

P.E.R.C. NO. 2011-72

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF BURLINGTON,

Petitioner,

-and-

PBA LOCAL 249,

Respondent.

Docket Nos. SN-2010-056
SN-2010-057
SN-2010-080

SYNOPSIS

The Public Employment Relations Commission grants the request of the County of Burlington for restraints of binding arbitration of grievances filed by PBA Local 249. The grievances challenge the County's methods used to verify sick leave. The Commission holds that the employer has a managerial prerogative to establish a sick leave verification policy. The Commission denies the request of the County for a restraint of binding arbitration of a grievance challenging the minor discipline issued to two officers. The Commission holds that minor discipline issued to law enforcement officers is legally arbitrable.

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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Respondent.

Appearances:

For the Petitioner, Capehart & Scatchard, P.A.,
attorneys (Alan R. Schmoll, of counsel; Kelly M.
Estevam, on the brief)

For the Respondent, Alterman & Associates, LLC,
attorneys (Stuart J. Alterman, of counsel; Christopher
A. Gray on the brief); and Mark W. Catanzaro, attorney

DECISION

In December 2008, the County of Burlington established new sick leave verification procedures for correction officers. In 2009, PBA Local 249 filed a total of six grievances challenging these new procedures; four of which contest the County's use of home visits, telephone calls, and requirement of a doctor's note from certain employees to verify sick leave use; the remaining two challenge minor disciplinary suspensions issued to PBA officers for allegedly violating these policies.^{1/} The County

^{1/} The docket numbers for each grievance are: AR-2009-528; AR-2009-536; AR-2009-702; AR-2009-703; AR-2010-196; AR-2010-378.

filed three scope of negotiation petitions, two on February 9, 2010 and one on March 26, 2010, seeking restraints of arbitration of the six grievances.

We grant the County's request and restrain arbitration of the four grievances (AR-2009-528, AR-2009-536, AR-2009-702, and AR-2009-703) that challenge the County's methods used to verify sick leave. We deny the County's request as to the two grievances (AR-2010-196 and AR-2010-378) challenging the minor discipline issued under the policy.

Both parties have filed briefs and exhibits.^{2/} These facts appear.

The PBA represents rank and file County correction officers. The parties' collective negotiations agreement has a term from January 1, 2005 through December 31, 2008. The grievance procedure ends in binding arbitration.

On or about December 22, 2008, several officers received letters from Deputy Warden Ronald A. Cox notifying them that, following a County audit of sick time use, they were suspected of abusing sick leave privileges over the prior three years. Those officers were also informed that the County would be monitoring their attendance over the next six months and that they would be

^{2/} Neither party has filed any certifications. N.J.A.C. 19:13-3.5(f) (all pertinent facts must be supported by certifications based upon personal knowledge).

required to bring a doctor's note verifying each future sick call out^{3/}.

On or about January 1, 2009, the County established an attendance verification policy. The Policy requires employees who take sick leave to remain at their residence and be available for telephone communication or a home visit from the County's appointed official during the hours of their normal work-shift. The Policy further instructs that employees who must leave their residence for medical needs are to contact their department head and advise of their anticipated departure and arrival time. Employees must also provide a land-line telephone number for communication^{4/}.

The home visits are conducted by officers in the County's Internal Affairs Unit. The Policy details the County's protocol for telephone and home visit verifications:

5. The department head shall be responsible for designating correction supervisors to contact absent employees in accordance with this policy. The department head or his/her designee shall compile a list of all essential custody employees who are absent on a given day by shift. All employees shall be subject to receiving two telephone contact calls during their shift. The contact calls will be made from the

3/ Neither party provided the Commission with a copy of Warden Cox's letters.

4/ Contact made by cellular telephone or call forwarding would equate to a "No Contact" under the Policy.

correctional facilities.

6. The correction supervisors assigned to contact employees during such absences shall log time, date, and telephone number contacted. Supervisors will obtain the officer's phone number from the Officer Phone Roster in the Jail Management System. The communication shall be limited to confirming that these employees are at their residence. At the conclusion of each shift, the correction supervisors shall forward the log sheet to the department head for appropriate action.

An employee who fails to answer telephone calls^{5/} or a home visit, or is found to have left their residence without contacting the County is a "No Contact" and subject to the Policy's disciplinary schedule:

- 1st Offense - Written Reprimand and Counseling
- 2nd Offense - 5 Day Suspension and Counseling
- 3rd Offense - 10 Day Suspension
- 4th Offense - Termination

By memorandum dated January 5, 2009, the County listed twelve dates in 2009 on which it planned to send representatives to make house calls to employees on sick leave; each of these dates was reviewed and signed for approval by representatives of the PBA. On January 21, the County sent Internal Affairs representatives to conduct home visits at the residences of two officers. Both officers were required to sign a sick call

^{5/} The Policy provides that an employee will not be disciplined for missing telephone contact unless more than one phone call is unanswered.

verification receipt. The PBA asserts that each officer gave the County advance notice, via doctor's note or telephone call, that they planned to call out sick for legitimate reasons before the home visits were conducted.

On August 9, 2009, the County issued a five-day suspension to an officer for failing to remain at home on a sick day as required by the Policy. On August 29, another officer called out sick and received a one-day suspension for not providing the County with a doctor's note to verify his illness.

The first grievance was filed on February 13, 2009 and asserts that the County's use of phone communication under the Policy violated the parties' past practice, that officers who provided appropriate medical documentation would not be subject to phone verification while on sick leave. On February 20, the PBA filed a second grievance pertaining to the subject of Warden Cox's December 2008 letters, that certain officers suspected of sick leave abuse were required to verify each future sick day with a doctor's note. On April 24, the PBA filed the third and fourth grievances relating to the Policy by contesting the January 21 home visits to officers. The fifth grievance was filed on September 15, 2009 and challenges the five-day suspension issued to an officer. Lastly, on November 30, the PBA filed a sixth grievance over the one-day suspension issued to an officer.

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]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer 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.

The County argues that it has the non-negotiable managerial prerogative to establish a sick leave verification policy that includes discipline; its Policy is reasonable because home visits occur only once a month and at random; and its January 8, 2008 notice requiring employees to provide medical documentation for

sick leave is reasonable because it only applies to select individuals on the Warden's list suspected of sick leave abuse.

The PBA contends that the Policy is mandatorily negotiable because it restricts what officers may do while using the contractual benefit of sick time and that the practice of home visits impinges on an officer's privacy rights. The PBA also claims that the County's application of the Policy is unreasonable because it provides for home visits to any officer who called in sick, even if that officer had no record of excessive absenteeism. Lastly, the PBA claims that the officers' suspensions are arbitrable because employees are allowed to contest discipline issued for violating a sick leave verification policy in arbitration.

We have repeatedly held that 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).

We have also held that an employer may use home visits and telephone calls as a reasonable means to verify employee use of sick leave. Maplewood Tp., P.E.R.C. No. 2011-22, 36 NJPER 350 (¶135 2010); Livingston Tp., P.E.R.C. No. 2008-11, 33 NJPER 218

(¶81 2007). In most instances, the employer's need to prevent sick leave abuse outweighs the absent employee's right to be free of the intrusion of telephone calls or a home visit. Maplewood Tp.

We have also held that employees may contest the application of a sick leave policy if it was allegedly conducted for improper reasons or constituted an egregious and unjustifiable violation of an employee's privacy. Borough of Dumont, P.E.R.C. No. 2003-7, 28 NJPER 337 (¶33118 2002); Borough of Belmar, P.E.R.C. No. 2003-63, 29 NJPER 104 (¶32 2003). Both Dumont and Belmar involved unusual situations where the employer's conduct went beyond routine application of a verification policy. In Dumont, the employer visited an employee's home not just to verify the employee was sick, but also to complete an investigation into a previous arrest made by the employee. To verify the employee's illness in Belmar, the employer required the civilian employee be escorted by a police officer to the employer's own physician. The PBA has not submitted a certification alleging facts akin to the situations in Dumont and Belmar. The PBA has not alleged that the County's home visits and telephone contact went beyond the sole purpose of verifying that the employee was at his or her residence when on sick leave.

We reject the PBA's argument that the Policy subjects all officers to home visits regardless of their past use of sick time because an employer's right to verify sick leave does not require a prior finding of sick leave abuse. Livingston Tp., P.E.R.C. No. 2008-11, 33 NJPER 218 (¶81 2007).

Accordingly, we restrain arbitration of the grievances contesting the County's methods of home visits and telephone contact used under the Policy to verify sick leave use.

The PBA also contends that the County's requirement of a doctor's note from certain employees to verify sick leave is a negotiable issue ^{6/}. Consistent with our prior decisions, we find the County has a non-negotiable managerial prerogative to require certain employees suspected of sick leave abuse provide proof of illness for future absences. This prerogative includes the right to determine the number of absences that warrant scrutiny of an employee's sick time use or trigger a doctor's note requirement. New Jersey Transit, P.E.R.C. 2006-91, 32 NJPER 175 (¶78 2006); New Jersey State Judiciary, P.E.R.C. No. 2005-24, 30 NJPER 436 (¶143 2004); State of New Jersey, P.E.R.C. No. 95-67, 21 NJPER 129 (¶26080 1995); Rahway Valley Sewerage Auth.,

^{6/} The PBA raised an additional issue in its reply brief regarding the responsibility of who would pay for a doctor's visit if a note was needed to verify sick leave. However, the PBA has not alleged any facts indicating that the County has required or is requiring employees pay for the cost of doctors notes.

P.E.R.C. No. 84-80, 9 NJPER 52 (¶14026 1982). The County acted within its non-negotiable prerogative when informing certain officers suspected of sick leave abuse that they would need to provide doctors notes to excuse future absences. Accordingly, we restrain arbitration of the PBA's February 20, 2009 grievance.

We decline to restrain arbitration of the grievances challenging suspensions issued to officers found to be in violation of the policy. While an employer has the right to establish a sick leave verification policy, minor disciplinary sanctions imposed on law enforcement officers for violating such a policy can be reviewed through binding arbitration. Hudson Cty., P.E.R.C. No. 2001-23, 27 NJPER 4 (¶32003 2000). Minor discipline includes reprimands, fines, and suspensions of five days or less. Id.^{7/}

ORDER

We grant the County's request to restrain arbitration of grievances AR-2009-528, AR-2009-536, AR-2009-702, and AR-2009-703 regarding the County's policy of home visits, telephone calls, and doctors notes to verify sick leave use. We deny the County's

^{7/} The County cites Maplewood and Livingston to support its position that grievances involving a sick leave verification policy should not be arbitrated. The grievances in both Livingston and Maplewood, however, challenged the employer's prerogative to establish or change a sick leave verification procedure, not the application of the policy. Id.

request as to grievances AR-2010-196 and AR-2010-378 challenging suspensions issued to officers.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners, Bonanni, Eaton, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Colligan recused himself. Commissioner Eskilson was not present.

ISSUED: April 28, 2011

Trenton, New Jersey