P.E.R.C. NO. 2009-59

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEPTUNE TOWNSHIP BOARD OF EDUCATION,

        Petitioner,

    -and-   Docket No. SN-2009-021

NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,

        Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Neptune Township Board of Education for a restraint of binding arbitration of a grievance filed by the Neptune Township Education Association. The grievance alleges that the retroactive docking of extended sick leave pay violates the parties' agreement. The Commission holds that the grievance is preempted by N.J.S.A. 18A:30-6 because the parties' contract cannot place any limits on the Board's discretion to grant a request for extended sick leave on a case-by-case basis.

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, Taylor, Whalen & Hybbeneth,
        consultants (William F. Hybbeneth, Jr., on the brief)

        For the Respondent, Detzky & Hunter, LLC, attorneys
        (Stephen B. Hunter, on the brief)

DECISION

On October 17, 2008, the Neptune Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Neptune Township Education Association on the ground that the dispute is preempted by laws governing extended sick leave. We grant the restraint.

The parties have filed briefs and exhibits. The Board has filed the certification of its superintendent. These facts appear.

The Association represents the Board's certificated and non-certified employees. The Board and the Association are parties to a collective negotiations agreement effective from July 1,

2006 through June 30, 2009.[1] The grievance procedure ends in

binding arbitration. Article XIII.A provides, in part:

> 3. Members who are absent because of a
> personal illness shall be reimbursed
> according to the following schedule:
>
>> a. There shall be no deduction in salary
>> for the use of a substitute for the
>> total earned cumulative days.
>>
>> b. A member who has used his total
>> cumulative days shall have the rate of a
>> substitute deducted from his salary, up
>> to and including a terminal date
>> established by the Board of Education.

Prior to February 2008, an employee who had used up earned

sick leave could receive extended paid sick leave, less the cost

of a substitute, until the next Board meeting when an end date

for receiving such benefits would be established. The

superintendent listed three unit members who received payments in

this manner during the term of the current agreement.

The superintendent states that in February 2008, he ended

the practice by directing that any employee who had exhausted his

or her sick leave not be paid for any subsequent days that they

did not report to work because of illness. He asserts that the

change was made to comply with N.J.S.A. 18A:30-6. It provides:

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[1]   We generally require petitioners to file a copy of the
       relevant collective negotiations agreement. N.J.S.A.
       34:13A-8.2 requires that public employers submit copies of
       their collective negotiations agreements to the Commission.
       The Board has done so and we take administrative notice of
       it.

> When absence, under the circumstances
> described in section 18A:30-1 of this
> article, exceeds the annual sick leave and
> the accumulated sick leave, the board of
> education may pay any such person each day's
> salary less the pay of a substitute, if a
> substitute is employed or the estimated cost
> of the employment of a substitute if none is
> employed, for such length of time as may be
> determined by the board of education in each
> individual case. A day's salary is defined
> as 1/200 of the annual salary.

On March 10, 2008, the Association filed a grievance alleging that the retroactive docking of extended sick leave pay violated Article XIII. The grievance seeks a cessation of the retroactive docking, reinstatement of the prior protocol, and payments to any affected employees. The superintendent and the Board denied the grievance. On September 22, the Association demanded arbitration. This petition ensued.

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.
> [Id. at 154]

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets 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. [Id. at 404-405]

The Board argues that its prior practice is prohibited under

N.J.S.A. 18A:30-6.[2/] The Association argues that the parties'

contract language gives the Board the discretion to grant or deny

extended sick leave on an individual basis, as required by

statute. The Association states that an arbitrator may find that

the Board had a contractual right to establish a retroactive

termination date, but that an arbitrator should be able to

determine whether the denial of any extended sick leave to the

two employees at issue was arbitrary and capricious.

Paid sick leave is generally mandatorily negotiable, unless

preempted by statute or regulation. N.J.S.A. 18A:30-6 preempts

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2/   The Board has submitted a 1993 arbitration award
     interpreting Article XIII.A.3.b. The award sustained a
     grievance seeking payment (salary less the cost of a
     substitute) for sick leave taken after an employee had used
     up earned leave allowances, but before the Board could
     decide whether to approve extended sick leave. There, as
     here, the employees had been retroactively docked when the
     Board did not approve any additional sick leave beyond the
     employees' earned allotments.

arbitration over the denial of extended sick leave for school employees, whether that denial is prospective or retroactive.

The Appellate Division has held that because the grant of extra sick leave days under N.J.S.A. 18A:30-6 is discretionary on a case-by-case basis, a board of education cannot negotiate away that discretion in its collective agreement with an employee association. Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance and Custodial Ass'n, 152 N.J. Super. 235 (App. Div. 1977). Because the parties' contract could not place any limits on the Board's discretion, any challenge to the exercise of that discretion must be made in another forum. See, e.g., Matawan Reg. Teachers Ass'n v. Matawan-Aberdeen Reg. School Dist. Bd. of Ed., 202 N.J. Super. 142, 145-146 (App Div. 1985) (affirming State Board of Education's decision that denial of extended sick leave was not arbitrary or capricious).

ORDER

The request of the Neptune Township Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, Colligan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed. Commissioner Branigan was not present.

ISSUED: April 30, 2009

Trenton, New Jersey