I.R. NO. 2019-25

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF OLD BRIDGE,

Petitioner,

-and- Docket No. SN-2019-042

UNITED SERVICE WORKERS UNION,
IUJAT, LOCAL 255,

Respondent.

SYNOPSIS

A Commission Designee grants the Township's request for an interim restraint of binding arbitration pending the outcome of a scope of negotiations petition before the Public Employment Relations Commission. The grievance alleges that the Township violated the parties' collective negotiations agreement by requiring certain unit members to provide a doctor's note for every sick day used. Finding that the Township has demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal allegations that arbitration should be restrained because it had a managerial prerogative to issue memoranda to certain unit members identifying their sick leave usage patterns and notifying them that future sick leave would require a doctor's note, and that the Township would suffer irreparable harm if required to arbitrate this matter prior to a final Commission decision, the Designee grants interim relief.

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Appearances:

For the Petitioner, Cleary, Giacobbe, Alfieri & Jacobs LLC, attorneys (Adam S. Abramson-Schneider, of counsel)

For the Respondent, Rothman, Rocco, LaRuffa LLP, attorneys (Eric J. LaRuffa, of counsel)

DECISION

On January 16, 2019, the Township of Old Bridge (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the United Service Workers Union, IUJAT, Local 255 (Local 255). The grievance alleges that the Township violated the parties' collective negotiations agreement (CNA) by requiring certain unit members to provide a doctor's note for every sick day used. On April 2, 2019, the Township filed the instant application for interim relief seeking a temporary restraint of a binding arbitration scheduled for July 16, 2019 pending disposition of the underlying scope of negotiations petition.

PROCEDURAL HISTORY

On April 16, 2019, I signed an Order to Show Cause directing Local 255 to file any opposition by April 29 and setting May 3 as the return date for an oral argument via telephone conference. On May 1, after receiving no opposition from Local 255, the Commission Case Administrator notified the parties that the oral argument would therefore be canceled and I would issue a decision based on the Township's application for interim relief.[1/] The Township's application for interim relief was accompanied by a brief, exhibits, and the April 1 certification of Avril Limage, the Township's Human Resources Manager.

FINDINGS OF FACT

Local 255 represents the Township's public works and sanitation employees. The Township and Local 255 are parties to an MOA effective from January 1, 2016 through December 31, 2020 that was ratified on April 4, 2018. Their previous agreements were an MOA effective from January 1, 2012 through December 31, 2015, and a CNA effective from July 1, 2009 through December 31, 2011. Article IX, section B. of the CNA provides for 15 sick days per year (four of which may be designated by the employee as

1/ By letter of May 1, counsel for the Township asked that I grant interim relief based on its moving brief because Local 255 failed to file a response brief in opposition. Interim relief may only be granted if the legal requirements are met; I may not grant the Township's application by default just because Local 255 failed to respond.

personal days) that may be accrued from year to year. The 2016-20 MOA amended Article IX, section B. to add that employees hired on or after the MOA ratification date would only have 13 sick days (two of which may be designated by the employee as personal days). Article IX, section H. of the CNA requires that any employee out sick more than three consecutive days provide a doctor's note verifying the illness and expected date of return.

Limage has been the Township's HR Manager since November 8, 2016. On August 27, 2018, Limage generated a report reflecting the use of sick leave by all Township employees to discern any abuse, or excessive use, of sick time to ensure adequate staffing. In reviewing the sick leave report ("Report"), Limage identified and flagged employees engaging in the following patterns of behavior: (1) taking sick time on Fridays and/or Mondays; (2) taking sick leave the day before and/or after a holiday; and (3) employees generally using an excessive amount of sick time in the 2018 calendar year. Limage certifies that "The majority of Township employees accrue eleven (11) sick days per year."[2/] Limage considered those employees who had used ten or

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2/ I note that the CNA and MOA show that employees accrue either 15 or 13 sick days per year depending on when they were hired. Therefore, I must assume that Limage arrived at 11 days by subtracting those sick days which the agreements allow the employees to designate as personal days (four out of 15, and two out of 13). Article IX, section B. of the CNA provides that those personal days are also to accrue as sick days if not used by the end of the year.

more days of sick leave in 2018 by the date of the Report to have taken excessive sick leave because at that point they had exhausted most of their annual allotment of sick leave.

Limage certifies that after finding patterns of absences and excessive sick leave usage, the Township issued counseling/performance memoranda to both union and non-union Township employees to enable them to improve their job performance and allow the Township to verify that sick time is being used for its intended purpose. On September 11, 2018, the Township delivered the counseling notices to six union members. The counseling notices referenced the employees' excessive use of sick leave and advised that a doctor's note verifying any alleged illness would be required for all future sick leave used during the 2018 calendar year. The Township provided copies of two of those counseling notices (Exhibits B and C), one of which provides:

> This memorandum serves as a counseling notice for your abuse/chronic and excessive use of sick leave. (use of more than 10 full days used in 2018 as of 9/10/2018 without a medical note or FMLA leave documentation on file and/or multiple patterned absences).
>
> Employee's performance is not acceptable for the following specific reasons:
> A review of your sick time usage indicates that to date, you have used 20 sick days for the year. In addition, you have repeatedly used sick time on Fridays and/or Mondays as well as in conjunction with vacation and holidays. Use of sick days to extend

> weekends, holidays and/or vacations is prohibited.
>
> This conduct demonstrates a preliminary pattern of sick leave abuse and is prohibited by the Township. The excessive and abuse of sick leave not only disrupts the delivery of services to the Township of Old Bridge, but also negatively affects your co-workers. In order for your department to function and be productive, each employee's attendance is very important.
>
> Be advised that you shall be required to produce a doctor's note verifying your illness for all future sick leave absences during the 2018 calendar year. Please provide all doctors' notes to the Manager of Human Resources.
>
> Should you have any questions or concerns, please do not hesitate to contact me.

On September 17, 2018, Local 255 filed a grievance contesting the sick leave memoranda as violating the contract by creating a "warning level" for use of more than ten sick days in a calendar year, imposing a doctor's note requirement for single sick days, and questioning the use of sick leave used on Mondays, Fridays, or before or after holidays. The grievance requested that the memoranda be rescinded. On September 20, the Township's Director of Public Works denied the grievance, stating that the memoranda are counseling memoranda that are evaluative in nature and not disciplinary, and that the Township retains the managerial prerogative to verify employee illness. On December 20, Local 255 filed a request for arbitration with the Commission (Docket No. AR-2019-324) stating the following issue to be

arbitrated: "The Employer violated the collective bargaining agreement by requiring certain bargaining unit employees to provide a doctor's note for every sick day used." The Township's scope of negotiations petition and this interim relief application ensued.

STANDARD OF REVIEW

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. De Gioia, 90 N.J. 126, 132-134 (1982); 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).

In a scope of negotiations determination, the Commission's jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978) states:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even

> whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, the Commission does not consider the contractual merits of the grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
>
> [Id. at 404-405.]

Scope of negotiations determinations must be decided on a case-by-case basis. See Troy v. Rutgers, 168 N.J. 354, 383 (2000) (citing City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574 (1998)). Where a restraint of binding arbitration is sought, a showing that the grievance is not legally arbitrable

warrants issuing an order suspending the arbitration until the Commission issues a final decision. See Ridgefield Park, 78 N.J. at 154; Bd. of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975).

ARGUMENTS

The Township asserts that it has a substantial likelihood of success on the merits because it has a managerial prerogative to require verification of sick leave to prevent abuse, and non-disciplinary memoranda are not arbitrable. Citing Roselle Park Bor., P.E.R.C. No. 2006-85, 32 NJPER 162 (¶72 2006), it argues that the employer has the right to determine the number of absences and the situations that trigger a doctor's note requirement, and may require sick leave verification at any time. The Township argues that counseling memoranda to notify employees of performance deficiencies, not to impose discipline, are not arbitrable.[3/] It asserts that, in this case, the counseling memoranda were not designed to criticize or penalize, but to notify of performance deficiencies, specify the manner of deviation, and attempt to improve performance in the area of attendance/sick leave usage by noting how the deficiencies would be monitored going forward.

3/ The Township cites Plainsboro Tp., P.E.R.C. No. 2009-26, 34 NJPER 380 (¶123 2008); Monmouth Cty. Prosc., P.E.R.C. No. 2014-91, 41 NJPER 61 (¶18 2014); and Delaware Valley Reg. Bd. of Ed., P.E.R.C. No. 2017-39, 43 NJPER 295 (¶83 2017).

The Township asserts that it will suffer irreparable harm, in the form of squandered time, energy, and money, if its request to stay the arbitration is not granted. It argues that both the Township and Local 255 will suffer harm if the stay is not granted by having to go forward with the arbitration before the Commission's negotiability determination, but that Local 255 will suffer no harm if the stay is granted. The Township asserts there will be no substantial injury to the public interest if arbitration is stayed, but rather the public's interest would be injured if the stay is not granted due to the public's resources being squandered on an arbitration proceeding that could be rendered moot by the final Commission decision on the merits.

ANALYSIS

A public employer has a managerial prerogative to verify that sick leave is not being abused, which includes the prerogative to verify sick leave at any time. City of Elizabeth and Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). The employer's right to verify illness includes the right to determine the number of absences and the situations that trigger a doctor's note requirement, regardless of whether the employees have exhausted their earned sick leave, and the right to define the period in which those absences will require a doctor's note. State of New

Jersey (Dept. of Treasury), P.E.R.C. No. 95-67, 21 NJPER 129 (¶26080 1995); State of New Jersey, P.E.R.C. No. 2000-32, 25 NJPER 448 (¶30198 1999); Raritan Tp., P.E.R.C. No. 2000-97, 26 NJPER 284 (¶31113 2000); and Montclair Tp., P.E.R.C. No. 2000-107, 26 NJPER 310 (¶31126 2000). This prerogative encompasses requiring employees suspected of abusing sick leave to bring in a doctor's note for any future absence. See, e.g., Burlington Cty., P.E.R.C. No. 97-3, 22 NJPER 274 (¶27147 1996); UMDNJ, P.E.R.C. No. 95-68, 21 NJPER 130 (¶26081 1995); and Rahway Valley Sewerage Auth., P.E.R.C. No. 96-69, 22 NJPER 138 (¶27069 1996) ("the Authority's decisions to place certain employees on a 'sick list' and to require a doctor's note to verify any future absence is not in and of itself disciplinary or otherwise mandatorily negotiable.")

In Raritan Tp., a unit member was identified as having used sick leave on Fridays and Mondays in violation of a new sick leave policy that included possible home phone, home visitation, and doctor's note requirements for such patterns of sick leave usage. The union grieved the employer's issuance of a memorandum notifying the unit member of his sick leave usage and that, "On the next Monday or Friday sick day occurrence, you will receive a phone call or visit from a Supervisor to verify your whereabouts, per the Policy." 26 NJPER at 285. The Commission restrained arbitration.

In Burlington Cty., the employer conducted a counseling session with a unit member to address her alleged abuse of sick leave, including excessive sick leave and use of sick leave in conjunction with days off. The employer also issued a counseling form indicating that she would be required to submit a doctor's note for any absence during the next six months and that her next infraction would lead to appropriate action. 22 NJPER at 275. The union filed a grievance alleging that the counseling session became disciplinary by imposing the doctor's note requirement. Ibid. The Commission restrained arbitration, holding, "We reject CWA's claim that the instant doctor's note requirement should be viewed as a disciplinary action rather than as a legitimate attempt to ensure that sick leave will not be abused." Ibid.

In State of New Jersey (Dept. of Treasury), the employer issued memoranda informing employees who had exceeded a certain number of sick leave days that future sick leave would require a doctor's note, that failure to provide such documentation could lead to discipline, and that the employee's use of time off would be monitored. The Commission restrained arbitration of the union's grievance alleging that the memoranda violated the CNA's sick leave clauses, holding that, "The employer has a prerogative to decide the number of absences triggering a notice to employees that a doctor's note is required and that the employees' attendance will be monitored." 21 NJPER at 130.

In Atlantic Cty. Sheriff's Office, 43 NJPER 202 (¶60 2016), the employer modified its sick leave policy to include monitoring of repeated instances of "calling out before or after regular days off, weekends, holidays, military leave and/or vacation without documented medical justification" within a 12 month period. The union grieved the employer's issuance of an electronic performance notice to a unit member that informed him of his violation of the sick leave policy and that future violations would result in progressive discipline. Id. at 204. The Commission restrained arbitration of the grievance, finding:

> Under these circumstances, we find that the electronic performance notice at issue was not designed to penalize the grievant for past conduct, but was issued to specify the manner in which he violated sick leave protocols and to remind him to be more diligent in the future. The performance notice does not indicate a failure to improve and does not impose discipline; rather, it warns that future violations will result in discipline.
>
> [43 NJPER at 206.]

Here, the Township adopted a policy that certain patterns of sick leave usage, such as at least ten sick days utilized before the end of the year, and patterns of Mondays/Fridays or days before/after holidays being taken off, would trigger a doctor's note requirement for any future sick leave days during calendar year 2018. The memoranda informing the affected employees did not impose discipline, but notified them of their sick leave

usage patterns and why they would therefore be required to submit a doctor's note for future sick days for the remainder of 2018. Thus, this case is analogous to Raritan Tp., Burlington Cty., State of New Jersey (Dept. of Treasury), and Atlantic Cty. Sheriff's Office. As here, these cases all involve the employers' determinations that certain numbers of sick leave absences within a certain time frame, or certain patterns of sick leave usage, warranted counseling and/or memoranda to inform employees of their performance deficiencies concerning sick leave and that future sick leave use would trigger additional verification or potential discipline.

Furthermore, the Commission has stated that such counseling, which the employer has represented as non-disciplinary, cannot be viewed as prior discipline for purposes of progressive discipline in any future disciplinary proceeding. See City of Elizabeth, P.E.R.C. No. 2000-42, 26 NJPER 22 (¶31007 1999) ("Should any sanction flow from an individual counseling session, the employee may contest the sanction through binding arbitration."); West Windsor-Plainsboro Reg. Bd. of Ed., P.E.R.C. No. 97-99, 23 NJPER 168 (¶28084 1997) ("the Board has expressly stated that the memorandum is not disciplinary and has thus foregone any right in future cases to cite it as a previous reprimand if a future disciplinary dispute arises."); and Atlantic Cty. Sheriff's Office.

Given the legal precepts set forth above, I find that the Township has demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal allegations that arbitration should be restrained because the Township had a managerial prerogative to issue memoranda to certain unit members identifying their sick leave usage patterns and notifying them that future sick leave would require a doctor's note. Given that determination, I also find that the Township would suffer irreparable harm if required to proceed to arbitration before a final Commission decision on this matter. See Raritan Plaza I Assocs., L.P. v. Cushman & Wakefield 273 N.J. Super. 64, 70 (App. Div. 1994), quoting Paine Webber, Inc. v. Hartmann, 921 F.2d 507, 514-15 (3d Cir. 1990) (overruled on other grounds), "[H]arm to a party would be per se irreparable if a court were to abdicate its responsibility to determine the scope of an arbitrator's jurisdiction and, instead, were to compel the party, who has not agreed to do so, to submit to an arbitrator's own determination of his authority." See also Englewood, "Obviously, if the result of a given scope proceeding would negate arbitration, the prosecution of arbitration proceedings in the interim would constitute a monumental waste of time and energy." Id. at 124.

Next, I find the relative hardships to the parties weighs in favor of the Township, as denying interim relief would cause both parties to proceed with arbitration on an issue that the

Commission is likely to decide should be restrained from arbitration, while granting relief would save the parties from prematurely going forward with arbitration while also preserving Local 255's ability to arbitrate the issue should the Commission determine it is mandatorily negotiable and arbitrable. Finally, I find that granting interim relief would not injure the public interest but would support the public interest by the Township not expending the time, costs, and energy to defend itself in an arbitration proceeding that I find would likely be mooted by a final Commission decision in this case.

Based upon the above facts and analysis, I find that the Commission's interim relief standards have been met. Accordingly, the Township's application for interim relief is granted. This case will be referred to the Commission for final disposition.

ORDER

The Township's application for a restraint of binding arbitration is temporarily granted pending the final decision or further order of the Commission.

/s/ *Frank C. Kanther*
Frank C. Kanther
Commission Designee

DATED: May 23, 2019

Trenton, New Jersey