

P.E.R.C. NO. 91-76

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EGG HARBOR TOWNSHIP,

Petitioner,

-and-

Docket No. SN-91-41

LOCAL UNION NO. 210, IBEW,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by Local Union No. 210, IBEW against Egg Harbor Township. The grievance alleges that a sanitation truck driver should have been paid during a leave of absence. The Commission finds that, in the abstract, the employer must negotiate over the subject of paid leaves of absence and could have contractually obligated itself to pay the driver during his absence.

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Appearances:

For the Petitioner, Peter J. Miller, Township Administrator

For the Respondent, Schneider, Cohen, Solomon, Leder & Montalbano, attorneys (Bruce D. Leder, of counsel)

DECISION AND ORDER

On December 17, 1990, the Township of Egg Harbor petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by Local Union No. 210, IBEW. The IBEW claims that a sanitation truck driver should have been paid during a leave of absence.

The parties have filed briefs and exhibits. These facts appear.

IBEW represents the Township's clerical and blue-collar employees. The parties' contract is effective from January 1, 1989 through December 31, 1991. The grievance procedure ends in final and binding arbitration.

Article 2 is entitled "Management Rights." It reserves management's right to discipline any employee "for good and just cause according to law."

Article 9 is entitled "Discipline." Sections A and B provide:

- A. The parties recognize the concept of progressive discipline. Discipline may include any or all of the following:
 - 1. verbal reprimand
 - 2. written reprimand
 - 3. suspension without pay
 - 4. termination

- B. The Township may utilize any or all of the above types of discipline depending upon the severity and/or the repetitive nature of the conduct to be disciplined.

Article 22 is entitled "Leave of Absence Without Pay."

Sections A and B provide:

- A. A permanent full-time employee may be granted leave without pay for a period not exceeding three (3) months during a fiscal year for specific personal reasons, or other reasons deemed in the best interests of the Township when recommended by the Division Manager/Department Head and approved by the Township Committee.

- B. Applications for leave without pay must be submitted in advance, in writing, to the employee's Division Manager/Department Head, stating the employee's reason for requesting such leave and containing a statement that he intends to return to the Township's service after the expiration of such leave.

Article 23 is entitled "Absence Without Leave." It provides:

- A. Absence without notification for five (5) consecutive days shall constitute a resignation.

Marvin Bell was hired as a sanitation truck driver in December 1980 and worked through February 6, 1990. Apparently Bell

was hospitalized from February 7 through 14 and did not report to work for a month. Bell asserts that his mother told the Township about his hospitalization and the date he expected to return to work.

On February 27, 1990, the Public Works Director wrote Bell that the Township had invoked Article 23 and accepted his resignation, effective February 13. Bell was told the same thing when he reported to work on March 5. He filed a grievance alleging wrongful discharge and seeking reinstatement. The Public Works Director conducted a hearing, learned that Bell's supervisor knew Bell would not be coming into work the week after February 16, and set aside the resignation. Nevertheless, the Director told Bell that he could not return to work unless the Township Committee granted him an unpaid leave of absence to cover the period he was out.

On March 29, 1990, Bell applied for a leave of absence. In light of Bell's employment history, including prior leaves of absence and disciplinary incidents, the Township Committee initially denied Bell's application. But on July 11, the Committee adopted a resolution granting Bell an unpaid leave of absence from February 13 through July 13. Bell returned to work on July 30.

On July 19, 1990, IBEW notified the Township Administrator that it intended to arbitrate the dispute. The initial demand for arbitration listed the issue as Bell's discharge, but IBEW later restated the issue as a loss of pay. IBEW seeks back pay for Bell from March 5 through July 13, 1990.

The employer asserts that the contractual language authorizing unpaid leaves of absence is a managerial prerogative. IBEW asserts that this dispute is mandatorily negotiable under two theories: (1) disciplinary disputes are mandatorily negotiable and Bell was disciplined by being given a 4 1/2 month unpaid suspension, and (2) leaves of absence are mandatorily negotiable.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [78 N.J. at 154]

Thus, we do not consider the merits of Bell's demand for pay or any contractual defense the employer may have.

Leaves of absence, paid or unpaid, are mandatorily negotiable. Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, Burlington Cty. College, 64 N.J. 10, 14 (1973); Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235, 243-244 (App. Div. 1977); Branchburg Tp., P.E.R.C. No. 89-20, 14 NJPER 571 (¶19240 1988); West Orange Tp., P.E.R.C. No. 84-141, 10 NJPER 358 (¶15166 1984). In the abstract, the employer must negotiate over the subject of paid leaves of absence and could have contractually obligated itself to pay Bell during his absence.

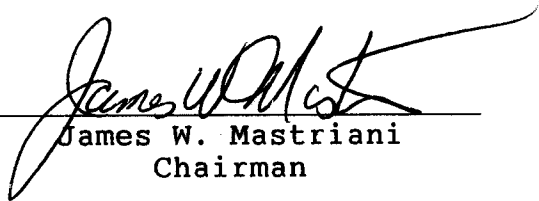
Whether it did obligate itself is another matter, one which the arbitrator must decide.^{1/}

Since the petitioner has not established a basis for restraining arbitration, we need not consider IBEW's alternative argument.

ORDER

The request of Egg Harbor Township for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Johnson, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
February 27, 1991
ISSUED: February 28, 1991

^{1/} The cases cited by the employer are inapplicable. Livingston Tp., P.E.R.C. No. 90-30, 15 NJPER 607 (¶20252 1989), restrained arbitration over a claim that the employer had no power to deny leaves based on its minimum staffing levels, not an issue here. See also City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), aff'd App. Div. Dkt. No. A-4636-81T3 (3/23/84). Bayonne Bd. of Ed., P.E.R.C. No. 89-25, 14 NJPER 579 (¶19245 1988), restrained arbitration over an extended sick leave claim preempted by a statute, not an issue here. Demarest Bd. of Ed. v. Demarest Ed. Ass'n, 177 N.J. Super. 211 (App. Div. 1980), involved a teacher taking an unexcused absence after leave had been denied, not an issue here. Cf. South River Bd. of Ed., P.E.R.C. No. 81-108, 7 NJPER 156 (¶12069 1981) (distinguishing Demarest).