

I.R. NO. 89-8

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
CITY OF PASSAIC,

Petitioner,

-and-

Docket No. SN-89-16

P.B.A. LOCAL NO. 14,

Respondent.

SYNOPSIS

A Commission designee temporarily restrains arbitration of a grievance contesting a departmental order stating procedures to be followed by all officers on sick leave. The City argued that the procedures constitute a sick leave verification policy which is neither negotiable nor arbitrable. PBA Local 14 contended that the procedures govern the employees' conduct while on sick leave and hence are negotiable and arbitrable. Based upon the record and Commission and Court cases addressing this issue, it appears that the departmental order is a sick leave verification policy and therefore, is neither negotiable nor arbitrable. Accordingly, the arbitration is temporarily restrained pending a decision by the full Commission on the negotiability issue.

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Appearances:

For the Petitioner
Sills, Cummis, Zuckerman, Radin, Tischman, Epstein &
Gross, Esqs.
(Richard M. Salsberg, of counsel)

For the Respondent
Loccke & Correia, Esqs.
(Michael J. Rappa, of counsel)

DECISION

The City of Passaic ("City") filed a Petition for Scope of Negotiations Determination on September 23, 1988, with the Public Employment Relations Commission ("Commission") seeking a determination as to whether certain matters in dispute between the City and P.B.A. Local No. 14 ("Local 14") are within the scope of negotiations. The petition was accompanied by an Order to Show Cause requesting that Local 14 show cause why an order should not be issued staying the arbitration of this dispute pending a final determination of the negotiability issue by the Commission. The Order to Show Cause was executed on October 12, 1988, and was made

returnable on October 26, 1988, before Commission designee Charles A. Tadduni. After an adjournment, I conducted an Order to Show Cause hearing on November 15, 1988, having been delegated such authority to act upon requests for interim relief on behalf of the full Commission. The parties submitted briefs and other documents and both parties argued orally at the hearing.

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/} The facts in this matter appear undisputed. They are as follows:

On June 28, 1988, the City of Passaic Acting Chief of Police issued a memorandum concerning the Police Department's sick

^{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).

leave policy. The memorandum states requirements to be followed by all officers on sick leave.^{2/}

On July 14, 1988, the PBA filed a grievance concerning that policy, alleging that it violated the parties' collective negotiations agreement. When the grievance reached the arbitration step, the City filed the instant petition for scope of negotiations determination, accompanied by a request for an Order to Show Cause requiring the PBA to demonstrate why a temporary order should not be issued restraining the arbitration which underlies this dispute.

The City argues that the dispute concerns a sick leave verification policy -- an issue which is a managerial prerogative and, therefore, neither negotiable nor arbitrable. The City notes that Local 14 is challenging the establishment of the sick leave verification policy, not its application to particular facts. The City also notes that this dispute does not concern the issue of assumption of costs for required medical exams.

2/ The memorandum stated, in part, the following procedure:

1. All members out on sick leave, when leaving their residence, must notify the desk officer or dispatcher and give the following facts:
 - a. Reason for leaving
 - b. What location member is going to
 - c. Phone number at that location
(NO BEEPER NUMBERS)
 - d. Length of time member is expected to be out of his/her residence
 - e. Notify headquarters upon returning home

Local 14 argues that the dispute here centers upon employees' conduct while on sick leave and is negotiable and arbitrable; the dispute does not concern a sick leave verification policy. Local 14 contends that the issue of conduct while on sick leave has been negotiated and is in the parties' contract (Article VI, Section 2, Paragraphs C & D). Local 14 argues that the issue of conduct while on sick leave, at a minimum, is permissively negotiable; because the employer has negotiated and agreed upon certain terms and conditions of employment concerning that issue, no order staying arbitration should now issue.

In Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982), the Commission held that employers have a non-negotiable and non-arbitrable right to adopt a sick leave verification policy. The Commission said that establishing a sick leave verification policy "...serves a legitimate need to insure 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 the question of who pays for required doctor visits are mandatorily negotiable subjects. Piscataway; City of Elizabeth and Elizabeth Fire Officers' Association, 198 N.J. Super 382 (App. Div. 1985).

In City of Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984), the Union charged that the Board had unilaterally changed terms and conditions of employment when it implemented an attendance improvement program ("AIP"). The AIP included provisions

requiring employee certifications that their sick leaves were due to illness; requiring attendance at a conference with supervisors; and potentially subjecting employees to discipline after a certain number of absences. The Commission concluded that the implementation of these aspects of the AIP was within the employer's managerial prerogative and did not constitute a violation of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

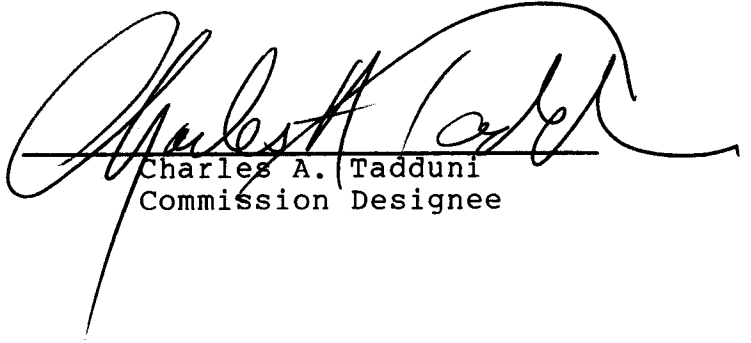
In City of East Orange, P.E.R.C. No. 84-68, 10 NJPER 25 (¶15015 1983), the FMBA charged that the City unilaterally altered terms and conditions of employment when it adopted a sick leave policy which included the following provisions: prohibiting employees from leaving their residences without the Fire Chief's prior approval; the Chief may call or visit an employee on sick leave at home to verify the employee's presence; a supervisor may meet with an employee whose record indicates an excessive use of sick leave; and the Chief may require medical verification of illness. The Commission concluded that the City had the managerial right to unilaterally promulgate the disputed sick leave policy and thus, did not violate the Act.

Finally, in City of Camden, P.E.R.C. No. 89-4, 11 NJPER 504 (¶19212 1988), the Commission held that the City had a managerial prerogative to establish and alter a sick leave policy and could not agree contractually to waive its right to change that policy.

The police department order disputed here appears to be a sick leave verification policy. It is more stringent than some, less than others which the Commission has considered. In all of those cases, the Commission determined that the promulgation of a sick leave verification policy is neither mandatorily nor permissively negotiable. While the Commission has held that various aspects of the application of verification policies and the costs of required medical exams are mandatorily negotiable, it appears that this case does not involve either application of the policy or medical exam costs. See Elizabeth and City of Newark, P.E.R.C. No. 85-13, 10 NJPER 505 (¶15231 1984). Rather, the grievance here involves the promulgation of a sick leave verification policy.

Based upon the facts in this matter and the Commission and Court cases addressing this issue, the City has demonstrated a substantial likelihood of success on the merits in a final Commission decision and that it would be irreparably harmed -- by requiring it to arbitrate what is likely to be determined non-negotiable and non-arbitrable -- if the arbitration is not restrained. It appears that temporarily restraining arbitration until a final Commission decision is issued would not place an undue burden on Local 14.

Accordingly, Local 14 is restrained from proceeding with the arbitration in this matter pending a decision by the full Commission on the scope of negotiations petition.



Charles A. Tadduni
Commission Designee

DATED: November 30, 1988
Trenton, New Jersey