

P.E.R.C. NO. 2009-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF WALDWICK,

Petitioner,

-and-

Docket No. SN-2008-083

P.B.A. LOCAL NO. 217,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Borough of Waldwick for a restraint of binding arbitration of a grievance filed by PBA Local No. 217. The grievance contests alleged changes in sick leave verification procedures. The Commission holds that the Borough has a managerial prerogative to require the grievant to be examined by a Borough-selected physician to substantiate his illness when conflicting information regarding whether grievant would be returning to work was previously submitted.

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, Ruderman & Glickman, P.C. attorneys
(John A. Boppert, on the brief)

For the Respondent, Loccke, Correia, Schlager, Limsky &
Bukosky, attorneys (Marcia J. Tapia, on the brief)

DECISION

On June 26, 2008, the Borough of Waldwick petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 217. The grievance alleges a change in sick leave verification procedures. We grant the Borough's request to restrain arbitration.

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

The PBA represents all full-time police officers. The parties' collective negotiations agreement is effective from January 1, 2006 through December 31, 2009. The grievance procedure ends in binding arbitration.

Article X is entitled Sick Leave. It provides that an employee absent on sick leave shall submit acceptable medical evidence substantiating the illness, if requested by the Borough.

On December 11, 2007, a sergeant submitted a doctor's note stating that he could not return to work until January 10, 2008. On January 8, he submitted a doctor's note stating that he "has severe medical problems and is unable to work until further notice." On January 23, the sergeant sent an email to the police chief stating:

Just to give you an update, I went to the Dr yesterday. I am scheduled for further testing on my lungs within the next two weeks. I go back to the Dr on 02/05. Nothing has been ruled in or out including the fact that this may be WTC related. My Dr spoke to me about it yesterday for the first time and I may be seeing a pulmonary specialist in the future. I am on additional medication to combat this "illness."

On February 20, 2008, the Borough administrator wrote to the sergeant about his return to work. He stated:

We hope that you are feeling better and will shortly be returning to work. We have received some communications from you as to your medical status but have not received any indication as to when you may be coming back to work. We would appreciate getting something from your doctor as to when we can anticipate your coming back to work and to whether this will be for full-status or modified duty. In that way we can plan our scheduling accordingly. Hope you are feeling better.

On February 25, 2008, the sergeant emailed the chief that he would "return to work when healthy and not a day before that. I cannot give you a timetable because there is no timetable."^{1/}

On March 25, 2008, the Borough administrator wrote to the sergeant. He stated:

We have received conflicting information from you regarding your health condition. In an email you state that your illness has no timetables for your recovery. On other occasions, you have claimed that you may never be able to return to full duty. While we would like to be able to afford you the time to make a full recovery at your own pace, we need to ascertain the extent of your illness and whether there is a potential for your return to duty.

As such you are required to make an appointment with Pulmonary Medicine Associates, in particular Dr. Barry Sakowitz. . . . The Borough will cover the cost associated with this visit in its entirety. We will check with Dr. Sakowitz's office on April 4th to ensure that you have followed through. If an appointment has not been scheduled, we will make arrangements to schedule the appointment for you and will not permit any rescheduling of same by you.

We hope that you are improving, and if you have any questions, please do not hesitate to contact me.

On April 3, 2008, the sergeant filed a grievance alleging that the contract's sick leave provision does not provide for a separate and independent medical evaluation. On that same day,

^{1/} A copy of this email has not been included in the Borough's exhibits.

the Borough's labor counsel wrote a response to an April 2 letter from the PBA counsel in which the Borough labor counsel advised that the implementation of a sick leave verification policy is a valid exercise of a managerial prerogative.^{2/} The Borough's labor counsel's letter also referenced an October 15 date identified by the PBA counsel as the date the sergeant would return to work, but noted that the date seemed to be arbitrary. Also on April 3, the Borough received a letter from the sergeant's doctor stating:

Please be advised that my patient, [name redacted], in my opinion is unable to adequately perform the duties of a Waldwick Police officer at this time. This is based on the job description that Chief Messner supplied to this office on or about 3/15/08. He is presently undergoing therapy and is on medications and rest. I see some improvement with medical therapy and anticipate his return to work in about 6 months.^{3/}

The grievance remained unresolved and on April 29, 2008, the PBA demanded arbitration of "unilateral change in sick leave procedures." This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

2/ The April 2, 2008 letter was not included in the Borough's exhibits.

3/ Six months from the date of the sergeant's doctor's letter was October 3, 2008. However, the Borough continues to assert, and the PBA does not dispute, that the sergeant has not returned to work.

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 merits of the grievance or any contractual defense the Township may have.

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), permits arbitration if the subject of the dispute is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged to have been violated is preempted or would substantially limit government's policymaking powers. No preemption issue is presented.

In Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982), we held that an employer has a prerogative to establish a sick leave verification policy and to use "reasonable means to verify employee illness or disability." We distinguished the mandatorily negotiable issue of whether a policy had been properly applied to deny sick leave benefits. We summed up this distinction by saying:

In short, the Association may not prevent the Board from attempting to verify the bona fides of a claim of sickness, but the Board may not prevent the Association from contesting its determination in a particular case that an employee was not actually sick.

Since Piscataway, we have decided dozens of cases involving sick leave verification policies. We have repeatedly stated and held that an employer has a prerogative to require employees on sick leave to produce doctors' notes verifying their sickness. See, e.g., Hudson Cty., P.E.R.C. No. 93-108, 19 NJPER 274 (¶24138 1993); City of Elizabeth, P.E.R.C. No. 93-84, 19 NJPER 211 (¶24102 1993); South Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989); City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988); Borough of Spring Lake, P.E.R.C. No. 88-150, 14 NJPER 475 (¶19201 1988).

The PBA acknowledges that the Borough has a prerogative to require proof of illness, but is grieving an alleged unilateral change in the existing policy. It maintains that requiring the sergeant to see a Borough doctor is a change in sick leave procedures and that the past practice has always been that a note from the employee's doctor is reasonable proof of illness. It claims a right to negotiate over who bears the cost of the doctor's visit, whether there are disciplinary consequences, and when the requirement to be examined by an employer-selected physician is triggered. The Borough responds that an independent medical evaluation is needed to substantiate the grievant's

illness, and that the costs of the examination and any disciplinary consequences are not at issue.

Under Piscataway, the Borough has a managerial prerogative to require the grievant to undergo a medical evaluation arranged by the Borough to verify the bona fides of his claim of illness. See also City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988); Newark Bd. of Education, P.E.R.C. No. 85-26, 10 NJPER 551 (¶15256 1984). Here, the sergeant submitted conflicting information regarding whether he would be returning to work, and his doctor was unable to provide a clear anticipated return to work date.

In City of Elizabeth, P.E.R.C. No. 93-84, 19 NJPER 211 (¶24101 1993), we found at least permissively negotiable a general order requiring sick employees to be examined by the City's physician, since employees have a substantial interest in being examined and treated by their own physicians. However, we specifically noted that the dispute did not involve the bona fides of a particular claim. This case falls within that exception. In the face of unclear documentation, it would substantially limit governmental policy if the Borough could not reasonably exercise its right to verify a sick leave claim by requiring the sergeant to undergo a Borough-arranged medical evaluation. Piscataway.

The PBA's reliance on City of Passaic, P.E.R.C. No. 89-77, 15 NJPER 93 (¶20041 1989), aff'd NJPER Supp.2d 221 (¶194 App. Div. 1989), is misplaced. There, we found that fine tuning of reporting procedures for employees on sick leave was permissively negotiable. However, we specifically noted that the case did not involve the City's right to demand proof of medical illness.

ORDER

The Borough of Waldwick's request for a restraint of binding arbitration is granted to the extent the grievance challenges the Borough's right to require the grievant to be examined by a Borough-selected physician to substantiate the grievant's illness.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed.

ISSUED: December 18, 2008

Trenton, New Jersey