I.R. NO. 91-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Petitioner,

-and- Docket No. SN-90-81

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 52, LOCALS 2306 and 1697, AFL-CIO,

Respondent.

SYNOPSIS

Ruling on a request to temporarily restrain arbitration of two grievances, a Commission Designee temporarily restrains arbitration, in part, and declines to temporarily restrain arbitration, in part.

The County sought to restrain arbitration of grievances contesting its adoption and implementation of a sick leave verification/excessive absenteeism policy. The County argued that it has a managerial prerogative to establish and implement a sick leave verification policy. AFSCME argued that the issue here is a disciplinary policy which is mandatorily negotiable.

The Commission Designee concluded that the grievances concerned both sick leave verification issues -- which are not mandatorily negotiable -- and disciplinary issues -- which are mandatorily negotiable. To the extent that AFSCME seeks to arbitrate aspects of the County policies concerning sick leave verification -- such as requesting employees who use sick leave to provide a doctor's note verifying illness -- the Commission Designee temporarily restrained arbitration. To the extent that AFSCME seeks to arbitrate aspects of the County policies which implicate disciplinary issues -- such as the issuance of written disciplinary warnings for a specified number of absences or following a schedule of discipline for a specified number of absences -- the Commission Designee refused to temporarily restrain arbitration. To the extent that AFSCME seeks to arbitrate those aspects of the subject grievances which concern the assignment of certain duties to supervisory employees to supervise subordinates' attendance and enforce the County absenteeism policy, the Commission Designee temporarily restrained arbitration.

I.R. NO. 91-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Petitioner,

-and- Docket No. SN-90-81

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 52, LOCALS 2306 and 1697, AFL-CIO,

Respondent.

Appearances:

For the Petitioner
Genova, Burns & Schott, attorneys
(Stephen E. Trimboli, of counsel)

For the Respondent
Szaferman, Lakind, Blumstein, Watter & Blader, attorneys
(Sidney H. Lehmann, of counsel)

INTERLOCUTORY DECISION

The County of Hudson ("County") filed a Petition for Scope of Negotiations Determination on June 11, 1990, with the Public Employment Relations Commission ("Commission") seeking a determination as to whether certain matters in dispute between the County and the American Federation of State, County and Municipal Employees, Council 52, Locals 2306 and 1697, AFL-CIO ("AFSCME") are within the scope of negotiations. N.J.S.A. 34:13A-5.4. On June 28, 1990, the County filed an Order to Show Cause and supporting documents with the Commission requesting that AFSCME show why an order should not be issued staying the arbitration of the grievance

underlying this dispute pending a final determination of the negotiability issue by the Commission. The Order to Show Cause was executed on July 10, 1990, and was made returnable on July 19, 1990. I conducted an Order to Show Cause hearing on July 19, 1990, having been delegated such authority to act upon requests for interim relief on behalf of the full Commission. AFSCME submitted a response to the Show Cause request on July 18, 1990. Both parties argued orally at the hearing.

On July 19, 1990, I issued an oral ruling granting the restraint of arbitration in part and denying the restraint of arbitration in part.

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the Courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for relief, the relative hardship to the parties in granting or denying the relief must be considered.[1/]

* * * *

1/ Crowe v. DeGioia, 90 N.J. 126 (1982); Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975). See also Englewood Bd. of Ed. v. Englewood Teachers Assn., 135 N.J. Super 120, 1 NJPER 34 (App. Div. 1975).

The facts in this matter appear as follows.

Local 2306 represents a collective negotiations unit of non-supervisory employees employed by Hudson County; Local 1697 represents a unit of supervisory employees employed by the County. On October 23, 1989, the parties concluded a Memorandum of Agreement as a successor to their expired collective negotiations agreements covering the period 1988-89.

In this proceeding, the parties have referred to several clauses from the expired 1988-89 contracts.[2/] The managerial rights article indicates that the employer may take disciplinary action for just cause; the grievance and arbitration procedure indicates that a grievance is any difference of opinion, controversy or dispute arising between the parties regarding the alleged violation, interpretation or application of any of the provisions of the agreement; the union rights article indicates that the department director may suspend an employee without pay due to misconduct, negligence, or for any other sufficient cause. The sick leave article provides as follows:

> A doctor's statement for illness shall be required after five (5) consecutive work days absence pursuant to Civil Service regulations. The Director may require acceptable medical evidence substantiating illness whenever such requirement appears reasonable. Abuse of sick leave shall be cause for disciplinary action.

2/ The Memorandum of Agreement executed by the parties lists the changes made to the expired contracts. None of the changes listed in the Memorandum appear to materially alter these contract provisions. Exhibits C7 and C8.

On December 5, 1988, the County issued a memo establishing a sick leave policy providing that employees taking sick leave may be required to provide written medical verification of illness. On December 6, 1989, the County issued a memo to all employees stating a) that employees who are chronically or excessively absent are subject to discipline; b) that chronic/excessive absenteeism includes instances where employees routinely use more sick leave in a calendar year than they are entitled to; c) that chronic/excessive absenteeism includes a pattern of sick leave use in conjunction with scheduled days off; and d) continued abuse of sick leave or excessive absenteeism will result in discipline. On December 6, 1989, the County issued a memo to its supervisory employees entitled, "Sick Leave Abuse", which contains specific guidelines for implementing the sick leave verification policy. (Implementation memo) It contains these points:

> 1. A nondisciplinary notice must be given to employees who were sick or absent more than 10 days in 1989 and in 1988 or in 1987. Such employees must provide a doctor's note if they are sick or absent more than 10 times in 1990.
>
> 2. A verbal warning notice must be given to employees who:
>
> > A. Were sick or absent more than 15 days in 1989, after being sick or absent more than 15 days in 1988 or 1987; or
> >
> > B. Exhibit a "pattern of absences" over the last two years of at least five days in each year (1989-90). ("Pattern absences" are defined as those following or preceding scheduled days off.)
>
> 3. Apply the following general guides in imposing discipline for employees who:

A. Were absent or sick 10 or more days in 1990, after having been out more than 15 days in 1988 and 1989; or

B. Exhibited a pattern of absence of at least five days in 1989.

4.

DISCIPLINE

# OF DAYS OF SICK LEAVE TAKEN OR DAYS ABSENT	FINE/SUSPENSION WITH DOCTOR'S NOTE	FINE/SUSPENSION WITHOUT A DOCTOR'S NOTE
10 DAYS	VERBAL WARNING	
15	WRITTEN WARNING	
16	1 DAY	2 DAYS
17	3	6
18	5	10
19	10	20
20	15	30
21	20	TERMINATION
22	25	
23	30	
24	TERMINATION	

PATTERN SICK LEAVE/ ABSENTEEISM	FINE/SUSPENSION WITH DOCTOR'S NOTE	FINE/SUSPENSION WITHOUT A DOCTOR'S NOTE
5	VERBAL WARNING	
6	WRITTEN WARNING	
7	1	2
8	3	6
9	5	10
10	10	20
11	20	TERMINATION
12	30	
13	TERMINATION	

5. The memo states that the guide is general and further states that the memo does not change the policy of requiring sick leave verification any time an abuse is suspected.

On December 6, 1989, the County issued another memo to supervisory employees reminding them that they are primarily responsible for supervising the attendance of subordinates and to report sick leave abuse and chronic or excessive absenteeism. The memo also notes that failure to properly supervise employee attendance will result in the supervisor being disciplined.

On December 28, 1989 and January 22, 1990, AFSCME filed two grievances challenging the new sick leave policy. The grievances claim that the County's sick leave policy violates the contractual sick leave article and other articles of the parties' collective negotiations agreements. The grievances request that the sick leave policy be changed so as to not violate the agreements.

On January 24, 1990, after a Step 3 grievance hearing had been held, the County Personnel Director denied the grievances. Subsequently, AFSCME sought to arbitrate the grievances. After the grievances were scheduled for arbitration on July 26, 1990, the County filed this request to restrain arbitration.

* * * *

The County contends that it has a managerial prerogative to implement and modify guidelines concerning sick leave verification. It further contends that it has the managerial prerogative to determine that supervisory employees must verify the use of sick leave by employees under their supervision. The County argues that AFSCME seeks to arbitrate the County's modification of a sick leave verification policy that requires employees who are absent more than

a specified amount to supply a doctor's note. The County argues that no dispute concerning the application of the modified sick leave policy to individual employees is presented in this matter.

AFSCME concedes that a sick leave verification policy is a managerial prerogative. However, it argues that the issue in this matter is not a sick leave verification policy but rather a unilaterally instituted disciplinary policy which imposes discipline for the legitimate use of sick leave. AFSCME argues that the sick leave policy penalizes employees for using contractually provided sick time. AFSCME argues that the policy requires that discipline be imposed upon employees who used specified amounts of sick time, even where a doctor's note was provided. AFSCME argues that what the County has implemented constitutes a disciplinary policy which is both mandatorily negotiable and arbitrable.

* * * *

In the instant matter, in 1988 and 1989, the County created and implemented policies to curb sick leave abuse and to control excessive absenteeism. AFSCME has filed grievances challenging those policies, in whole or in part, as violating the parties' collective negotiations agreements.

The Commission has held that employers have a non-negotiable and non-arbitrable right to establish and alter a sick leave verification policy. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982) and City of Camden, P.E.R.C. No. 89-4, 11 NJPER 504 (¶19212 1988). In Piscataway, the Commission

said that establishing a sick leave verification policy "...serves a legitimate need to ensure that employees do not abuse contractual sick leave benefits." 8 NJPER at 97. However, the Commission has recognized that the specific application of a sick leave verification policy, and such questions as who pays for required doctor visits, are mandatorily negotiable subjects. Piscataway; City of Elizabeth and Elizabeth Fire Officers' Assn., 198 N.J. Super 382 (App. Div. 1985).

Accordingly, to the extent that AFSCME seeks to arbitrate aspects of the County's policies concerning the verification of sick leave -- such as (a) requirements that employees using sick leave provide a doctor's note verifying illness or (b) the County's providing employees who use specified amounts of sick leave with non-disciplinary notices that upon further use of sick leave, they are required to provide a doctor's note -- the arbitration of such issues is temporarily restrained pending the Commission's decision on the instant scope petition. Piscataway; City of East Orange, P.E.R.C. No. 84-68, 10 NJPER 25 (¶15015 1983). With regard to these issues, based upon the foregoing, I believe that the County has established a substantial likelihood of success on the merits in a final Commission decision, that irreparable harm would occur absent the restraint and that the temporary restraint will not place an undue burden on AFSCME. Crowe v. DeGoia; Tp. of Stafford; and Englewood Bd. of Ed. **To the extent that AFSCME seeks to arbitrate such aspects of the grievances as costs of the required doctors'**

visits, the requested temporary restraint of arbitration is denied. Piscataway.

However, another part of the dispute here concerns aspects of the policies promulgated by the County which implicate disciplinary issues -- more specifically, the warning notices to employees who are absent for specified periods and the guides for imposing discipline on employees absent for specified periods.

In 1982, the Legislature amended section 5.3 of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") to make disciplinary issues a mandatorily negotiable subject. CWA v. PERC, 193 N.J. Super 658 (App. Div. 1984).

In Glassboro Bd. of Ed., P.E.R.C. No. 77-12, 2 NJPER 355 (1976), the Board unilaterally adopted an excessive absence/tardiness policy which provided for certain monetary penalties for specified breaches of the policy. The Commission concluded that the Board's unilateral adoption of monetary penalties for breach of the policy affected terms and conditions of employment. The Commission stated:

> Succinctly stated, a public employer is not obligated under the Act to negotiate collectively concerning a decision to establish a tardiness and absenteeism policy, as such a policy relates to managerial prerogatives rather than terms and conditions of employment. Furthermore, an employer may establish penalties and procedures relating to the violation of such a policy, provided, however, that the employer must, upon demand, negotiate with the majority representative regarding such matters to the extent that they establish or modify terms and conditions of employment....[Here] the Board not only unilaterally established a tardiness and

> absenteeism policy -- that is not a violation of the Act -- but it also unilaterally established penalties and procedures that affect terms and conditions of employment and refused to negotiate...concerning those penalties and procedures....While the Board is free to maintain discipline among its employees and insist that contracted-for services are performed punctually and regularly, it may not unilaterally establish or alter disciplinary procedures impacting upon terms and conditions of employment. The monetary penalties contained in the instant policy unquestionably affect a term and condition of employment: compensation. Id. at 357.

In a later case, Montville Tp. Bd. of Ed., P.E.R.C. No. 84-10, 9 NJPER 537 (¶14221 1983), the Association grieved an unsatisfactory component of a teacher evaluation where the unsatisfactory rating was based upon a unilaterally adopted Board policy governing teacher absence/attendance (Teacher Attendance Evaluation Guidelines). The grievance contended that the Board violated the sick leave provisions of the parties' collective negotiations agreement when it issued a teacher an unsatisfactory attendance rating based, in part, upon the teacher's use of negotiated sick leave. Viewing the matter as involving evaluation criteria, the Commission there held that the establishment of evaluation criteria is non-negotiable and non-arbitrable. In a related matter before the State Board of Education, the State Board ruled that a teacher could receive a negative rating based solely on the number of days absent, even though the number was less than the statutorily-provided number of sick leave days. However, the Appellate Division reversed the State Board ruling. The Court found that such an automatic rating system infringes upon the employee's statutory sick leave rights. The Court stated:

> ...the record does not support the State Board's finding that the evaluation system...[takes] legitimate illnesses into proper account. We so conclude because irrespective of the narrative information which may be included in the evaluation report, the simple fact remains that the assigned rating is merely a mathematical consequence and unaffected by the reason for the absence....An unsatisfactory rating adversely prejudices a staff member's legitimate interest in a satisfactory evaluation. That prejudical consequence contravenes the statutory allowance for sick leave in the event of illness or disability.
> Montville Tp. Bd. of Ed., App. Div. Dkt. No. A-1178-84T7, (1985).

In Cty. College of Morris Staff Assn. v. Cty. College of Morris, 100 N.J. 83 (1985), the Court ruled that an arbitrator had exceeded his authority under the contract by "reading into" the contract a progressive discipline system where the contract contained none. The Court stated:

> Obviously, there is no explicit provision in the contract between the College and the Association requiring the use of such incremental or progressive discipline, nor did the arbitrator point to any other, related contract terms as furnishing implicit support for a progressive-discipline requirement. We are impressed with the fact that it has been the practice in other labor contracts to set forth specifically any requirements of prior warning and progressive discipline. The inclusion of these explicit provisions in other agreements suggests to us that the decision whether to use such a disciplinary scheme is likely to be a subject of collective negotiations, and that the College would legitimately expect the Association to give some quid pro quo to obtain that protection.
> Id. at 395. Citations omitted.

Finally, in Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984), the Commission held that the Board did not

violate the Act when it unilaterally established and implemented an Attendance Improvement Program. The Court stated:

> This provision, as written, does not impose discipline. By its very terms, it only provides that after an employee reaches a certain number of absences, the Board may consider whether to institute disciplinary proceedings in the event it determines that sick leave is being abused. Further, there is no indication in the record that any employees have, in fact, been disciplined as a result of this provision. Rather, it is quite clear from the record that an employee who uses eight days of sick leave is not automatically disciplined. Given this posture of the case, we do not find the mere establishment of this aspect of the AIP to constitute an unfair practice. See Rahway Valley Sewerage Authority, P.E.R.C. No. 83-80, 9 NJPER 523 (¶14026 1983). Id. at 547 (footnote omitted).

See also Freehold Bd. of Ed., P.E.R.C. No. 86-137, 12 NJPER 454 (¶17172 1986). The Commission found no violation in these cases, in part, because the policy provision involved did not automatically impose discipline. In the instant matter, the absenteeism policy seems more certain to automatically impose discipline.

All of these cases, when taken together, suggest that a schedule of certain discipline for stated infractions, or certain aspects thereof, is mandatorily negotiable. Although the Commission has not directly addressed this issue, I cannot conclude, based upon the foregoing, that the County has demonstrated a substantial likelihood of success on the merits in a final Commission decision on this issue. **Accordingly, I decline to restrain arbitration of those aspects of the subject grievances which implicate disciplinary issues -- more specifically, the issuance of oral and written**

disciplinary warnings for a specified number of absences and the implementation of the schedule of discipline for a specified number of absences.

The Commission has held that employers have the right to establish job descriptions and to require employees to perform additional duties related to their normal duties. Willingboro Bd. of Ed., P.E.R.C. No. 85-74, 11 NJPER 57 (¶16030 1984); West Deptford Bd. of Ed., P.E.R.C. No. 80-95, 6 NJPER 56 (¶11030 1980); Rutgers University, P.E.R.C. No. 84-45, 9 NJPER 663 (¶14287 1983); City of Camden, P.E.R.C. No. 83-116, 9 NJPER 163 (¶14077 1983).

In this case, the County's memoradum to its supervisory employees reminding them of or assigning them the duty to supervise subordinates' attendance and enforce the County's excessive absenteeism policy appears sufficiently related to the supervisors' normal duties to fall within the managerial right discussed in Willingboro and West Deptford. Based upon the foregoing, I conclude that the County has demonstrated a substantial likelihood of success on the merits in a final Commission decision on this issue, that irreparable harm will occur absent a restraint and that AFSCME will bear no undue burden if the arbitration is restrained. Crowe v. DeGoia; Tp. of Stafford; and Tp. of Englewood. Accordingly, to the extent that AFSCME seeks to arbitrate those aspects of the subject

grievances which concern assigning supervisory employees duties to supervise subordinates' attendance and enforce the County absenteeism policy, arbitration is temporarily restrained.

Charles A. Tadduni
Commission Designee

DATED: July 25, 1990
Trenton, New Jersey