicable collective negotiations agreements by unilaterally implementing a five-day furlough for all unit employees.

After concluding that Charging Parties had demonstrated a substantial likelihood of success on the merits of the charges, the Commission Chairman determined that:

> . . . permitting unilateral changes of this magnitude in these fundamental terms and conditions of employment . . . could irreparably harm the continuing relations between the employer and the majority representatives and cause hardship for individual employees.
>
> County of Union at 452.

The instant matter is distinguishable. In Union, the employer was withholding 5 days' pay; in this matter, a $415 fine

was roughly equal to less than two days' pay on a $55,000 salary. In Union, the withholding affected approximately 1500 employees - - three entire negotiations units. Here, the fines affected 650 employees - - approximately 3% of the statewide negotiations unit. In Union, employees could do nothing to alleviate the harm of the employer's action. Here, many employees could and did make choices to alleviate or avoid the harm flowing from the employer's unilateral action.

Finally, in the instant matter, the parties engaged in discussions of this matter as it evolved. The unions secured significant adjustments to the employer's order that helped alleviate addressing the medical documentation requirement - - the lengthening of the time within which to produce the medical documentation; and allowing employees to convert sick leave call outs into AL time, comp time or vacation time. The organizations' ability to secure such terms in difficult, fast-moving circumstances demonstrates a continuing ability to viably represent their units.

* * *

Having considered all of the facts and arguments presented in these cases, I conclude that Charging Parties have not met the heavy burden requisite for securing interim relief. The nature of the harm created under the circumstances of these cases is primarily economic in nature and can be redressed by the

Commission at the conclusion of plenary proceedings, should Charging Parties prevail. Union Cty., supra.

ORDER

The application for interim relief is denied. The charge will be forwarded to the Director of Unfair Practices for processing in accordance with the Commission's rules.

Charles A. Tadduni
Commission Designee

Dated: August 20, 2010
Trenton, NJ