

<b>Matter of Murphy v Hall</b>
2008 NY Slip Op 30863(U)
March 11, 2008
Supreme Court, Nassau County
Docket Number: 6254-07/
Judge: Joseph P. Spinola
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**SHORT FORM ORDER**  
SUPREME COURT, STATE OF NEW YORK  
COUNTY OF NASSAU

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**In the Matter of the Application of**  
**JOHN MURPHY, *Et al.***  
Petitioners

**Trial/IAS Part 19**  
**Index No. 07-16254**  
**Sequence No. 01, 02**  
**Submit Date 11/23/07**

*against*

**WAYNE J HALL, SR., *Et al.*,**  
Respondents

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**The following papers read on this motion:**

- Notice of Motion/Petition..... X**
- Cross-Motions..... X**
- Answering Affidavits..... X**
- Replying Affidavits.....**

**PRESENT: HON. JOSEPH P. SPINOLA**

This hybrid proceeding involves a collective bargaining agreement (“CBA”) between the respondent Village of Hempstead Police Department (“the Police Department”) and petitioner Hempstead Police Benevolent Association. This CBA covered the period from June 1, 2002 through May 31, 2007, and is now expired. It contained a two-part sick leave provision: part 8(E)(3)(a) is a “stay at home” requirement, requiring those on sick leave to stay at home 24-hours a day while on sick leave, except where permission is specifically granted by the Chief or Watch Commander; part 8(E)(3)(b) provided for exemptions from the “stay at home” requirement.

Ordinarily, when a collective bargaining agreement expires, its terms continue in effect until a successor agreement is reached. However part 8(E)(3)(b), including the right to “grievance machinery,” was subject to an express “sunset” provision, namely, this CBA provided that part 8(E)(3)(b) would “expire one day prior to the expiration of the CBA. Consequently, it is part 8(E)(3)(a) which governs current sick leave determinations.

The petition herein contains three causes of action. In their first cause of action

petitioners Dawn Borum (police officer on sick leave alleging injuries to both thumbs) and Frank Mylett (police officer on sick leave alleging injuries to head, neck, lower back, legs and wrist) complain that under the current sick leave policy they are restricted to their homes on a 24-hour 7-day a week basis, and that this "sick leave policy was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, and an abuse of discretion" (petition par.23). There is no relief sought in the first cause of action. In their second and third causes of action petitioners seek declarations that respondents' sick leave policy is unconstitutional. The petition itself contains no "Wherefore" clause and no prayer for relief, although it is accompanied by an order to show cause wherein petitioners seek, inter alia, declaratory and injunctive relief, overtime compensation, and attorneys fees.

Respondents seek pre-answer dismissal of this proceeding based upon the argument that petitioners' claims are moot. Subsequent to the filing of the petition, respondents issued General Order #27, which they argue remedies any potential for arbitrary application of the "stay at home" sick leave policy at issue.

The standard for judicial review of police regulations is rationality [*Cain v Board of Police Commissioners of Metropolitan Police Dept. of City of St. Louis*, 920 F2d 1402, 1408-1409 (8<sup>th</sup> Cir. 1991); *Philadelphia Lodge No. 5 v City of Philadelphia*, 599 FSupp. 254, 257-258 (MDPA 1985), affd by *Local 22, Intern. Assn of Firefighters, AFLCIO v City of Philadelphia*, 779 F2d 43 (3<sup>rd</sup> Cir. 1985)], that is, whether the subject regulation is rationally connected in a non-arbitrary fashion to the municipal interest at issue [*Voorhees v Shull*, 686 FSupp. 389, 394 (EDNY 1987); see also *Uryevick v Rozzi*, 751 FSupp. 1064, 1068 (EDNY 1990)].

The interest of the Police Department in maintaining its "stay at-home" sick leave policy is to have an effective means of ensuring that a disabled member performing no duty does not partake in activity that is inconsistent with her status and might undermine her expeditious return to service [*Loughran v Codd*, 432 FSupp. 259, 263 (EDNY 1976)]. Further, the Police Department's interest is not only in tracking the individual rehabilitative progress of the disabled member, but also to encourage departmental efficiency and soothe the additional burdens imposed on working officers caused by their colleague's absence [*Loughran* at 264]. The "stay at home" sick leave policy minimizes "goldbricking,"<sup>1</sup> thereby promoting a fair distribution of the department workload [see *Loughran* at 264].

In considering a challenge to a police department sick leave policy similar to the one at issue herein the Eighth Circuit Court of Appeals stated:

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<sup>1</sup>"Goldbrick," vb., a form of swindle in which worthless gold bricks are passed off as being made of gold; to evade or half heartedly perform assigned work; shirk duty or responsibility [Webster's Third New International Dictionary (1963), p.975].

The legitimacy of the Police Board's interests is obvious. "[A] police department has a substantial interest in developing 'discipline, *esprit de corps*, and uniformity' within its ranks so as to insure the safety of persons and property." *Hughes v Whitmer*, 714 F2d 1407, 1419 (8<sup>th</sup> Cir. 1983)(quoting *Kelley*, 425 US at 246, 96 SCT at 1445), cert. denied, 465 US 1023, 104 SCT 1275, 79 LED 2<sup>nd</sup> 680 (1984). The police department, as a paramilitary organization, must be given considerably more latitude in its decisions regarding discipline and personnel regulations than the ordinary government employer. See 714 F2d at 1419. Importantly the restrictions that appellants complain of are not restrictions of their rights at all times, but rather are limitations placed on their activities only when officers represent that they are too ill to report to duty. While acknowledging that the St. Louis Police Department's sick leave regulations are stringent, we have no difficulty finding that they are rationally connected to the legitimate interests the department has articulated.

[*Cain*, 920 at 1409]. This court agrees. In this case, the Police Department's "stay at home" sick leave policy, while stringent, is rationally connected to the legitimate interests of the Police Department.

Is the "stay at home" sick leave policy herein rationally connected in a non-arbitrary fashion to the Police Department's interests? With the expiration of part 8(E)(3)(b), no exemption from the "stay at home" policy is provided. Officer Borum complains that she has become a prisoner in her own home, and she insists that she is "injured, not bedridden" (Borum affidavit, par. 22). While part 8(E)(3)(a) does provide for permission to leave the residence from the Chief or Watch Commander, that permission is limited to emergencies, treatment, or "such other reason as may be approved."

Where no guidelines exist, a determination to grant or deny permission to engage in an activity rests solely within the discretion of the decision maker, and that absolute discretion carries with it the potential for arbitrary application [*Voorhees v Shull*; see also *Uryevick v Rozzi*]. However General Order #27 clarifies the language "or such other reason as may be approved" of part 8(E)(3)(a) to include the following:

- (1) Scheduled medical appointments;
- (2) Trips to purchase food, medicine and household necessities;
- (3) Observances concerning sincerely held religious beliefs;
- (4) Voting;
- (5) Exercise recommended by an attending physician;
- (6) Answering court subpoenas;

(7) Reporting to Police Headquarters when ordered to do so.

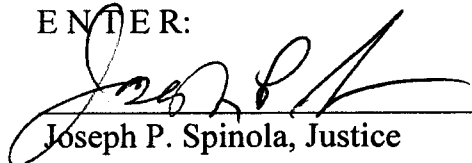
The availability of these same seven circumstances for permission to leave one's residence were found to "negate" arbitrariness alleged with respect to a sick leave policy for police officers in *Atterberry v Police Commissioner of Boston* [392 Mass 550 (1984), cert. den. by *Atterberry v Jordan*, 469 US 1208 (1985)]. This Court finds that these seven important and specific circumstances where permission to leave may be considered by the Chief or Watch Commander negates the arbitrariness alleged by petitioners. Respondent Police Department's "stay at home" sick leave policy, as modified by General Order #27, is rationally connected in a non-arbitrary fashion to the legitimate interests of the Police Department's interests in speeding the recuperation of its officers, maintaining discipline and moral, and preventing abuses.

Based on the foregoing, respondents' motion to dismiss as moot petitioners' requests for declarations of the unconstitutionality of the subject sick leave policy, as set forth in their second and third causes of action, must be granted. While the Court has some doubt as to whether the first cause of action states a claim under Article 78, to the extent that it alleges the Police Department's sick leave policy is arbitrary and capricious, this cause of action is also now moot, based on the Court's finding that General Order #27 "negates arbitrariness."

Accordingly, Petitioners' application denied and the motion by respondents for dismissal of petitioners' proceeding pursuant to CPLR 7804(f) is granted. The relief sought in the order to show cause is denied, and the petition is dismissed.

This constitutes the decision and order of the Court.

ENTER:

  
Joseph P. Spinola, Justice  
Supreme Court, Nassau County

Dated: March 11, 2008  
Mineola, NY

**ENTERED**

MAR 21 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE