

P.E.R.C. NO. 2002-40

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2000-20

AFSCME, COUNCIL 52, LOCAL 2299,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Newark for a restraint of binding arbitration of a grievance filed by AFSCME, Council 52, Local 2299. The grievance contests the denial of six days of vacation leave. The Commission finds that vacation leave is mandatorily negotiable and employees may arbitrate the reasonableness of vacation denials.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, JoAnne Y. Watson, Corporation Counsel  
(Phillip R. Dowdell, Assistant Corporation Counsel, on  
the brief; Richard C. Gordon, Assistant Corporation  
Counsel, on the reply brief)

For the Respondent, Kathleen Fantacone Mazzouccolo,  
attorney

DECISION

On August 19, 1999, the City of Newark petitioned for a  
scope of negotiations determination.<sup>1/</sup> The City seeks to  
restrain binding arbitration of a grievance filed by AFSCME,  
Council 52, Local 2299. The grievance contests the denial of six  
days of vacation leave.

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

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<sup>1/</sup> Processing of this petition was delayed for several reasons,  
including attempts by the parties to resolve procedural  
issues relating to the grievance, several extensions of  
time, and a change in the City's attorney.

The City is a civil service jurisdiction. AFSCME represents inspectors, including code enforcement officers. At the time this petition was filed, the City and AFSCME were parties to a collective negotiations agreement effective from January 1, 1995 through December 31, 1997. The contract's grievance procedure ends in binding arbitration. The parties have since concluded negotiations for a successor agreement.

Lawrence Simmons has been a supervising code enforcement officer since 1993. On or about July 27, 1998, Simmons submitted a vacation leave form requesting vacation beginning on August 10 and ending on August 17, 1998. The clerk received the vacation leave form on July 27, but the form does not indicate that the request was granted or denied. The City has submitted an undated and unsigned handwritten note that states:

Your request for vacation leave cannot regrettably be granted now. Your help is vital, if we are to succeed in our inspection mission. When we have covered several milestones along that path, you'll be able to take the vacation you most certainly deserve.

The City states that the note is from Darryl Matthews, Manager/Chief of Field Operations. The note is not addressed to anyone and the record does not indicate whether Simmons received it. Simmons went on vacation and returned to work on August 18, 1998.

On August 14, 1998, Simmons was issued a Preliminary Notice of Disciplinary Action stating that he had failed to report to work or call in for five consecutive days from August 10

through August 14, 1998. The Notice indicated that disciplinary action including removal was pending. Simmons was charged with incompetency, inefficiency, or failure to perform duties; inability to perform duties; chronic or excessive absenteeism or lateness; neglect of duty; and "other sufficient [cause]."

On August 18, 1998, Simmons submitted a "Request for Hearing: Termination" in response to the Preliminary Notice. He also requested that six days of pay not be removed from his August 21 pay until after the hearing or, in the alternative, that the deductions be divided over the next three paychecks.

On August 26, 1998, Simmons filed a grievance alleging that, despite his giving proper notice of his vacation plans, the City had failed to pay him for his vacation time.

On September 24, 1998, Simmons asked for a second conference to try to resolve the issues. Simmons stated that he had new responsibilities and was not given proper training. Simmons never received a Final Notice of Disciplinary Action indicating that he had been suspended for six days.

On September 24, 1998, Simmons wrote to the Merit System Board of the Department of Personnel. He enclosed copies of the Preliminary Notice of Disciplinary Action and stated that he had been docked six days' pay and that he had requested but not received a hearing.

On November 23, 1998, AFSCME demanded arbitration. The demand for arbitration listed three grievances involving Simmons,

including the grievance over the loss of vacation pay. The scope petition seeks a restraint of arbitration of only the vacation pay grievance.

On December 4, 1998, the MSB advised Simmons that it would not review his appeal of a minor disciplinary action.

On January 30, 1999, Simmons wrote to the MSB asking for a meeting to review the facts concerning the disciplinary actions.

On March 17, 1999, the City denied all of Simmons' grievances.

On April 13, 1999, the MSB wrote to AFSCME explaining that Simmons had filed an appeal of a major disciplinary action, but that on review, it was determined that he had received a five, not a six-day suspension, and that the appeal was therefore summarily dismissed. Simmons had contacted the MSB on several occasions, asserting that he had received a six-day suspension and was entitled to MSB review. Because Simmons' submissions to the MSB did not address the standards for reconsideration, AFSCME was granted 20 additional days to resubmit the appeal. It does not appear that the appeal was resubmitted or that the MSB is reviewing the loss of six-days pay.

AFSCME wrote to the MSB asking that a final determination on Simmons' appeal be held in abeyance pending the resolution of certain procedural and jurisdictional issues. AFSCME explained that the vacation pay issue is a non-disciplinary denial of contractual benefits.

An arbitration hearing was held on May 11, 1999 on the loss of pay for the vacation days and two suspensions. Another arbitration hearing was scheduled for July 1999, but the record does not indicate the current status of the arbitration proceeding.

On August 19, 1999, the City filed this petition.

Our 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, we do not consider the contractual arbitrability or merits of the grievance.

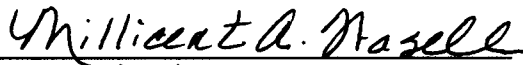
Vacation leave is mandatorily negotiable and employees may arbitrate the reasonableness of vacation denials. See Livingston Tp., P.E.R.C. No. 90-30, 15 NJPER 607 (¶20252 1989); Borough of Bradley Beach, P.E.R.C. No. 90-60, 16 NJPER 43 (¶21020 1989). Accordingly, AFSCME may arbitrate its claim that the employer violated the contract by denying Simmons his request for a six-day vacation.

Civil service employees must appeal major discipline, including suspensions for more than five days, to the MSB. North Bergen Municipal Utilities Auth., P.E.R.C. No. 2001-34, 27 NJPER 39 (¶32020 2000). But no Final Notice of Disciplinary Action was issued indicating that Simmons was suspended for six days. The record before us indicates only that he was docked six-days pay -- the number of days he was absent, allegedly on a proper vacation. It may be that the six-day penalty was intended to be major discipline and not simply a denial of vacation pay for vacation days allegedly not authorized. But the documents submitted by the City do not make that case clearly enough for us to restrain arbitration over the legally arbitrable claim that Simmons was improperly denied a contractual benefit. Absent documentation indicating that the City, in fact, suspended Simmons for six days as discipline for some misconduct, we decline to restrain binding arbitration over the alleged denial of contractual vacation benefits.

ORDER

The request of the City of Newark for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Muscato, Ricci and Sandman all voted in favor of this decision. None opposed.

DATED: January 31, 2002  
Trenton, New Jersey  
ISSUED: February 1, 2002