

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PISCATAWAY TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-83-52

PISCATAWAY TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance the Piscataway Township Education Association filed against the Piscataway Township Board of Education. The grievance alleged that the Board had improperly denied sick leave benefits to a teacher who was allegedly sick for three days.

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Appearances:

For the Petitioner, Rubin, Lerner & Rubin, Esqs.
(David B. Rubin, of Counsel)

For the Respondent, Klausner & Hunter, Esqs.
(Stephen E. Klausner, of Counsel)

DECISION AND ORDER

On December 27, 1982, the Piscataway Township Board of Education ("Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Board sought to restrain binding arbitration of a grievance the Piscataway Township Education Association ("Association") had filed. The grievance alleged that the Board had improperly denied a teacher pay for three days he was allegedly sick in February, 1982.

Both parties have filed briefs and documents. The following facts appear.

The Association is the majority representative of a unit of teachers employed by the Board. The Association and Board have entered a collective negotiations agreement effective

between July 1, 1981 and June 30, 1983. Article X of the contract provides, in part:

A. Sick Leave

1. Definition

Sick Leave is defined to mean the absence of any teacher from their post of duty because of personal disability due to illness, injury or pregnancy, or because of exclusion from school by the school district's medical authorities as a result of contagious disease or by being quarantined for disease in the immediate household. [NJSA 18A:30-1]

2. Accumulative

Teachers will be allowed sick leave with full pay as specified in NJSA 18A:30-2,3 for a minimum of eleven (11) school days in any school year....

3. Number of Days

Teachers who are employed on a ten (10) month basis are allowed eleven (11) days sick leave per year. Teachers who are employed on a twelve (12) month contract are allowed twelve (12) days sick leave per year.

4. Physician's Certificates

Pursuant to NJSA 18A:30-4 the Board of Education may require, in order to obtain sick leave, a physician's certificate to be filed with the Secretary of the Board of Education.

The agreement also contains a grievance procedure which culminates in binding arbitration.

Jerry Johnson teaches 7th and 8th grade social studies at Quibbletown Middle School. In December 1981, he proposed that he take ten eighth grade students on a field trip including seminars to Washington D.C. during the week of February 22 to 26, 1982. The superintendent rejected this proposal. Mr. Johnson informed the principal that the parents of the students intended to have their children go ahead with the trip and that Johnson intended to use his two personal days to attend seminars in

Washington, D.C. on Monday and Tuesday, February 22 and 23. This request for two personal days was approved. The administration also asked Johnson if he intended to return to his classes on February 24, 25, and 26; he said yes. Johnson later asked for three personal days on February 24, 25, and 26, but this request was denied.

On the evening of February 23, Johnson informed the administration that he was ill and would be absent the next three days. He remained in Washington, D.C.

On March 1, his principal met with Johnson and an Association representative concerning his absence. Johnson informed the principal that he had missed school because he was suffering from dental problems. The principal asked for a dentist's note. Johnson underwent emergency root canal surgery on Tuesday, March 2. Johnson submitted a dentist's note concerning this operation.

The Board decided to reject Johnson's claim for three days sick leave pay. On April 1, the Association filed a grievance alleging that the Board violated Article X of its contract when it denied Johnson's sick leave claim. It asked that Johnson be paid his sick leave benefit for the three days he missed.^{1/} The Board denied the grievance, and the Association demanded

^{1/} The Board had also decided to withhold Johnson's negotiated salary increment for the 1982-83 school year and the Association's grievance challenged that decision as well. The Association, however, has since abandoned that aspect of the grievance.

arbitration. The instant petition ensued.^{2/}

In its brief, the Board frames the issue thusly: "The abstract issue is the negotiability of a decision by a board of education to withhold sick pay from a teacher who has not, in the opinion of the board, demonstrated disability requiring absence from his teaching duties." The Board acknowledges that the Commission in In re Piscataway Twp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982) ("Piscataway") stated that an employee may arbitrate the question of whether an employer properly rejected a claim for paid sick leave, but argues that this aspect of Piscataway is dictum. The Board then asserts that the grievance is not arbitrable because it concerns a disciplinary determination and because the Commissioner of Education has jurisdiction to enforce statutory sick leave provisions. N.J.S.A. 18A:30-1 et. seq.

In its brief, the Association relies primarily upon Piscataway. It also contends that statutory sick leave provisions set terms and conditions of employment which are incorporated into collective negotiations agreements by reference and that, pursuant to State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978) ("State Supervisory") and Twp. of W. Windsor v. PERC, 78 N.J. 98 (1978) ("West Windsor"), disputes concerning such provisions may be submitted to binding arbitration. In

^{2/} In its petition, the Board requested that the Commission stay an arbitration scheduled for January 7, 1983. The parties met with the Commission's Chairman. Pursuant to this discussion, the Chairman advised the arbitrator that he could hear the case, but should not issue an award until the full Commission issued its scope decision.

response to the Board's arguments, it asserts that it has dropped any contractual claim that the Board disciplined Johnson without just cause, that there is no specific statutory provision authorizing the Commissioner of Education to hear sick leave disputes, and that the interpretation and application of sick leave provisions do not implicate matters of educational policy.

At the outset, we stress the limits of our inquiry:

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.

See, In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975); Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). Thus, we specifically do not consider whether Johnson was or was not sick.

In Piscataway, we held that the Board did not commit an unfair practice when it unilaterally adopted a new sick leave policy and accompanying regulations which were designed to verify whether an employee had been sick.^{3/} We specifically held that

3/ For example, the regulation provided, in part:

When in the judgment of the employee's immediate supervisor, the Superintendent, or the Superintendent's designee, there is a need to verify any claimed disability on the date of an absence, such verification may be made by telephoning or visiting the home of the employee. Any employee who is not at home having claimed sick leave may be required to present acceptable proof of disability.

In addition, the regulation stated that a physician's written statement certifying disability could be required for any day of sick leave and would be required if absence exceeded five days.

the Board had a managerial prerogative to establish reasonable verification measures to control abuse of sick leave. In reaching that conclusion, however, we stressed what was not involved in that case:

There is no allegation before us that any particular employee has been improperly deprived of sick leave benefits as a result of the new policy or that the policy is being utilized to harass an employee, or is otherwise being implemented in an unreasonable manner which unduly interferes with the employee's welfare. The mere establishment of a verification policy is the prerogative of the employer. The application of the policy, however, may be subject to contractual grievance procedures.

N.J.S.A. 34:13A-5.3 provides:

Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements and administrative decisions affecting them. See also, Tp. of W. Windsor v. PERC, 78 N.J. 98 (1978).

Thus, if an employee believes that the Board erred in determining that the employee was not actually sick, the Association may file a grievance and, if necessary, take the matter to binding arbitration. (Footnote omitted) 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. [4]

[4] While it is not essential to our determination, contrary to the Association, we do not read the regulation in question as requiring an employee on sick leave to stay at home, to own a telephone, or to answer a telephone call. Instead, the regulation provides that an employee who is not at home during a sick leave "may be required to present acceptable proof of disability." As discussed above, whether an employee has or has not presented acceptable proof of disability may be litigated through the grievance procedure. (Footnote in original) (Emphasis supplied).

Also, the employer's right to place memoranda memorializing conferences in employee personnel files is subject to other contract provisions granting employees the right to inspect their personnel files or to respond to material in their files. Again, the Board cannot unilaterally determine that an employee abused sick leave without affording the employee an opportunity to contest that determination. Further, in this regard we distinguish between the lawful prerogative of the Board to use unjustifiable absence from work as a criterion for evaluating employee performance, which is not reviewable, from a determination to withdraw a negotiated sick leave benefit, which we believe is reviewable under the parties' grievance mechanism.

Keeping these limitations on our holding firmly in mind, we conclude that the mere establishment of the Board's sick leave policy does not impinge on the Association's ability to negotiate sick leave benefits or on an individual's ability to utilize sick leave for proper purposes. To the contrary, the policy serves a legitimate and non-negotiable management need to insure that employees do not abuse contractual sick leave benefits. Accordingly, the Board did not violate our Act when it authorized home visitations, telephone calls, and conferences in an attempt to verify sick leave claims.
(Emphasis supplied)

We reject the Board's argument that Piscataway should not be given precedential weight to the extent it states that employees may arbitrate claims that they are entitled to paid sick leave. To the contrary, Piscataway, read as a whole, is our considered attempt to balance and accommodate the legitimate interests of employer and employees in the area of establishing and applying sick leave policies. Bd. of Ed. of Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980). We found there, and repeat here, that when the question is whether a board may adopt generally applicable verification procedures

designed to control sick leave abuses, the balance shifts in favor of finding a managerial prerogative, but when the question is merely whether a particular employee was actually sick on a particular day, the balance shifts in favor of permitting arbitration. The latter question presents no issue of educational policy or judgment; all an arbitrator must do is assess the parties' competing proofs on the employee's claimed disability. Contrast, Bd. of Ed. of Bernards Township v. Bernards Township Ed. Ass'n, 79 N.J. 311 (1979) (employer's prerogative to evaluate employee performance -- a prerogative not involved here -- outweighs employee interest in challenging withholding of an increment under N.J.S.A. 18A:29-14 through binding arbitration.)^{5/} That question does, however, have a substantial importance for an employee who is losing a claimed sick leave benefit as well as having his good faith and professional responsibility challenged. As has been repeatedly held, the subject of sick leave benefits is a mandatorily negotiable term and condition of employment. See, Burlington County College Fac. Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973); Bd. of Ed. of Piscataway Tp. v. Piscataway Maintenance and Custodial Ass'n, 152 N.J. Super. 235 (App. Div. 1977); Hoboken Bd. of Ed. v. Hoboken Teachers Ass'n, P.E.R.C. No. 81-97, 7 NJPER 135 (¶12058 1981), aff'd App. Div. Docket No. A-3379-80T2, pet. for certif. dismissed as improvidently granted, Supreme Court Docket No. 19,389 (1/27/83). Accordingly, we hold

^{5/} We reject the Board's effort to characterize this case as involving a disciplinary determination. The only question before the arbitrator is whether Johnson had a contractual right to paid sick leave.

that the Board does not have a non-arbitrable managerial prerogative to withhold a sick leave benefit based on its unilateral rejection of an employee's claim of sickness. See also, In re Freehold Regional High School Dist. Bd. of Ed., P.E.R.C. No. 83-10, 8 NJPER 438 (¶13206 1982) (board of education had a right to require absent teachers to submit proof of illness in order to receive paid sick leave, but employees had a right, which they exercised, to grieve any decision denying paid sick leave on the basis that the employee was not actually sick); In re Rahway Valley Sewerage Auth., P.E.R.C. No. 83-80, 9 NJPER ____ (¶____ 1982) (employer had a non-arbitrable right to establish a program for controlling abuse of sick leave, but did not have a non-arbitrable right to apply that policy to withhold sick leave benefits whenever it saw fit).

We also reject the Board's argument that the dispute is not arbitrable because the Commissioner of Education has jurisdiction to enforce the sick leave statutes. The Board notes that N.J.S.A. 18A:30-4 states that a board may require the filing of a physician's certificate in order to obtain sick leave, that N.J.S.A. 18A:30-5 empowers the Commissioner to withhold state school moneys from a school district violating the sick leave laws, and that N.J.S.A. 18A:6-9 gives the Commissioner power generally to resolve disputes and controversies under the education laws.

The Board's argument is diametrically opposed to the language and policy of the New Jersey Employer-Employee Relations

Act and the decisions of the New Jersey Supreme Court in State Supervisory and West Windsor. N.J.S.A. 34:13A-5.3, as amended, provides, in part" "Grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement." This language reflects the legislative intent to encourage parties to resolve their disputes through the grievance procedures which they have themselves established and which are generally quicker, cheaper, and less polarized than recourse to drawn-out administrative and judicial litigation. In State Supervisory, supra at p. 80, the Court specifically endorsed the primacy of negotiated grievance procedures over statutory dispute-resolution mechanisms for employee complaints concerning terms and conditions of employment, supra at p. 80, n. 6. Similarly, in West Windsor, supra at p. 117, the Court reiterated that "[t]he negotiated grievance procedures to which the amendment accords primacy will therefore supplant statutory dispute resolution mechanisms...as to disputes of the type enumerated in N.J.S.A. 34:13A-5.3 which directly and intimately impact upon the terms and conditions of public employment."

In the instant case, the parties' contract contains sick leave benefits which we have already determined are mandatorily negotiable. Under State Supervisory and West Windsor, the parties' negotiated grievance procedure, which ends in binding arbitration, has primacy over any statutory resolution mechanisms which might exist for the resolution of a question concerning a


particular employee's contractual entitlement to sick leave. See also Hoboken, supra.^{6/}

For the foregoing reasons, we decline to restrain the issuance of an arbitrator's award on the Association's grievance.

ORDER

The Board's request for an order restraining the issuance of the arbitrator's award on the Association's grievance is denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett and Graves voted for this decision. Commissioners Suskin, Newbaker and Hipp abstained. None opposed.

DATED: Trenton, New Jersey
February 16, 1983
ISSUED: February 17, 1983

^{6/} It is not clear to us that the Commissioner of Education would assert jurisdiction to redress an improper denial of sick leave for an individual employee. N.J.S.A. 18A:30-5 is the only specific jurisdictional statute concerning the statutory sick leave provisions; it authorizes the Commissioner to withhold state school moneys from noncomplying school districts, but does not authorize an individual to commence proceedings to recover sick leave payments owing to him. (Contrast N.J.S.A. 18A:29-14) N.J.S.A. 18A-6.9 vests jurisdiction in the Commissioner to hear all controversies and disputes arising under the school laws, but the State Board of Education has recently held that the Commissioner lacks jurisdiction over controversies over the interpretation or enforcement of an employment contract. Michael Larsen v. Bd. of Ed. of Township of Piscataway, E.D.U. #1445-81 (October 6, 1982). In any case, we need not decide the reach of the Commissioner's jurisdiction: it suffices to hold that any such jurisdiction does not preclude arbitration of the dispute before us.