

P.E.R.C. NO. 2017-26

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2017-002

PBA LOCAL 243,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Sheriff's Office for a restraint of binding arbitration of a grievance filed by the PBA seeking rescission of a modified sick leave verification policy and removal of an electronic performance notice related to an officer's sick leave usage. Finding that the Sheriff's Office has a managerial prerogative to use reasonable means, such as requiring doctors' notes, to verify illness for employees taking sick leave and to determine the number of absences that will trigger a doctors' note requirement, the Commission holds that the modified sick leave verification policy is not legally arbitrable. As for the electronic performance notice, the Commission holds that it is a non-arbitrable evaluation and not a disciplinary reprimand because it does not impose discipline but specifies his violation of sick leave protocols, and it will be deleted in six months and not placed in the grievant's personnel file.

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, Atlantic County Law
Department, Assistant County Counsel,
Elizabeth C. D'Ancona

For the Respondent, Crivelli & Barbati, LLC,
attorneys (Frank C. Crivelli, of counsel and
on the brief)

DECISION

On July 6, 2016, the Atlantic County Sheriff's Office filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 243 (PBA). The grievance seeks the rescission of a modified sick leave verification policy (General Order 15-64) and the removal of an electronic performance notice related to the grievant's sick leave usage from a computerized tracking system.

The Sheriff's Office filed a brief, exhibits, and the certifications of the Sheriff and Undersheriff. The PBA filed a brief, exhibits, the certification of its President, and a

request for oral argument pursuant to N.J.A.C. 19:13-3.9.^{1/} The Sheriff's Office also filed a reply brief. These facts appear.

The PBA represents all sheriff's officers and investigators excluding the sheriff, undersheriff, chief sheriff's officer, sergeants, captains, and lieutenants. The Sheriff's Office and the PBA are parties to a collective negotiations agreement (CNA) in effect from January 1, 2013 through December 31, 2017. The grievance procedure ends in binding arbitration.

Article 1.04 of the parties' CNA, entitled "Employee Rights," provides in pertinent part that "[n]o employee shall be disciplined without just cause."

Article 2.11 of the parties' CNA, entitled "Sick Leave," provides in pertinent part:

C. If an employee is absent for five (5) consecutive working days, for any of the reasons set forth in the above, the Employer shall require acceptable evidence. The nature of the illness and the length of time the employee will be absent shall be stated on the doctor's certificate provided to the County. If a pattern of sick days evolves for any particular employee, the County may likewise require acceptable evidence.

The Sheriff's Office has had some form of sick leave verification policy in place since at least 2009. From 2009 through 2012, the Sheriff's Office followed Atlantic County's sick leave verification policy. In March 2012, the Sheriff

^{1/} The parties have adequately briefed the issues raised in the scope petition. Accordingly, oral argument is unnecessary.

issued General Order 12-13 which established an internal sick leave verification policy. In November 2015, General Order 12-13 was superseded by General Order 15-64 which modified the sick leave verification policy.^{2/}

Section 7.2 of the new policy modifies the criteria used by the Sheriff's Office to determine whether an internal review of an employee's attendance record will be conducted. Specifically, an internal review of an employee's attendance record will be conducted if an employee uses fifteen sick days within a twelve-month period rather than within a calendar year. Section 7.2 of the policy also modifies the factors used by the Sheriff's Office in determining whether an employee is abusing sick time even if he/she has not used fifteen sick days within a twelve-month period. Specifically:

-calling out before or after regular days off, weekends, holidays, military leave and/or vacation without documented medical justification will be a factor considered in sick leave abuse determinations if it occurs five or more times within a twelve-month period rather than within a four-month period;

2/ The Undersheriff certifies that he invited the PBA President to collaborate with him on modifications. He also certifies that the PBA President and Superior Officers' Association President participated in a meeting with him about sick leave verification policy modifications. General Order 15-64 was issued after a draft policy was reviewed by the PBA and certain suggestions were accepted or rejected by the Sheriff's Office.

-calling out the same day of the week without documented medical justification will be a factor considered in sick leave abuse determinations if it occurs five or more times within a twelve-month period rather than three or more times; and

-the use of five or more undocumented sick days will be a factor considered in sick leave abuse determinations if it occurs within a sixty-day period rather than within a thirty-day period.

Despite the new sick leave verification policy, the Sheriff certifies that his office is plagued with a high number of call-outs - specifically 5.3 sick call-outs per person from January 1 through June 30, 2016, excluding FMLA, vacation, administrative, and compensatory leave. As a result, the Sheriff's Office incurs more overtime expense, is forced to pull officers from other assignments, and is required to deal with safety issues related to staffing.

In order to alert an officer about the violation of a policy or procedure, the Sheriff's Office issues performance notices that are electronically entered into a computerized tracking system. The Sheriff certifies that performance notices remain electronic and are never printed for an employee's personnel file. While positive performance notices stay in the computerized tracking system for the entire length of an officer's career, negative performances notices are automatically deleted six months after they are issued. The Sheriff certifies that performance notices are not relied upon in decisions

concerning promotions, post assignments, or other opportunities and cannot be relied upon in future disciplinary actions.

However, General Order 10-44, entitled "Performance/Behavior Notices," provides in pertinent part:

I. Purpose

Performance/Behavior Notices are necessary to document personnel action concerning subordinates; this will include positive/exceptional as well as negative contacts for both performance and behavior. The Performance Notice is an integral part of the office evaluation system designed to track positive and negative actions for training, discipline and evaluative purposes. Performance notices are written records, and they are intended to recognize positive/exceptional actions or be the least intrusive form of written discipline when used as a disciplinary tool for negative actions.

* * *

E. Approved Performance Notices will be placed in the subordinate personnel file
1. Commendation/Positive Performance Notices will remain permanently in the personnel file of the respective officer or employee.
2. Negative job performances, specific problem areas, or behavior issue Performance Notices shall remain in the personnel file of the respective permanent officer or employee for a period of six (6) months after the date the employee was served the approved notice, provided no other breach of discipline has occurred during that six (6) month period.

* * *

F. Performance Notices filed in the subordinate's personnel file as a disciplinary action may be used as part of the progressive disciplinary process.

* * *

H. The Office of Professional Responsibility will monitor Final Performance Notices and report to the Sheriff, or his/her designee, notices scheduled to expire.

. . .
2. The Sheriff may authorize the retention of a Performance Notice in an employee's personnel file when it is evident, through submission of documentation, that they produced negative job performances, specific problem areas, behavior issues and training issues.

[emphasis added]

The Sheriff certifies that General Order 10-44 was inadvertently not updated after the Sheriff's Office began using the computerized tracking system and does not accurately reflect how performances notice are created and how long they are retained. He also certifies that General Order 10-44 will be updated shortly to bring it in line with current practices.

On July 8, 2016, the grievant received an electronic performance notice memorializing counseling he had received from a supervisor that outlined pattern absences and advised that he had utilized all of his contractually allowed sick time. In pertinent part, the performance notice provides:

[The grievant] is in violation of General Order 15-64, Section 7.2(a)(2). Calling out sick before or after regular days off, weekends, holidays, military, and/or after approved time off without documented medical justification five or more times in a twelve (12) month period. . . . Future violations will result in progressive discipline.

The grievant was not denied any sick leave benefits despite calling out sick fourteen times in a three-month period, five of which were before and/or after regularly-scheduled days off. The

Sheriff certifies that the grievant is not the first officer to receive a negative performance notice based upon General Order 15-64. Moreover, the Sheriff certifies that the performance notice was not placed into the grievant's personnel file and will be deleted from the computerized tracking system on December 1, 2016.

On June 14, 2016, the PBA filed a grievance asserting that the Sheriff's Office violated Articles 1.04(G) and 3.01(C) of the CNA by disciplining the grievant for violating General Order 15-64. The Sheriff's Office denied the grievance at each step of the process. On June 24, the PBA filed a Request for Submission of a Panel of Arbitrators (AR-2016-713) seeking rescission of the modified sick leave verification policy (General Order 15-64) and the removal of the electronic performance notice related to the grievant's sick leave usage from the computerized tracking system. 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 contractual merits of the grievance or any contractual defenses the employer may have.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978). If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

Arbitration is permitted if the subject of the grievance 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). Thus, if a grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

We must balance the parties' interests in light of the particular facts and arguments presented. *City of Jersey City v. Jersey City POBA*, 154 N.J. 555, 574-575 (1998).

The Sheriff's Office argues that the establishment of a sick leave verification policy and the use of reasonable means to verify employee illness or disability, including the provision of a doctor's certification for absences of any duration, are non-negotiable managerial prerogatives. The Sheriff's Office also argues that it has a managerial prerogative to develop and implement evaluation criteria in the form of performance notices. The Sheriff's Office contends that the performance notice at issue falls within its managerial prerogative, maintaining that the performance notice was evaluative in nature, did not impose discipline, electronically memorialized a counseling session between the grievant and his supervisor, outlined the grievant's

pattern absences, advised the grievant that he had utilized all of his contractually allowed sick time, will not be placed in the grievant's personnel file, and will be deleted from the computerized tracking system six months after issuance.

The PBA argues that unilateral changes to the sick leave verification policy are legally arbitrable because they modify when medical documentation must be obtained by an employee to justify the use of sick leave. The PBA also argues that given the description of performance notices in General Order 10-44 as "the least intrusive form of written discipline when used as a disciplinary tool for negative actions," the grievance is legally arbitrable.

In reply, the Sheriff's Office maintains that there was a sick leave verification policy in effect when the current CNA was negotiated and that policy was modified, with input from the PBA, pursuant to the Sheriff's Office's managerial prerogative. Moreover, the Sheriff's Office reiterates that the grievant was not denied any sick leave benefits. The Sheriff's Office also maintains that performance notices and written reprimands are independent of each other; a temporary performance notice placed in the computerized tracking system functions as an early warning system that seeks to address an issue before discipline is warranted. Further, contrary to the PBA's suggestion, the Sheriff's Office claims that there is no formula whereby a

certain number of performance notices result in disciplinary action.

The Commission has consistently held that a public employer has a managerial prerogative to use reasonable means to verify employee illness or disability. See, e.g., Carteret Bd. of Ed., P.E.R.C. No. 2009-71, 35 NJPER 213 (¶76 2009); State of New Jersey (Dep't of Treasury), P.E.R.C. No. 95-67, 21 NJPER 129 (¶26080 1995); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). This includes the right to require that employees taking sick leave produce doctors' notes; it also includes the right to determine the number of absences that will trigger a doctor's note requirement and the time frame in which absences will be counted. See, e.g., New Jersey State Judiciary (Ocean Vicinage), P.E.R.C. No. 2005-24, 30 NJPER 436 (¶143 2004); North Hudson Reg. Fire & Rescue, P.E.R.C. No. 2000-78, 26 NJPER 184 (¶31075 2000); City of Elizabeth, P.E.R.C. No. 2000-42, 26 NJPER 22 (¶31007 1999); South Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989); Butler Bor., P.E.R.C. No. 87-121, 13 NJPER 292 (¶18123 1987). However, what the disciplinary penalties will be for abusing sick leave and the cost of obtaining verification are mandatorily negotiable and the application of a sick leave verification policy may be challenged through contractual grievance procedures. See, e.g., Elizabeth and Elizabeth Fire Officers Ass'n, Local 2040, IAFF, P.E.R.C. No.

84-75, 10 NJPER 39 (¶15022 1983), aff'd 198 N.J. Super. 382 (App. Div. 1985); State of New Jersey (Dep't of Treasury).

Given the parameters of our scope jurisdiction, the Commission is only tasked with addressing the abstract issue of negotiability.^{3/} The Sheriff's Office's development and implementation of a sick leave verification policy, whether in the form of General Order 12-13 or 15-64, is a managerial prerogative. Although the adoption of General Order 15-64 may require unit members to obtain/produce medical documentation in order to justify sick leave, the Sheriff's Office's managerial prerogative includes the right to require that employees taking sick leave produce doctors' notes verifying absences of any duration notwithstanding that the cost of obtaining verification is normally mandatorily negotiable.^{4/}

While the application of a sick leave verification policy may be challenged through contractual grievance procedures, there is no allegation that any particular employee has been improperly deprived of sick leave benefits as a result of the new policy.

^{3/} To the extent the PBA contends that the Sheriff's Office has unilaterally changed terms and conditions of employment or past practice, such issues are more appropriately raised in an unfair practice charge. See, e.g., Willingboro Bd. of Ed., P.E.R.C. No. 85-74, 11 NJPER 57 (¶16030 1984); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982); see also, N.J.S.A. 34:13A-5.4; N.J.A.C. 19:14-1.1 et seq.

^{4/} Neither party raised the cost of obtaining verification as an issue in this scope petition.

Moreover, the PBA has not asserted that the new policy is being utilized to harass employees or otherwise being implemented in an unreasonable manner that unduly interferes with employee welfare. Accordingly, we restrain arbitration of the grievance with respect to the modified sick leave verification policy (General Order 15-64).

Turning to the electronic performance notice related to the grievant's sick leave usage, the Commission has consistently held that "[a]n employer has a non-negotiable right to select the criteria for evaluating its employees." Monmouth Cty. Prosecutor, P.E.R.C. No. 2014-91, 41 NJPER (¶18 2014) (citing Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982)); see also, Washington Tp., P.E.R.C. 2005-15, 30 NJPER 404 (¶130 2004). N.J.S.A. 34:13A-5.3 provides in pertinent part:

Nothing herein shall be construed as
permitting negotiation of the standards or
criteria for employee performance.

However, "if an employer issues a reprimand to an employee for failing to meet performance criteria, that reprimand may be

challenged in binding arbitration."^{5/} Edison Tp., P.E.R.C. No. 2009-60, 35 NJPER 141 (¶51 2009).

In Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd NJPER Supp.2d 183 (¶161 App. Div. 1987), the Commission specified its approach for determining whether a document critical of employee performance is a non-arbitrable evaluation or an arbitrable reprimand:

We realize that there may not always be a precise demarcation between that which predominantly involves a reprimand and is therefore disciplinary within the amendments to N.J.S.A. 34:13A-5.3 and that which pertains to the Board's managerial prerogative to observe and evaluate teachers and is therefore nonnegotiable. We cannot be blind to the reality that a "reprimand" may involve combinations of an evaluation of teaching performance and a disciplinary sanction; and we recognize that under the circumstances of a particular case what appears on its face to be a reprimand may predominantly be an evaluation and vice-versa. Our task is to give meaning to both legitimate interests. Where there is a dispute we will review the facts of each case to determine, on balance, whether a disciplinary reprimand is at issue or whether the case merely involves an evaluation, observation or other benign form of constructive criticism intended to improve

^{5/} Under N.J.S.A. 34:13A-5.3, public employers and the majority representative of their police officers may agree to arbitrate minor disciplinary disputes, but not major disciplinary disputes. Minor discipline includes reprimands and suspensions or fines of five days or less unless the employee has been suspended or fined an aggregate of 15 or more days or received more than three suspensions or fines of five days or less in one calendar year. See Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997).

teaching performance. While we will not be bound by the label placed on the action taken, the context is relevant. Therefore, we will presume the substantive comments of an evaluation relating to teaching performance are not disciplinary, but that statements or actions which are not designed to enhance teaching performance are disciplinary.

In the context of sick leave verification, the Commission has recognized that "[t]he employer's prerogative to verify illness may include the right to conduct a conference with the employee to find out why the employee was absent and to determine whether a disciplinary sanction is warranted." City of Elizabeth, P.E.R.C. No. 2000-42, 26 NJPER 22 (¶31007 1999) (restraining arbitration of a grievance contesting a sick leave verification policy that required employees who used ten or more sick days to undergo a counseling session and to submit a private report memorializing the counseling session). However, "once the employer [determines] that there is abuse and invokes a disciplinary sanction, arbitration may be invoked." Plainsboro Tp., P.E.R.C. No. 2009-26, 34 NJPER 380 (¶123 2008) (restraining arbitration of a grievance contesting a performance improvement plan and related counseling, finding that they were not designed to criticize the grievant for past conduct but to notify him of performance deficiencies and that failure to improve would be noted in his next performance evaluation and could result in future disciplinary action).

In this case, the Sheriff has certified that:

- negative performances notice remain electronic and are never printed for an employee's personnel file;
- negative performance notices are deleted from the computerized tracking system six months after issuance;
- negative performance notices alert employees as to some violation of policy or procedure in an effort to make the employee aware so that it does not happen again;
- negative performance notices are not relied upon in decisions concerning promotions, post assignments, or other opportunities;
- negative performance notices cannot be relied upon in future discipline; and
- it is not unusual for an employee to have multiple negative performance notices in the computerized tracking system at any one time without triggering a written reprimand.

The Sheriff also certifies that General Order 10-44 will be updated to bring it in line with current practices.

Under these circumstances, we find that the electronic performance notice at issue was not designed to penalize the grievant for past conduct, but was issued to specify the manner in which he violated sick leave protocols and to remind him to be more diligent in the future. The performance notice does not indicate a failure to improve and does not impose discipline; rather, it warns that future violations will result in discipline. Moreover, as certified by the Sheriff, the electronic performance notice issued to the grievant differs in

form and substance from the exemplar attached to General Order 10-44. Unlike the exemplar, the document at issue is clearly marked "Performance Notice - Negative" and there are no check boxes indicating "Commended" or "Reprimanded." Taken together, the language of the performance notice, its context, and the fact that it will never be placed in the grievant's personnel file but will be deleted six months after issuance indicates an intent to address problems before discipline is warranted. Compare Monmouth Cty. Prosecutor, P.E.R.C. No. 2014-91, 41 NJPER 61 (¶18 2014) (restraining arbitration of a grievance to the extent it contested the contents of performance notices, finding that the performance notices were not designed to penalize but were issued to specify deviations from proper protocol and the need to adhere to proper procedures without noting a failure to improve or imposing discipline) with Town of Guttenberg, P.E.R.C. No. 2005-37, 30 NJPER 477 (¶159 2004) (denying a restraint of arbitration of a grievance contesting the application of a sick leave verification policy, finding that the subject counseling letters - which were placed in the grievant's personnel file - indicated a determination that the employee's attendance record had not improved and were more in the nature of a reprimand rather than a memorialization of a conference).

Accordingly, the electronic performance notice related to the grievant's sick leave usage cannot be contested through

binding arbitration. The PBA's concerns regarding General Order 10-44 and use of the performance notice in any future disciplinary proceeding are unwarranted given the Sheriff's certification. See City of Elizabeth; Plainsboro Tp.

ORDER

The request of the Atlantic County Sheriff's Office for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson voted in favor of this decision. None opposed. Commissioners Jones, Voos and Wall were not present.

ISSUED: November 17, 2016

Trenton, New Jersey