P.E.R.C. NO. 2000-42

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Petitioner,

-and- Docket No. SN-2000-18

P.B.A. LOCAL NO. 4,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the City of Elizabeth's request for a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 4. The Commission denies the City's request for a restraint of binding arbitration of three other grievances. The Commission finds that a grievance pertaining to a change in sick leave policy is not legally arbitrable. The Commission finds legally arbitrable grievances concerning officers' meal detail, compensation for loss of the use of police vehicles, and annual vacation scheduling.

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, Genova, Burns & Vernoia, attorneys (Courtney M. Gaccione, on the brief)

For the Respondent, Perrotta, Fraser, Forrester & Fernandez, LLC, attorneys (Donald B. Fraser, Jr. and Eugene J. Perrotta, on the brief)

DECISION

On August 10, 1999, the City of Elizabeth petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of four grievances filed by P.B.A. Local No. 4. The grievances concern sick leave, use of police vehicles, meal detail, and annual vacations.

The parties have filed briefs, exhibits and certifications. These facts appear.

The PBA represents all police officers below the rank of sergeant. The City and the PBA are parties to a collective negotiations agreement effective from January 1, 1994 to June 30, 1998. The grievance procedure ends in binding arbitration.

The City has denied the grievances. On January 5, 1999, the PBA filed a single demand for arbitration of all four grievances. 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 City may have.1/

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:

1/ We specifically do not consider the City's contention that the grievances should not be consolidated for arbitration. If we determine that more than one grievance is legally arbitrable, the City may ask the arbitrator to consider severing the grievances for arbitration.

> 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.

Sick Leave

On January 1, 1998, Joseph Cosgrove became the City's police director. On February 28, he issued this memorandum:

> The Elizabeth Police Department provides a generous sick leave benefit for all police officers.

A recent review of the sick records revealed that many members are abusing and some grossly abusing this sick leave policy. In order to better control and prevent any further abuse, commanding officers shall personally counsel any member of their command who has accumulated ten (10) or more such days since January 1, 1997 to present. Upon completion of this counseling session the employee shall be ordered to submit a private report indicating that he/she was counseled.

Commanding officers, who after said review, feel that an employee has grossly abused the sick leave policy, shall also submit a report recommending that the employee be examined by the police surgeon.

The personnel office will then schedule such employee for a medical examination with the police surgeon and depending on this medical report the employee will be charged departmentally or be recommended for disability retirement.

It should be noted that just because the number ten (10) was used as a measure, this does not indicate that ten (10) sick days per year will be acceptable. Commanding officers shall continually review the sick records of all officers under their command being alert for patterns of possible abuse:

a. Calling off sick on weekends; or

b. Regularly or frequently returning from sick leave on days off; or

c. Calling sick on first or last days of a tour; or

d. Calling sick on holidays; or

e. Other patterns which are unusual over a period of time

I would also like to commend the members of this department who have exhibited exemplary sick records. Commanding officers should also be aware of these employees and should use this

> exemplary record as a measure for determining priorities for requests for personal days off or any other preferred assignments.

Cosgrove's certification asserts that because of the high average use of sick leave per officer, many shifts were not being adequately staffed. He maintains that the purpose of the counseling sessions is to uncover any difficulties officers may be experiencing, aid them in coping with those problems, train personnel to curb sick leave abuse, and verify sick leave.

On April 15, 1998, the PBA grieved the sick leave memorandum. The grievance asserted that the director had unilaterally implemented a punitive policy violating Article X of the parties' agreement. As a remedy, the grievance sought rescission of the policy and negotiations over any changes in the sick leave policy.

In its brief, the PBA states that it does not challenge commander review of officers' sick time use, or the submission of recommendations where appropriate for an officer to see the police surgeon. Nor does the PBA challenge the City's right to verify sick time. Instead, the PBA focusses on challenging the counseling requirement. It argues that the parties have always viewed counseling as a form of discipline and that penalties for violating sick leave and absenteeism policies are mandatorily negotiable. It further argues that the required private report

has no relationship to ensuring that sick time is used for legitimate purposes.2/

The City responds that the counseling procedures are not disciplinary, but are instead informal sessions to allow the commanding officer to determine if the officer may be experiencing personal or professional problems that have led to the absenteeism. It adds that submission of the confidential report merely confirms the more informal oral counseling session.

A public employer has a prerogative to verify that sick leave is not being abused. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-63, 8 NJPER 94 (¶13038 1982). Since Piscataway, we have decided dozens of cases involving sick leave verification policies. They hold that an employer has a prerogative to require employees taking sick leave to produce doctors' notes verifying their illness. See Rahway Valley Sewerage Auth., P.E.R.C. No. 96-69, 22 NJPER 138 (¶27069 1996); State of New Jersey (Dept. of Treasury), P.E.R.C. No. 95-67, 21 NJPER 129 (¶26080 1995); Hudson Cty., P.E.R.C. No. 93-108, 19 NJPER 274 (¶24138 1993); City of Elizabeth, P.E.R.C. No. 93-84, 19 NJPER 211 (¶24101 1993); South Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989): City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988); Borough of Spring Lake, P.E.R.C. No. 88-150, 14 NJPER 475 (¶19201 1988); Jersey City Med. Center, P.E.R.C. No. 87-5, 12 NJPER 602

2/ Given the limited issue presented by the PBA's brief, we will not review the policy section by section.

(¶17226 1986); Newark Bd. of Ed., P.E.R.C. No. 85-26, 10 NJPER 551 (¶15256 1984).

But we have also held that the issue of who pays for doctors' notes is mandatorily negotiable and that the penalties for violating sick leave and absenteeism policies are mandatorily negotiable. UMDNJ, P.E.R.C. No. 95-68, 21 NJPER 130 (¶26081 1995); Teaneck Tp., P.E.R.C. No. 93-44, 19 NJPER 18 (¶24009 1992); City of Paterson, P.E.R.C. No. 92-89, 18 NJPER 131 (¶23061 1992); Mainland Reg. H.S. Dist Bd. of Ed., P.E.R.C. No. 92-12, 17 NJPER 406 (¶22192 1991); Aberdeen Tp., P.E.R.C. No. 90-24, 15 NJPER 599 (¶20246 1989); Jersey City Medical Center, P.E.R.C. No. 87-5, 12 NJPER 602 (¶17226 1986). Cf. Cty. College of Morris Staff Ass'n v. Morris Cty. College, 100 N.J. 383 (1985)(progressive discipline concepts are negotiable). In addition, the imposition of economic and/or minor disciplinary sanctions stemming from the application of sick leave verification policies is reviewable through binding arbitration. See City of Elizabeth v. Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985); Rahway Valley Sewerage Auth.; Teaneck Tp., P.E.R.C. No. 93-44, 19 NJPER 18 (¶24009 1992); City of Paterson, P.E.R.C. No. 92-89, 18 NJPER 131 (¶23061 1992); Mainland Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-12, 17 NJPER 406 (¶22192 1991); Aberdeen Tp., P.E.R.C. No. 90-24, 15 NJPER 599 (¶20246 1989).

The employer's right 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. See, e.g., Mainland Reg. H.S. Dist., P.E.R.C. No. 92-12, 17 NJPER 406 (¶22192 1991). But once the employer decides that there is abuse and invokes a disciplinary sanction, arbitration may be invoked. In Mainland, counselling was a sanction imposed after a conference to discuss the employee's absence record. We noted that disciplinary sanctions for absenteeism could include counseling, letters of reprimand, docking of pay, withholding of increments, tenure charges, and nonrenewal or termination of nontenured staff members. Similarly, in Rahway Valley Sewerage Auth., P.E.R.C. No. 83-80, 9 NJPER 52 (¶14026 1982), the Chairman restrained arbitration of a grievance challenging the establishment of a sick leave verification policy. That policy included a provision that a certain number of absences would trigger the employer's review of the employee's attendance record to see if counseling or a warning were appropriate. In that case, the employer had a managerial prerogative to review the employee's record; counseling and a warning were presumably two forms of discipline that could be initiated when appropriate after the employer's review.

In this case, the employer has established a policy that includes counseling sessions that are in the nature of the conferences addressed in Mainland and Rahway. Given the employer's representation, we find that the decision to have the conferences cannot be contested through binding arbitration. The

PBA's concern that the session will be viewed as prior discipline in any future disciplinary proceeding is unwarranted given the employer's statement that it is not disciplinary. West Windsor-Plainsboro Reg. Bd. of Ed., P.E.R.C. No. 97-99, 23 NJPER 168 (¶28084 1997). Should any sanction flow from an individual counseling session, the employee may contest the sanction through binding arbitration.

Police Vehicles

On March 1, 1998, Cosgrove advised all personnel that effective April 1, 1998 only certain officers would be authorized to take home a City vehicle. If an employee was transferred or reassigned, the vehicle authorization would remain with the position, not the employee. K-9 officers who reside within the City would be authorized to take home their assigned, marked patrol vehicle.

On April 15, 1998, the PBA grieved the directive. The grievance asserts that the list of employees allowed to take home City vehicles excludes all personnel under the rank of sergeant except the K-9 detective and takes away vehicles from all personnel on the on-call roster. The grievance also asserts that the assignment of vehicles is a result of a prior negotiated agreement to continue the use of vehicles by on-call personnel. The alleged agreement also provided that overtime for on-call personnel would begin only at the time of arrival at the police department, in recognition that the officer would be reporting in

with a police vehicle. As a remedy, the grievance seeks appropriate compensation for all personnel ordered to be on-call.

Cosgrove states there are 39 detectives who are each on call for nine weeks per year. While on call, the detectives were allowed to take home vehicles and received an additional detective's allowance. He asserts that the limited number of available vehicles precludes assigning a car to all on-call officers. Cosgrove states that policy began when officers were requested to take vehicles home because of limited parking at the old police headquarters. He adds that more officers have moved outside the City and those vehicles are no longer available for use by other officers on short notice. Cosgrove asserts the change in vehicle policy will not affect the detectives' pay rate for on-call hours.

PBA President Olivero asserts that throughout his tenure, off-duty detectives who are on call have been allowed to take home department vehicles. He maintains that the practice is a substantial economic benefit because officers do not have to use their own vehicles for commuting.

Morris Cty. and Morris Cty. Park Commission, P.E.R.C. No. 83-31, 8 NJPER 561 (¶13259 1982), aff'd 10 NJPER 103 (¶15052 App. Div. 1984), certif. den. 97 N.J. 672 (1984), holds that the decision to allow employees to use employer-owned vehicles for commuting purposes is not mandatorily negotiable. But the same decision also held, under the circumstances of that case, that the

employer was required to negotiate over offsetting compensation for the economic loss suffered by its employees.3/ See also New Jersey Turnpike Auth., P.E.R.C. No. 93-72, 19 NJPER 154 (¶24077 1993)(employer violated Act by delaying negotiations over compensation to offset the loss of Authority-owned vehicles for commuting). The PBA's grievance seeks compensation for the City's change in the vehicle policy. It specifically alleges that use of a department vehicle formed part of the compensation employees were to receive for agreeing to be on call. The grievance is legally arbitrable.

Meal Detail

On January 27, 1998, Cosgrove issued this memorandum to all commanders:

> It has come to my attention that members of this department are routinely taking a code 10-99 (meal detail) to end their tour of duty.
>
> Effective immediately this practice shall cease.
>
> Members of this department will be allowed one **30 minute** meal detail (10-99) per tour of duty and that detail shall not be taken in the first or last two hours of the duty tour.

3/ The City cites Dennis Tp. Bd. of Ed., D.U.P. No. 98-36, 24 NJPER 302 (¶29145 1998), and Egg Harbor Tp. Bd. of Ed., D.U.P. No. 98-5, 23 NJPER 473 (¶28221 1997) in asserting that the grievance may not be arbitrated. Egg Harbor, however, acknowledges the negotiability of a severable claim for compensation for the loss of vehicle use, but notes that no such claim was raised in that case. In Dennis, the Director of Unfair Practices determined that the Association did not violate its duty of fair representation in making a judgment that it would not prevail if it took the charging party's grievance to arbitration.

> Officers will continue to request a meal detail from the dispatcher and ensure that the dispatcher has the exact location.
>
> Dispatchers after reviewing the queue shall either grant or deny the officer's request based on the work load. All personnel are reminded that a meal detail is a low priority (D4) and will be granted only after all higher priority assignments are serviced.
>
> While on a meal detail, officers will be responsible for monitoring their radio and may be pre-empted for a more serious call for service. Additionally, no more than two units shall be on a meal detail at one time.
>
> Supervisors shall ensure that the contents of this memo are strictly adhered to and shall be the subject of roll call training for the next three weeks.

On April 15, 1998, the PBA grieved that portion of the memorandum that allegedly reduced the meal detail by 15 minutes. The grievance asserts that a 45-minute meal detail was established by a sidebar agreement arrived at by all parties after the implementation of the present four and four work schedule. As a remedy, the PBA seeks rescission of that portion of the order reducing the meal detail by 15 minutes, return to the 45-minute meal detail, and rescission of the order based on the failure to provide advance notice of a work schedule change as provided in the contract.

Cosgrove asserts that he has no knowledge of any officers having been permitted a 45-minute meal detail and that the past practice has been 30 minutes. He asserts that officers have been abusing the meal detail benefit and have begun taking it at the

end of their shift in violation of department policy. He asserts this has resulted in staffing shortages and concern for the public safety.

The PBA does not challenge Cosgrove's statement that the meal detail should not be used as a means of allowing officers to end their shift early and the grievance does not challenge that portion of the directive. Olivero maintains that throughout his service, the meal detail has always been 45 minutes.

The length of meal periods is mandatorily negotiable. Neptune City Bd. of Ed. v. Neptune City Ed. Ass'n, 153 N.J. Super. 406, 410 (App. Div. 1977); Wayne Tp. Bd. of Ed., P.E.R.C. No. 89-36, 14 NJPER 653 (¶19274 1988); Willingboro Tp. Bd. of Ed., P.E.R.C. No. 78-20, 3 NJPER 369 (1977). Cf. Pennsauken Tp., P.E.R.C. No. 93-62, 19 NJPER 114 (¶24054 1993)(directive that employees eat at worksite, imposed without negotiations, violated the Act). It intimately affects employee work and welfare and does not significantly interfere with any governmental policy determinations. The PBA may seek to have an arbitrator restore a 45-minute meal period.

Annual Vacations

Article XXIV is entitled Vacations. Section 7 provides:

> Vacations shall be scheduled by the Director. Vacation periods may be split if necessary for departmental efficiency. Where the efficiency of the department is not jeopardized, every effort shall be made to give at least two (2) weeks vacation during the ten (10) prime summer weeks commencing during the last week of June and ending during the first week of September,

it being the intent of the parties to approximate as closely as possible in this provision the summer recess of the children in the Elizabeth School system.

On February 26, 1998, Cosgrove issued General Order #126. Sections II, III and IV provide:

II. Operations

The Platoon Captains, with due regard for police service needs shall:

1. Establish a vacation schedule for personnel assigned to his platoon in accordance with the vacation allocation procedures outlined in this order; and

2. Ensure that no more than 10% of the total strength of each squad within his platoon is on vacation at any given time; and

3. Require that all vacation selections are in accordance with seniority; and

4. Establish for the ensuing year by November 15th of the current year, authorized vacation brackets for police officers, sergeants and lieutenants; and

5. Disseminate the authorized patrol schedule for the coming year and be completed by January 15th.

III. Community Policing

1. Ensure that the above 1,2,3,4, and 5 requirements are implemented.

IV. All Other Deputy Chiefs and Captains shall:

1. Establish a vacation schedule which authorizes the minimum percentage of personnel of the various ranks within their unit to be on vacation at one time.

2. Disseminate the vacation schedule to all divisions, units and squads in their command and require that all vacations for the coming year are completed by January 15th.

3. Require that vacation selections be in accordance with seniority.

The General Order also sets forth requirements concerning vacation year, vacation time, submission of vacation picks, split vacations, vacation deferments, and compliance with the order.

On April 15, 1998, the PBA grieved General Order #126, asserting that it violates Article XXIV. The grievance asserts that the Director had not set forth any facts showing that the present vacation practices jeopardized departmental efficiency. The PBA seeks an order rescinding the directive and requiring negotiations before any future changes in the allocation of vacation time.

The Director asserts that the order was promulgated to minimize conflicts between scheduling vacations and having sufficient personnel for police services, while still allowing vacation selection according to the contractual seniority system. Cosgrove posits that when combining all leaves and holidays officers receive, it is possible 20 to 30 per cent of the department could be out at a time. He maintains that there have been problems scheduling coverage for officers on vacation.

The PBA disputes that Cosgrove's statistics show that there have been any problems caused by adherence to the contractual vacation scheduling practices. It maintains that its grievance does not seek to establish staffing levels but seeks to prevent the City from circumventing the terms of the agreement.

Scheduling of vacation leave is mandatorily negotiable, provided the employer can meet its staffing requirements. Pennsauken Tp., P.E.R.C. No. 92-39, 17 NJPER 478 (¶22232 1991); City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), aff'd NJPER Supp.2d 141 (¶125 App. Div. 1984); Town of West New York, P.E.R.C. No. 89-131, 15 NJPER 413 (¶20169 1989); City of Orange Tp., P.E.R.C. No. 89-64, 15 NJPER 26 (¶20011 1988); Middle Tp., P.E.R.C. No. 88-22, 13 NJPER 724 (¶18272 1987); Marlboro Tp., P.E.R.C. No. 87-124, 13 NJPER 301 (¶18126 1987). An employer may deny a requested vacation day to ensure that it has enough employees to cover a shift, but it may also legally agree to allow an employee to take a vacation day even though doing so would require it to pay overtime compensation to a replacement employee. Borough of Rutherford, P.E.R.C. No. 97-12, 22 NJPER 322 (¶27163 1996). An employer does not have prerogative to limit the amount of vacation time absent a showing that minimum staffing requirements would be jeopardized. Pennsauken; Logan Tp., I.R. No. 95-23, 21 NJPER 243 (¶26152 1995); Town of Kearny, I.R. No. 95-19, 21 NJPER 187 (¶26120 1995).

The City has not demonstrated how the contractual vacation policy limits its ability to maintain appropriate staffing levels when employees are on vacation. Accordingly we find that the PBA's challenge to the Director's new policy, if sustained by the arbitrator, would not, on this record, substantially limit the City's achievement of its policy goals. The subject of this grievance is at least permissively negotiable.

ORDER

The City's request for a restraint of arbitration is granted as to the "Sick Leave" grievance. Its request is denied as to the grievances pertaining to "Police Vehicles," "Meal Detail" and "Annual Vacations."

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato and Ricci voted in favor of this decision. None opposed. Commissioner Madonna abstained from consideration.

DATED: November 15, 1999
Trenton, New Jersey
ISSUED: November 16, 1999