

L.D. No. 89-2

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION
LITIGATION ALTERNATIVE PROGRAM

In the Matter of

COUNTY OF ESSEX

Public Employer,

-and-

Docket No. SN-89-4

ESSEX COUNTY SUPERIOR
OFFICERS' ASSOCIATION,

Petitioner.

Appearances:

For the Public Employer,
Lucille LaCosta-DaVino, County Counsel

For the Petitioner,
Whipple, Ross & Hirsch (Donald B. Ross, Esq.)

LAP DECISION

On July 13, 1988, Essex County ("County") filed a Scope of Negotiations Petition seeking to restrain arbitration of a grievance filed by the Essex County Superior Officers' Association ("SOA"). The grievance, filed on March 25, 1988, protests the County's implementation of a policy requiring employees to earn sick leave each month if they have exhausted their sick leave before the end of the prior calendar year. The County denied the grievance on April 6, 1988 and on June 8, the SOA filed for arbitration.

On July 28, 1988, with the parties' consent, this matter was transferred to the Commission's Litigation Alternative Program ("LAP").

On September 22, 1988 I conducted a hearing at which the parties argued their positions and introduced documents. The parties agreed that this recommended decision is not subject to review.

Employees are entitled to fifteen sick days each year. Sick days are earned on a monthly basis, but are credited to employees at the beginning of each year. On December 29, 1987, the County established the following policy:

Effective January 1, 1988 all employees who are starting the new year with zero sick time will not be credited (15) days sick time as will all other employees. You will be credited one and one quarter days at the beginning of each month. Also, in the future, your use or abuse of sick time will be considered in assignments, shift changes and promotions. Continued abuse of sick time will necessitate adoption of a stringent sick call policy. It is to everyone's benefit that sick call abuses stop immediately.

The County asserts that crediting sick leave each January is a courtesy to employees. Arguing that the policy's goal is to curb sick leave abuse, the County contends that it changed only the timing of entitlement to sick leave, but not the amount of sick leave. Finally, the County asserts that the use of attendance as a criteria for assignment and promotion is a managerial prerogative.

The SOA notes the County may institute a sick leave verification policy to curb sick leave abuse, but argues that

changing when an employee is credited with sick leave is negotiable. Asserting that negotiation over when employees earn sick leave is not preempted; the SOA notes that N.J.A.C. 4A:6-1.3 requires that sick leave be credited to an employee at the beginning of the calendar year.

In Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police and firefighters.^{1/}

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policy making powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable. [Id. at 92-93; citations omitted]

^{1/} The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Compare, Local 195, IFPTE v. State, 88 N.J. 393 (1982).

Initially, I must determine whether N.J.A.C. 4A:6-1.3 preempts negotiation over when employees receive credit for sick leave. Negotiation is preempted where a statute or regulation speaks in the imperative, leaving the employer without discretion. State v. State Supervisory Employees Assn., 78 N.J. 58 (1978). Statutes or regulations which mandate minimum and/or maximum levels of benefits do not bar negotiations over proposals providing benefit levels fitting within the requirements of the statute or regulation. Id. at 81-82. See also Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982); New Jersey State College Locals v. State Bd. of Higher Ed., 91 N.J. 18 (1982).

N.J.A.C. 4A:6-1.3 provides in part:

(a)....Full-time local employees shall be entitled to a minimum of annual paid sick leave as follows:

(2) After the initial month of employment and up to the end of the first calendar year, employees shall be credited with one working day for each month of service. Thereafter, at the beginning of each calendar year in anticipation of continued employment, employees shall be credited with 15 working days.

The regulation requires employers to provide employees with 15 sick days credited at the beginning of each year. It imposes a minimum requirement. An employer is free to negotiate sick leave

benefits beyond those required by the regulation.^{2/} The SOA seeks to arbitrate the County's refusal to provide certain employees with the minimum required by N.J.A.C. 4A:6-1.3.

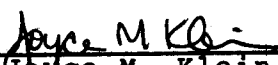
The Supreme Court has held that statutes and regulations are incorporated by reference into a collective agreement and may be enforced through the agreement's binding arbitration mechanism. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 97 N.J. 9, 14-15 (1983). See also State Supervisory; West Windsor Tp. v. PERC, 78 N.J. 98, 116 (1978).

In the public sector, arbitrators must consider pertinent statutes and regulations, Kearny PBA Local No. 21 v. Tp. of Kearny, 81 N.J. 208, 217 (1979). Arbitration will not be restrained because the arbitrator must consider a regulation and its possible application to the dispute. City of Newark, P.E.R.C. No. 89-33, 14 NJPER ____ (¶ ____ 1988).

Criteria considered in assignments, evaluations and promotions are not negotiable. State Supervisory; State Troopers NCO Ass'n, 179 N.J. Super. 80 (App. Div. 1981). Therefore the County's policy is not negotiable to the extent that it provides that exhaustion of available sick leave may be considered in assignments, evaluations and promotions.

^{2/} Sick leave is a mandatorily negotiable term and condition of employment. Burlington Cty. College Fac. Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973); Bd. of Ed. of Piscataway Tp. v. Piscataway Maintenance and Custodial Ass'n, 152 N.J. Super. 235 (App. Div. 1977); Pennsauken, CITE. Hoboken Bd. of Ed. v. Hoboken Teachers Ass'n, P.E.R.C. No. 81-97, 7 NJPER 135 (¶12058 1981), aff'd App. Div. Docket No. A-3379-80T2, appeal dism'd. 93 N.J. 263 (1983).

I conclude that the SOA's grievance is arbitrable to the extent that it concerns a change in when certain employees receive credit for sick leave. I conclude that the grievance is not arbitrable to the extent that it would interfere with the County's managerial prerogative to determine criteria used in assignments, evaluations and promotions.



Joyce M. Klein
Commission Designee

DATED: October 20, 1988
Trenton, New Jersey