

P.E.R.C. NO. 2013-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF SOUTH BRUNSWICK,

Petitioner,

-and-

Docket No. SN-2012-013

AFSCME COUNCIL 73, LOCAL 2242,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township of South Brunswick for a restraint of binding arbitration of a grievance filed by AFSCME Council 73, Local 2242. The grievance contests the application of a sick leave policy. The Commission finds that AFSCME did not establish that the application of the policy was intrusive and restrains arbitration based on the employer's managerial prerogative to verify illness.

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, Apruzzese, McDermott, Mastro & Murphy, attorneys (Arthur R. Thibault, Jr., of counsel)

For the Respondent, Alice Weisman, Staff Representative

DECISION

On October 28, 2011, the Township of South Brunswick petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by AFSCME Council 73, Local 2242. The grievance contests the application of the Police Department's sick leave policy to a clerical employee of the Department. We grant the Township's request to restrain arbitration.

The parties have filed briefs, and the Township has filed exhibits.^{1/} AFSCME represents full and part-time employees of the Township. The Township and AFSCME are parties to a

^{1/} Neither party has filed a certification setting forth facts based upon personal knowledge. N.J.A.C. 19:13-3.5 (f).

collective negotiations agreement effective from January 1, 2008 to December 31, 2011. Article 26 of the Agreement is entitled Sick Leave. Article 26, Subsection J provides in pertinent part that "[m]edical verification may be required. Such shall not be arbitrary or capricious. . . . "

Police Department Standard Operating Procedure S.1.32 is entitled Sick Time Usage. Subsection S.1.32.4 (A) (1) states that it applies to "police employees and all other full-time department employees unable to report to duty because of personal illness. . . . Subsection B (1) states that "[e]mployees reporting out sick or injured shall remain at their residence or place of confinement for the entire period of time they should be working." Subsection B (2) states that "[e]mployees who report out/off duty due to sickness or injury shall be available either for phone contact or in-person visit by the Chief or his designee during the time required to be at home or place of confinement."

The subject clerical employee was absent from work due to sickness on July 27, 28 and 29, 2011. On July 29, she was visited at her home in East Windsor by two Township police officers to confirm that she was indeed sick.^{2/} AFSCME filed a

^{2/} AFSCME claims that the subject employee was a Township employee for twenty-seven years, that she properly followed the call-out procedures as outlined in the Agreement, and that the Police Department's sick leave policy has never been applied to clerical employees. However, none of these assertions are supported by a certification. N.J.A.C.
(continued...)

grievance which was denied at steps 1 and 2.^{3/} On October 21, AFSCME filed a Request for Submission for a Panel of Arbitrators. 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), articulates the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item

2/ (...continued)
19:13-3.5 (f).

3/ The grievance documents reflect that AFSME was initially contesting the implementation of the Police Department's sick leave policy, instead of the policy outlined in the Agreement, to clerical employees. However, in its brief filed in opposition to the Township's scope petition, it refined its claim to a challenge of the reasonableness of the application of the policy to the subject clerical employee in this instance.

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. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[Id. at 404-405]

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

The Township asserts that it enjoys a managerial prerogative to implement a sick leave verification policy. AFSCME responds that the application of the sick leave policy in this instance was intrusive and not routine and that the Township could have required that the employee produce a doctor's note in accordance with the Agreement.

An employer has a 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 (¶13039 1982). Reasonable verification measures may include telephone calls and home visits. Dumont, P.E.R.C. No. 2003-7, 28 NJPER 337 (¶33118 2002). In Piscataway, we also found that an employee "may contest the

application of the policy if particular home visitations or telephone calls were for purposes other than implementing a reasonable verification policy or constituted an egregious and unjustifiable violation of an employee's privacy."

There is no evidence in the record that this employee had been abusing sick leave, or failed to follow the procedures for calling out of work sick. On these bare facts, we question the reasoning of the Township's decision to send two police officers from South Brunswick to East Windsor to verify the employee's sick leave in this instance. Nonetheless, there have been no facts asserted by AFSCME that rise to the level of facts in other cases where we found that a sick leave policy might have been implemented in an unreasonable or egregious manner which unduly interferes with the employee's privacy. Belmar, P.E.R.C. No. 2003-63, 29 NJPER 104 (¶32 2003) (the Borough sent a police car to pick up an ill employee at her home and escorted her to a Borough physician for evaluation despite her having an appointment with her own doctor that same day); Dumont (the Borough conducted a home visit and interrogated employee after he called out of work sick for one day). Therefore, the Township's request for a restraint of binding arbitration is granted.

ORDER

The Township of South Brunswick's request for a restraint of arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson and Wall voted in favor of this decision. Commissioners Jones and Voos voted against this decision. Commissioner Bonanni was not present.

ISSUED: September 27, 2012

Trenton, New Jersey