

P.E.R.C. NO. 2011-22

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MAPLEWOOD,

Petitioner,

-and-

Docket No. SN-2010-037

P.B.A. LOCAL NO. 44A,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township of Maplewood for a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 44A. The grievance alleges that the Township violated a past practice when it conducted a home visit to verify the sick leave of an employee who was on leave for more than five days. The Commission holds that prohibiting the Township from conducting a home visit simply because the employee was out for five or more consecutive days would substantially limit the employer's ability to determine if sick leave abuse was occurring.

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, Genova, Burns & Giantomasi,
attorneys (Brian Kronick, of counsel)

For the Respondent, Abramson & Liebeskind Associates
(Marc Abramson, on the brief)

DECISION

On November 2, 2009, the Township of Maplewood petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 44A. The grievance alleges that the Township violated a past practice when it conducted a home visit to verify sick leave of an employee who was on leave for more than five days. We restrain arbitration.

The parties have filed briefs and exhibits. The Township has filed a certification from the Chief of Police. The PBA has filed certifications from the PBA President and an injured sergeant on leave. These facts appear.

The PBA represents all superior officers. The parties' collective negotiations agreement is effective from January 1, 2003 through December 31, 2006. The grievance procedure ends in binding arbitration.

On June 18, 2009, a sergeant was struck by a car while off-duty and riding a bicycle. She sustained injuries requiring medical attention. On or about June 19, the sergeant called out of work in accordance with departmental policy, reporting that she had been involved in an accident and would be out of work through June 23.

On or about June 22, 2009, a captain contacted the sergeant to receive an update on her status. The sergeant reported that she had a doctor's appointment and anticipated a return to work after the appointment.

On July 1, 2009, an orthopedic physician evaluated the sergeant's injuries and informed her that she would be unable to return to work before July 15. The sergeant telephoned a lieutenant and reported the update in her medical status, pursuant to departmental practice.

As of July 2, 2009, the sergeant had not provided any documentation to verify her condition or estimated return date. On July 4, the Township sent an officer to the sergeant's home to verify that she was home on sick leave. The sergeant was home when the check was performed and no discipline was imposed.

On July 17, 2009, the PBA filed a grievance contesting the home visit. The grievance alleges that there is a past practice that any employee out sick or injured for a duration of five days or longer would not be required to call in should the officer leave his or her residence. The grievance refers to this as the "Five Day Exclusionary Rule." The grievance also states that this was a benefit the PBA negotiated to alleviate the inconvenience to employees out of work for long-term illnesses and injuries. The grievance alleges that the Township should not have performed a home visit because the injured sergeant informed the Township that she would be out of work for more than five days and, thus, a home visit was unnecessary to verify her injury. The grievance seeks recognition of and adherence to the "Five Day Exclusionary Rule."

The PBA President certifies that the Township and PBA agreed that when an officer was out sick or injured for five days or longer, the officer would not be required to call the desk when leaving his or her residence or be confined to his or her home, absent doctor's orders to remain at home.

The grievance was not resolved. On August 26, 2009, the PBA demanded arbitration. 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:

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 is preempted or would substantially limit government's policymaking powers. No preemption issue is presented.

The PBA asserts that it is not challenging the Township's right to conduct home visits to verify sick leave abuses, but is only challenging the use of home visits after an employee has proffered verifying documentation of the illness or injury and the Township has accepted that documentation. However, no facts are alleged to demonstrate that the injured sergeant provided verifying documentation to the Township and that the Township accepted that documentation.

A public employer has a non-negotiable managerial prerogative to establish a sick leave verification policy and to use reasonable means to verify employee illness or disability. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95, 96 (¶13039 1982); 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). Sick leave verification serves a non-negotiable management interest in ensuring that employees do not abuse contractual sick leave benefits. Piscataway, 8 NJPER at 97. It does not impinge upon a union's ability to negotiate sick leave benefits or an individual's ability to use sick leave for proper purposes, or prevent an employee from arbitrating a grievance asserting that such leave was improperly denied. Ibid.

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), cited by the PBA, is distinguishable. There, the contract provided that officers out sick or injured were not required to stay at home if their doctor felt it unnecessary, but the officers had to let the desk officer know where they could be reached. The employer issued a policy requiring officers to notify the desk officer of the reason for leaving, new location, phone number at that location, time expected to be out, and time they returned. We held that a grievance challenging those more burdensome reporting requirements was at least permissively negotiable because if the

union were to prevail in arbitration, the employer would still know the whereabouts of employees on sick leave and could still demand medical proof of illness. Enforcement of the contract provision would not have substantially limited the employer's ability to verify illness.

Unlike Passaic, this case is not about burdensome reporting requirements, but instead about conducting a home visit to verify an employee's injury.^{1/} Prohibiting the employer from conducting a home visit simply because the employee was out for five or more consecutive days would substantially limit the employer's ability to determine if sick leave abuse was occurring. We accordingly restrain binding arbitration.

ORDER

The request of the Township of Maplewood for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Commissioners Eaton, Fuller, Voos and Watkins voted in favor of this decision. None opposed. Commissioner Colligan recused himself. Commissioner Krengel was not present.

ISSUED: September 23, 2010

Trenton, New Jersey

^{1/} The employer has not asserted a right to require an employee with a verified long term illness or injury to remain at home.