As part of the program, you will have access to medical information, immediate resources, and advice from a health care professional, on your first day of absence. You will also be able to take advantage of extended clinic hours at the 233 Park Avenue South facility during weekends and holidays.

We plan to solicit your feedback on a regular basis, which will allow us to make phased adjustments to this pilot program as necessary. Your input will ensure that we are implementing the most effective and comprehensive program.

If you have any questions regarding the integrated absence program, you can contact Paulette Counts, Medical Operations Manager (212-435-2666) or Robin Martin, Medical Services Director (212-435-8447).

//Original Signed By//
Mary Lee Hannell
Chief, Human Capital

[J-24; PA-8(b)]

51. Paul Nunziato, a PA Police Officer since 1987, PBA President since 2010, and the PBA's lead negotiator, explained the process by which police officers called out sick or IOD prior to the implementation of the pilot IAP. Officers calling out sick or injured in the line of duty called the absence control unit (a 1-800 number) and a sergeant or lieutenant would usually answer. If the sergeant or lieutenant was not present, the call transferred to a sergeant on the central police desk. (T161-165)

52. The police supervisor who took the call would ask for the nature of the medical leave (i.e., sick or IOD). The Supervisor from the absence control unit would schedule an appointment for the officer with OMS on or after the officer's sixth day of absence. (T 165-166, T 211-214, T 667-668, T 534, 543)

53. Prior to the implementation of the IAP, the Office of Medical Services was not open on weekends. Officers were not scheduled for follow-up appointments on weekends, holidays, or their scheduled days off. (T166)

54. Citing J-9 (PBA MOA) §XVI(1)(C)(IV), Officer Nunziato explained that: "When [you were] sick or injured in the line of duty, you're assigned day tours following your chart. So if I was steady midnights and my RODs happened to be Monday or Tuesday I would not get called on those two days, but I'd be available the rest of the days, Monday through Friday, to come to Medical." (T167)

55. Officers who called out sick (but not IOD or hospitalized) for less than 5 days could self-return by calling absence control and reporting that they were returning to duty prior to their scheduled visit. (T165, 215)

56. Prior to the IAP, PA law enforcement personnel reported to the Manhattan, South Park Avenue Clinic for annual physical exams, promotional exams, and medical status evaluations (which are referred by a supervisor who believes a possible medical condition may affect the referred officer's ability to perform). (T452-453)

57. Prior to the implementation of the pilot IAP, police officers had a defined location to report for evaluation by OMS for return to duty, based on the proximity of the officer's command assignment. (T 165)

58. The LBA introduced a document depicting the PA medical clinic locations to which Public Safety employees reported for medical services (including return to duty and fitness for duty exams) based on their command assignments prior to March 3, 2014. (LBA-1)

59. The following commands reported to PATC Medical: NLIA, SIB, NJMT, HT, LT, CPD and ESU-NJ. (Id.)

60. The following Commands reported to Park Avenue South :GWB, WTC, PABT, K-9, CIB, ESU-WTC, PATH (annual physical only). (Id.)

61. JFK, LGA and ESU-NY reported to JFK Medical. (Id.)

62. #55 PATH reported to PATH Medical (for sick/IOD). (Id.)

63. While searching the Authority's website, Mr. Gomes discovered a document titled "Employee Overtime Performance - 1st Quarter 2015". (IBEW-8) Page 2 of the report has a section captioned "Integrated Absence Management", which states:

> The Integrated Absence program is now fully established and continues to help reduce the average days lost per employee. Compared to the baseline period (March 2013 through February 2014) preceding the implementation of the program, the agency's average lost days per employee due to sick decreased by 10% and by 13.5% for Injury-On-Duty (IOD), respectively.
>
> Office of Medical Services (OMS) will continue to reinforce compliance with the 24/7 Absence Call Center as well as coordination with nurse case management to provide immediate tracking of each absence. In addition, OMS will expand required utilization of weekend clinic hours to Aviation and PATH to expedite return to duty examinations. (T 62, 64; IBEW-8)

POSITIONS OF THE PARTIES

Charging Parties' Positions

1. The PA unilaterally modified established terms and conditions of employment by changing Clinic hours and reporting locations when it implemented the IAP. (79 PAERP 39, 43, 44, 45 and 46: 79 PAERP 14 to 19) (PBA brief, pp.15-17)

2. The PA violated the past practices clause of the MOA and the Labor Instruction by unilaterally determining that employees must go to the Park Avenue South Clinic for evaluation on weekends and holidays. The location of the provision of medical services is a mandatorily negotiable subject of bargaining. (89 PAERP 5) (PBA brief, p.22)

3. The Unions were not required to Request impact negotiations. (89 PAERP 5) (PBA brief, pp. 27-29)

4. The unilateral implementation of the pilot and permanent IAP included new reporting requirements which affected the terms and conditions of negotiations unit members' employment. (IBEW Local 3 and IUOE Local 30 brief, p.18, 19)

5. The parties had an established practice on absence reporting, which should not have been altered without negotiations. PAI 20-3.04, *Medical Absence Reporting*, "outlines the policies and procedures governing the reporting of employees who are absent from work for medical reasons." (J-23). The PAI is incorporated into the parties' contracts and is explicitly protected by the past practice provision. (Id.)

6. The PA failed to negotiate with the Unions about procedural and economic impacts of its implementation of the IAP, which are themselves terms and conditions of employment. (Id. pp. 20-21) (IP-99-35)

7. "Inasmuch as the new terms and conditions of employment, unilaterally imposed by the employer's implementations of the [IAP] involve procedures for returning to work from sick or injury absences, proof of illness, the time when employees must notify the employer that they will be absent, issues involving employee health and safety including free physical examinations, the availability of nurse case managers to assist them with their health and other such issues, these procedures are mandatorily negotiable." (Brief submitted on behalf of original six charging parties at pp. 105-106, citing PERB cases)

8. Since the new procedures unilaterally implemented by the Authority trigger consequences which may include discipline for failure to comply, the procedures are mandatorily negotiable. Therefore, the Authority violated Section XI(A)d when it implemented the IAP without negotiations. (Id. p. 106, 107) (*State of New York*, 37 PERB ¶ 6601 [2004]; *City of Albany*, 7 PERB ¶ 3078 [1974])

9. The Authority's unilateral implementation of the IAP violates §XI(A)(d) because it pertains in part to the provision of medical services, a mandatory subject of negotiations. (79 PAERP 39,43,44,45,46; 86 PAERP 12-17)

10. Unilateral changes to hours, and changes to the location at which medical services are provided violate §XI(A)(d) because they are mandatorily negotiable. (Id., p. 108) (79 PAERP 14-19; 89 PAERP 5)

Port Authority's Positions

1. The IAP is a reasonable sick leave verification policy and a management prerogative. Most of the absence reporting protocols have been in place for many years and have remained unchanged since the adoption of the IAP. Police employees continue to call the Absence Control Unit. The two-step process requiring civilian employees to call the MAEU after contacting their supervisor is a *de minimis* change. The extra phone call has caused no hardship nor is there evidence of HIPAA or confidentiality breaches.(89 PAERP 19; 01 PAERP 30, 31 and 32; *Piscataway Twp. Bd. of Ed.* 8 NJPER 13039 (1982) and *Poughkeepsie City School District* 19 PERB 3046 (1981) the Authority) (PA brief, pp. 14-15)

2. The Unions have failed to meet their burden of proof under LRI Section XI(A)(d), Panel precedent, and applicable case law.

3. There are essentially two dimensions to the policy that the Charging Parties are challenging within the context of these Improper Practice Charges: 1) the absence management protocols for reporting and monitoring employee absence and 2); the weekend medical clinic hours related to fitness for duty and return to duty examinations, both of which are non-mandatory subjects.

4. Operations order #2015-OPS-110 was a reasonable verification of sick absence in furtherance of successful operations, productivity and efficiency, and was justified by the public policy objective of ensuring sufficient public safety. (*Svarnas v. AT&T Communicatsion* T, 326 *NJ Super* 59 (App. Div. 1999); *Sternkopf v White Plains Hospital*, 2014 WL 789641 (S.D.N.Y.); Local 195, *IFPTE, AFL-CIO v. State*, 88 *NJ* 393, 443, A.2d 187 (1982)

5. Much of the testimony offered by the Unions about reporting and monitoring impacts of the IAP was based on uncorroborated second and third hand hearsay. (Id. p. 17-18)

6. The Authority had no obligation to negotiate with the Unions about the hours of or the locations for examinations. Fitness for Duty or Return to Duty examinations are not terms and conditions of employment and therefore are not mandatorily negotiable. (Id. p. 19-23) (99 *PAERP* 35)

7. The *Charging Parties* demanded negotiations of neither the implementation of nor impact of the IAP. Therefore, the Unions failed to meet the conditions precedent required by state case law and the Panel to obtain the relief sought. (83 PAERP 11; 89 *PAERP* 19; 92 *PAERP* 49, 51, 53); see p. 30 13 *NJPER* 18094 (1987) (Id. p. 26-31)

8. The Past Practice Clauses are inapplicable because the IAP is a reasonable sick leave verification policy and not a mandatory subject of negotiations. (99 *PAERP* 35; 89 *PAERP* 19/24) (PA brief, p. 32)

9. The cases cited by the Charging Parties (89 *PAERP* 05 AND 94 *PAERP* 27, 28, 29, 30 and 32) are not controlling because they deal with closing medical facilities where employees received annual exams, and changing the hours of operation of an employee cafeteria, which are irrelevant to the decision to expand or alter the number of hours OMS has a medical facility open, a policy decision consistent with the view that "fitness for duty" and "return to work" are not mandatory subjects of negotiation. (Id. p. 35-37)

ISSUES PRESENTED

1. Whether the Port Authority violated Section XI(A)(d) of the Labor Relations Instruction and the Charging Parties' MOA's when it unilaterally implemented the Integrated Absence Program? If so, what shall be the remedy?
    a) Was all or some of the IAP a sick leave verification policy?
    b) Did the Port Authority have the unilateral right to require fitness for duty examinations be conducted on Saturday and Sunday in certain circumstances?
    c) If so, did the Port Authority have the unilateral right to require that all such examinations only be held during the weekend hours it set and only at the Park Avenue OMS location?
    d) If some or all of the IAP was a sick leave verification policy did the Charging Parties' demand impact negotiations, and if so, did the Port Authority refuse such negotiations?
    e) Did the Port Authority violate Section XI (A)(d) of the Instruction by ordering officers who reported out sick or IOD on December 31, 2015 and January 1, 2016 to report for fitness for duty exams on January 2 and January 3, 2016?

DISCUSSION

Having reviewed the extensive documentation that accompanied these charges it appears to me that this consolidated matter is really a tale of two cases. The record shows quite clearly that the IAP affected many civilian employees differently than the police employees. The top portion of the absence reporting requirements in the IAP (Exhibits J-24 and J-25) directly affected the civilian employees, but to my knowledge, civilian employees were, if at all, only occasionally affected by the implementation of Saturday and Sunday OMS hours in Manhattan. The police employees, however, were not affected by the absence reporting requirements in the IAP, because they continued to call the police absence control unit for their absences, but they were directly affected by the requirement in the IAP to go to the

Manhattan Clinic on Saturdays or Sundays if the Saturday or Sunday was their 6th regularly scheduled work day.

According to the Port Authority, the only change for civilian employees resulting from the IAP is that they must now call the toll-free phone number for the Medical Absence Evaluation Unit's (MAEU) call center on their first absence day. The Charging Parties, however, argue there were far more extensive changes. They note that the changes include the Port Authority: requiring employees provide additional information on their first date of absence; sending correspondence to the employee's home at the beginning of their absence; unilaterally scheduling a medical examination appointment for the employee; contacting the employee each day of his/her absence; referring the employee to the optional use of a Nurse Case Manager; and, requiring the employee to report to the Manhattan OMS facility if their 6th regularly scheduled work day fell on a weekend or holiday.

Relying upon numerous cases not limited to but particularly including 79 *PAERP* 14-19; 79 *PAERP* 39-46; 86 *PAERP* 12-17; and 89 *PAERP* 5, the Charging Parties strenuously argued that all of the changes the Port Authority unilaterally implemented through the IAP negatively affected and/or changed existing terms and conditions of employment. According to the Charging Parties, as a result of that implementation the Port Authority violated Section XI(A)(d) of the Instruction and breached the past practice clauses of the parties' respective Memorandums of Agreement.

Not surprisingly, the Port Authority had a much different view of this case. Relying upon several cases not limited to but including 83 *PAERP* 17; 89 *PAERP* 19; and, 99 *PAERP* 35, the Port Authority argued that the call in and follow up requirements in the IAP were reasonable sick leave verification procedures which were not mandatorily negotiable. Similarly, the Port

Authority argued that the IAP requirement that employees in certain circumstances appear at the Park Avenue OMS facility on weekends and holidays for a fitness for duty/return to work examination was not a mandatory subject of negotiations.

The Charging Parties argued that 79 *PAERP* 14-19 supports their position that the Port Authority commits a violation of the Instruction by unilaterally implementing changes or alterations to matters involving mere convenience to bargaining unit members which are mandatory subjects of negotiations. In that case the Panel found that the Port Authority violated the Instruction by curtailing/modifying cafeteria hours and the level of service which it found was a mandatory subjects of negotiations.

Following through on that same argument the Charging Parties noted that the Panel has found that the Port Authority violated the Instruction by unilaterally changing the method by which it notified police officers of certain promotional opportunities 86 *PAERP* 20; violated the Instruction and the parties' past practice clauses by unilaterally discontinuing the funding for an employee welfare fund 85 *PAERP* 16-19; and, that the Commission in *Brick Board of Education*, P.E.R.C. No. 2003-25, 28 *NJPER* 436 (¶ 33160 2002) found that the unilateral change in the timing of employee paychecks violated the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A *et. seq.* (Act).

Based upon those cases the Charging Parties contend that in this case the Port Authority's unilateral changes in the procedures for reporting sick absences; providing unit members with access to medical information; immediate resources; the availability of a nurse case manager; a procedure involving administrative referrals for discipline; the hours and locations at which employees may be required to report for medical services and/or for fitness for duty/return to work examination, violated both the Instruction and the parties' past practices.

Citing to 79 *PAERP* 39, 43-46 and 86 *PAERP* 12-17, the Charging Parties also contend that even if the IAP concerned sick absence monitoring, it violated the Instruction and the parties' past practices because it also concerned medical services such as flu shots, immunizations, vaccinations, free physical examinations and the optional use of a nurse case manager; all of which the Charging Parties argued are negotiable terms and conditions of employment and make the IAP more about negotiable subjects than not.

The Port Authority, however, contends that the IAP is a reasonable sick leave verification policy and is not mandatorily negotiable. It noted that the absence reporting requirements therein did not apply to police employees, and that the one new requirement for civilian employees - to call the MAEU in addition to their supervisor - was not unreasonable. The Port Authority also argued that Operations Order 2015-OPS-110 (affecting the DEA, SBA, LBA and PBA) was a reasonable sick leave verification of absence for officers who called out sick on December 31, 2015 and January 1, 2016.

The Port Authority noted the Panel's decision in 89 *PAERP* 19 wherein it held that the implementation of a reasonable sick leave verification policy is a managerial prerogative and not subject to mandatory negotiations. According to the Panel in that case, policies and procedures containing reasonable means to verify employee illness or disability are not negotiable, but issues such as compensation that may arise from the application of such policies would be negotiable. The Panel in that decision also emphasized that since such sick leave verification policies are not mandatorily negotiable, then the modification of such policies are also not mandatorily negotiable.

The Panel in 99 *PAERP* 35 reiterated that the Port Authority has the prerogative to unilaterally establish a reasonable sick leave verification policy and it added that such

prerogative includes "the right to determine how many absences trigger a verification requirement, and the right to define the period in which those absences will be counted". *Id.* at p. 8. But the Panel also held in that decision that a requirement that an employee report to an OMS facility on the day he/she called in sick was unreasonable.

In 01 *PAERP* 30-32, the Panel again held that the Port Authority had the prerogative to implement a reasonable sick leave verification policy, but it emphasized that economic and certain procedural impact issues arising from such implementation were terms and conditions of employment. The Panel concluded therein that the Port Authority failed to negotiate over the charging parties' demand for impact negotiations over certain issues.

Having considered the testimony and the parties' arguments and the cases cited in their briefs, I find that the absence reporting requirements in the IAP, including the new requirement that civilian employees call the OMS Absence Call Center to provide information in addition to calling their supervisor to report their absence, and the items listed in paragraphs 1 and 2 of J-24 and J-25, were reasonable elements of the Port Authority's sick leave verification policy. The new requirement for civilian employees to call the MAEU was directly related to a reasonable method to verify the employees absence; and the information obtained from that call or calls was very similar to the information collected in J-23, the prior Medical Absence Reporting Policy, and such information is appropriate information to gather to verify an employee's absence.

In accordance with the Panel's decision in 89 *PAERP* 19, the Authority had the prerogative to make reasonable modifications to its absence reporting requirements and in my view that is what it did in Sections 1 and 2 of the IAP. Those modifications (as compared to J-23) were dissimilar from the employer changes in 79 *PAERP* 14-19; 86 *PAERP* 20; and, *Brick*

Board of Education. In those cases, the employer changed a negotiable benefit. The modifications/changes the IAP made to the Port Authority's pervious sick leave verification policy, however, did not eliminate or change a prior benefit. Rather, it created a system (the MAEU) to better verify employee absences, and it continued to request information related to such verification.

The fact that the nurse case manager may have an increased role in the verification process does not, in my view, create a negotiable obligation for the Port Authority because the case managers contacts with the employee are still related to the verification of the employee's use of sick leave. Paragraph 12 of Exhibit PA-10 demonstrates that the case manager will contact the employee on the third absence day to offer assistance, and on the fifth absence day to schedule the employee for an OMS appointment. While the employee need not accept assistance, contacting the employee on his/her third and fifth absence is an opportunity for the case manager to verify the employee's continued absence, and the scheduling of the OMS appointment is both part of the Port Authority's managerial prerogative to verify sick leave and its prerogative to determine fitness for duty.

Although the Port Authority has the prerogative to verify sick leave, that prerogative does not mean the Port Authority has the right to harass employees in verifying their sick leave. The Charging Parties seem to argue that the increased employee contacts by letter and/or telephone resulting from the IAP is either unreasonable and/or harassing and, therefore, negates the Port Authority's right to implement the IAP. If the Port Authority's daily or every other day contacts were unreasonable, I would agree with the Charging Parties. But the Port Authority has the right to verify an employee's absence everyday of their absence, and the use

of letters and the telephone to make contact with the employee to verity their absence is a reasonable method to contact the employee.

While I would not condone harassment in the use of those methods, the presence of any such harassment is not justification for the elimination of a verification policy, but rather it must be dealt with by seeking to discipline the person or people who have harassed others. To the extent the Charging Parties contend that the Port Authority's use of letters and telephone calls to verify sick leave harassed employees in these cases, I find the evidence insufficient to support an improper practice.

My basis for finding the IAP was - for the most part – a sick leave verification policy also applies to Operations Order 2015-OPS-110. It is basic common sense that an increased police presence is needed in Manhattan and the greater New York-New Jersey metropolitan area on New Year's Eve and New Year's Day. Applying the test provided in *Local 195, IFPTE, AFL-CIO v State*, 88 *N.J.* 393 (1982), and balancing the interests of the public employees and the Port Authority, I find that the Port Authority's need to provide extra coverage on those days – and therefore its need to verify the use of sick leave on those days – was the dominant and an emergent concern. Given the importance associated with such coverage on those days it was not unreasonable for the Port Authority to schedule fitness for duty exams on January 2nd and 3rd 2016. Although, as explained later, I believe the place, day and time of the fitness for duty exams is negotiable, given what I believe was the Port Authority's emergent need to quickly verify the use of sick leave on December 31, 2015 and on January 1, 2016, I believe the Port Authority had the prerogative to require that those exams be held at the Manhattan OMS clinic on January 2nd and 3rd, 2016.