

P.E.R.C. NO. 2003-7

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF DUMONT,

Petitioner,

-and-

Docket No. SN-2002-33

PATROLMAN'S BENEVOLENT ASSOCIATION
(PBA) LOCAL 83 (DUMONT UNIT),

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Borough of Dumont for a restraint of binding arbitration of a grievance filed by the Patrolman's Benevolent Association (PBA) Local 83 (Dumont Unit). The grievance protests a home visit that the Borough contends was conducted in part to verify that an officer on sick leave was at his residence. The Commission concludes that the grievance is legally arbitrable; it does not challenge the Borough's adoption of a sick leave verification policy, but protests a November 22, 2000 home visit. The Commission concludes that an arbitrator may evaluate whether the visit was conducted for reasons other than implementing a sick leave verification policy or constituted an egregious and unjustifiable violation of the officer's privacy.

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, Ruderman & Glickman, P.C., attorneys
(Mark S. Ruderman, on the brief)

For the Respondent, Loccke & Correia, attorneys
(Merick H. Limsky, on the brief)

DECISION

On February 14, 2002, the Borough of Dumont petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by the Patrolman's Benevolent Association (PBA) Local 83 (Dumont Unit). The grievance protests a home visit that the Borough contends was conducted in part to verify that an officer on sick leave was at his residence. The parties have filed briefs and exhibits. These facts appear.

The PBA represents all police officers except the chief. The Borough's scope petition states that the term of the parties' current agreement is January 1, 1999 through December 31, 2001.

The Borough has submitted the parties' previous agreement effective from January 1, 1996 through December 31, 1999. The grievance procedure ends in binding arbitration.

On March 21, 1997, the Borough adopted a sick leave verification policy. That policy provides:

A. The officer in charge of the department or supervisor may visit the employee who is on sick leave or Workers Compensation leave at his/her place of residence or place of confinement. Such visits shall be recorded on the sick leave form.

B. The officer in charge of the department or on duty supervisor may telephone the employee who has reported on sick leave or is on Workers Compensation leave at his/her place of confinement during the scheduled work day(s). An answering machine will not be accepted for purposes of verification. To have a call answered by a machine shall mean that no one is home and may result in disciplinary charges.

C. Any employee who calls in sick to engage in outside employment shall be subject to disciplinary action.

D. Habitual absenteeism or tardiness may be cause for discipline up to and including discharge.

The sick leave provision in the parties' contract states that the sick leave policy shall be maintained as provided for in Ordinance No. 690. That ordinance sets forth procedures for reporting illness or injury either before duty or while on duty; provides that the chief may designate a physician to make an examination and report to him; states that a physician may visit the ill or injured employee; specifies the number of sick days to be granted and how that leave is accumulated; includes the

procedures for extending sick leave; allows employees to be excused from duty for injuries in the line of duty with the chief's consent; and provides that the chief will keep a record of all sick days and accumulated sick time.

On December 6, 2000, Patrolman Patrick Bland filed two grievances with the chief.^{1/} The grievance concerning sick leave on November 22 states:

On November 22, 2000 at approximately 1355 hours via telephone I notified Dispatcher Reynolds that I was unable to work my scheduled 4-12 tour of duty due to sickness. At approximately 1430 hours Captain Warren Kaine arrived at my residence and interrogated me about my illness. I have submitted incident report #200011851 for your review: It is my opinion that Captain Warren Kaine did harass me by arriving at my residence prior to my scheduled tour of duty. Captain Kaine's actions toward me were unduly offensive and I was subjected to an intrusion of my privacy. Therefore, after reviewing the Boro. Sick Leave Verification Policy dated March 21, 1997, I am filing a level one grievance as outlined in our Collective Bargaining Agreement. I must implore you to [cease] this type of Vindictiveness in the Dumont Police Department. I eagerly await your response to this matter.

The grievance concerning sick leave on December 1 states:

On December 1, 2000 at approximately 0630 hours I notified Dispatcher McMahon that I was unable to work my scheduled 8-4 tour due to sickness. At approximately 1050 hours, I received a telephone call at my residence from Sergeant Isaacson. The nature of the call was to

^{1/} The PBA refers to only one grievance concerning Bland's sick leave on November 22. However, the Borough has also submitted another grievance filed by Bland on December 6 relating to his sick leave on December 1.

confirm my confinement to my residence, during my scheduled tour of duty. Once again the harassment is continuing by Dumont Police Department and it appears that Captain Warren Kaine is at the hub of this controversy. Therefore, after reviewing Article XXIII entitled Sick Leave in our Collective Bargaining Agreement, I submit this level one grievance. I must implore you to [cease] this type of vindictiveness in the Dumont Police Department. I eagerly await your response to this matter.

Although no documentation was submitted, we assume that both grievances were denied. On July 26, 2001, the PBA demanded arbitration over "sick leave verification." This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield 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 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 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

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.... 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 policy-making 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. [Id. at 92-93; citations omitted]

When a negotiability dispute arises over a grievance, arbitration will be permitted if the subject of the dispute is at least 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 policy-making powers.

The Borough argues that arbitration must be restrained because, under Commission case law, employers have a prerogative

to verify illness by visiting an employee's home. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). It also asserts that an allegation that a sick leave policy is being used to harass an employee must be pursued through an unfair practice proceeding.

The PBA does not address the grievance concerning the December 1, 2000 absence. With respect to the grievance protesting the November 22 home visit, the PBA states that it does not challenge the Borough's right to establish a sick leave verification policy. However, it stresses that Captain Kaine arrived at Bland's house at approximately 2:30 p.m., one and one-half hours before the start of Bland's shift. It maintains that the grievance is legally arbitrable because it protests a home visit prior to the start of a scheduled tour and because it alleges that this particular visit violated Bland's privacy. It cites a Hearing Examiner decision holding that an employer could not unilaterally adopt a requirement that an employee on sick leave remain at home for 24 hours.

The Borough replies that Bland suffered no economic or disciplinary sanctions and states that there was no requirement that Bland be at home on a 24-hour basis or before the start of his shift. It explains that Kaine visited Bland's home when he did because he was on patrol in that area and had been asked by the Chief on November 21, 2000 to investigate a November 11 arrest in which Bland was involved, where officers arrested two females

and placed them in custody without calling a female matron. It appears that Bland was the most senior squad officer and, in the absence of a supervisor, was functioning as the tour commander.

The Borough has submitted a memorandum from Kaine, which describes the home visit. It states, in part:

On the 22nd of November 2000, in the area of 1400 hours this officer was requested to call the desk via phone from his patrol unit. Lt. Coughlin advised me that Officer Bland had called in sick and by doing so it would make the tour short on one of the busiest days of the year, Thanksgiving eve. When I received the call, I was in car 261 and in the White Beeches area. I called the desk via phone and asked for Officer Bland's home address. It was my intent to kill two birds with one stone, to stop at his home and verify that he was sick per the rules and regulations of the department and to see if he could clear up the other arrest matter.

Officer Bland answered the door to his dwelling and I asked him what his medical problem was, he stated his stomach was upset. He was dressed in a plaid shirt with blue jeans and sneakers and did not in my opinion look ill at all, in fact he looked better than he usually does. His daughter and her girlfriend were in the room with Officer Bland [and she] stated that, she was home because St. Mary's had a half day of school today. I told Officer Bland that I wanted to speak to him on another matter and intended to when he came in at 1600 hours. He invited me into his home and we both sat on the couch in the family room. I told him that Chief Affrunti had requested me to look into the problem of November 11, 2000, in regard to two arrests involving females and no female representing the department present. He stated "he wouldn't go after me at this time, he be crazy". I advised him that just because it was well known that he supplied information to the prosecutor's office on pending litigation, he still has to comply with the rules and regulations of the department.

Kaine indicated that he told Bland that "every attempt" was to be made to call in a female officer when handling female prisoners, even though that procedure was not set forth in department rules and regulations. Kaine also wrote that he advised headquarters that he had checked to see that Bland was at home and that the middle tour did not have to call him. The memorandum concluded with Kaine's recommendation that when a squad works without a supervisor, the best qualified officer, and not the most senior, should be designated the tour commander.

In Piscataway, we held that the employer had a prerogative to establish a sick leave verification policy and to use "reasonable means to verify employee illness or disability." Id. at 96. Verification measures may include, as did the Piscataway policy, telephone calls and home visits to verify illness. See also City of East Orange, P.E.R.C. No. 84-68, 10 NJPER 25 (¶15015 1983) (employer did not commit unfair practice by unilaterally establishing sick leave policy that, among other things, authorized home visits and required that employee on sick leave notify the department when the employee left his or her residence).

Piscataway distinguished the mandatorily negotiable issues of whether a policy had been properly applied to deny sick leave benefits or had otherwise been implemented in an unreasonable manner. We summed up this distinction by saying:

In short, the Association may not prevent the Board from attempting to verify the bona fides of

a claim of sickness, but the Board may not prevent the Association from contesting its determination in a particular case that an employee was not actually sick. Further, even if an employee suffers no deprivation of a sick leave benefit, he 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. Such allegation could be grieved and arbitrated under N.J.S.A. 34:13A-5.3 and the contract. Id. at 96 [footnote omitted].

However, an allegation that a policy was adopted to harass employees during negotiations, thereby violating the obligation to negotiate in good faith, must be pursued through an unfair practice charge, not a grievance. See Raritan Tp., P.E.R.C. No. 2000-97, 26 NJPER 284 (¶31113 2000).

Since Piscataway, we have decided dozens of cases involving sick leave verification. See Raritan and cases cited therein. We have repeatedly stated and held that an employer has a prerogative to establish a sick leave verification policy. We have also reiterated that a sick leave policy might be implemented in an unreasonable manner which unduly interferes with the employee's welfare and that a grievance contesting such unreasonable implementation could be arbitrated. Maplewood Tp., P.E.R.C. No. 2000-9, 25 NJPER 374 (¶30163 1999); Somerset Cty., P.E.R.C. No. 91-119, 17 NJPER 344 (¶22154 1991); 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).

We have also considered, post-Piscataway, the arbitrability of grievances protesting application of sick leave policies. Thus, in Passaic, we held to be at least permissively negotiable the City's decision to impose more burdensome reporting requirements on sick or injured officers who left their residence. We reasoned that arbitration would not substantially limit the employer's ability to verify sick leave, since the City would still know the whereabouts of employees on leave even if the union prevailed. In Somerset Cty. Sheriff, P.E.R.C. No. 98-79, 24 NJPER 51 (¶29032 1997), we dismissed a scope of negotiations petition that had been triggered by grievances alleging that the employer had violated the parties' negotiated agreement when it disciplined employees for not answering telephone calls to their residences while on sick leave. We reasoned that there was no scope of negotiations dispute because the union did not seek to arbitrate the employer's decision to require employees on sick leave to answer their telephone. And the employer did not seek to arbitrate the issue of concern to the union -- its contention that the employees did not violate the policy and were improperly disciplined.

We have never addressed the time period within which an employer could require a sick or injured employee to remain at home or available for contact. Piscataway cited with approval a New York PERB hearing officer's decision holding not mandatorily negotiable a clause that would have required tour employees to remain at their homes only between 9 a.m. and 5 p.m. on days they were regularly

scheduled to work. One of our Hearing Examiners has held that, at the other end of the spectrum, an employer could not unilaterally require that sick employees be available for contact on a 24-hour basis. Borough of Roselle Park, H.E. No. 93-31, 19 NJPER 375 (124167 1993).^{2/}

Within this framework, we first address the argument that the allegations raised in the grievance must be pursued through an unfair practice charge. We decline to so hold. Unlike Raritan, there is no contention that the adoption of the policy was triggered by activity protected by our Act.

We also hold that the grievance is legally arbitrable. It does not challenge the Borough's adoption of the sick leave policy but protests only the November 22, 2000 home visit. And, without addressing the merits of the grievance, it does not appear that this visit was a routine application of the Borough's policy. Kaine's memorandum indicates that the visit was intended to "kill two birds with one stone" and was prompted in part by his desire to complete his investigation of the November 11, 2000 arrest. An arbitrator may evaluate whether the visit was conducted for reasons other than implementing a sick leave verification policy or constituted an "egregious and unjustifiable violation" of Bland's privacy. Piscataway. While the Borough suggests that a single visit cannot

^{2/} The case was withdrawn before a Commission decision issued.

be an "egregious" violation of privacy, that is for an arbitrator to decide.

As in Passaic, arbitration of the grievance would not substantially limit the Borough's ability to detect and prevent sick leave abuse. Even if the PBA prevails, the Borough could still implement its policy in other circumstances and, indeed, the PBA does not suggest that the Borough could not have verified Bland's illness on November 22, 2000 by other means such as a telephone check or a home visit at a different time. As in Somerset, the PBA does not dispute the Borough's right to conduct home visits as part of its sick leave verification policy.^{3/}


Finally, since the Borough states that it did not require that Bland be at home before the start of this shift, we need not decide whether it could have done so or whether it could legally agree that home checks would occur only after the start of a scheduled shift. The arbitrator may consider the time of the visit as one of the factors bearing on whether the visit was a valid implementation of the Borough's sick leave policy.

^{3/} Since neither party addresses the arbitrability of the grievance concerning Bland's December 1, 2000 absence, we do not do so either. If it becomes an issue at arbitration and the Borough believes that arbitration would substantially limit governmental decision-making, it may re-file its petition.

ORDER

The request of the Borough of Dumont for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Muscato and Ricci voted in favor of this decisions. None opposed. Commissioner Sandman was not present.

DATED: July 25, 2002
Trenton, New Jersey
ISSUED: July 26, 2002