

P.E.R.C. NO. 2002-24

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX (DEPARTMENT  
OF CITIZENS SERVICES),

Petitioner,

-and-

Docket No. SN-2001-50

PUBLIC EMPLOYEES SUPERVISORS UNION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the County of Essex (Department of Citizens Services) for a restraint of binding arbitration of a grievance filed by the Public Employees Supervisors Union. The grievance alleges that the County violated the parties' collective negotiations agreement by changing a past practice where employees were given the opportunity to avoid docking for tardiness, with an appropriate excuse. The Commission restrains arbitration to the extent PESU seeks to arbitrate aspects of the tardiness guidelines that do not relate to the terms and conditions of employment of PESU-represented employees. The request is otherwise denied.

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, Juan C. Fernandez, Essex County  
Counsel (Kenneth Aaron Rosenberg, on the brief; Courtney  
M. Gaccione, on the reply brief)

For the Respondent, Schneider, Goldberger, Cohen, Finn,  
Solomon, Leder & Montalbano, attorneys (James M. Mets, on  
the brief)

DECISION

On April 20, 2001, the County of Essex (Department of  
Citizen Services) petitioned for a scope of negotiations  
determination. The County seeks a restraint of binding  
arbitration of a grievance filed by the Public Employees  
Supervisors Union (PESU). The grievance alleges that the County  
violated the parties' collective negotiations agreement by  
changing its tardiness guidelines.

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

PESU represents a unit of supervisory employees and a  
unit of administrative employees in the County Welfare Division.

The County and PESU are parties to separate collective negotiations agreements for each unit, both of which have been extended by Memoranda of Agreement effective from January 1, 2000 through December 31, 2002. Each contract has a grievance procedure ending in binding arbitration.

The Department of Citizen Services, Welfare Division is responsible for providing social services and public assistance to County residents. Office hours are between 7:30 a.m. and 5:00 p.m. and employees' work hours are staggered between these hours. Many Department clients are required to maintain either paid or unpaid employment; prompt service is therefore important.

Administrators and supervisors are required to implement and enforce the Department's attendance and tardiness policies. PESU unit employees supervise employees who are members of CWA Local 1081's clerical and professional negotiations units.

Yvonne Davis is the deputy director of the Division of Welfare. She is also chief of personnel and labor relations. She is responsible for promulgating personnel policies; maintaining personnel and labor relations files; and investigating, resolving and answering grievances. In a certification, Davis states that during 1998, the Department reviewed its operations and identified attendance and tardiness problems. She revised the Department's attendance guidelines to address them.

On October 23, 1998, she notified all division directors and union representatives about the revised guidelines and asked

for comments by November 20, 1998. None of the unions submitted comments. The guidelines were issued on January 22, 1999 and distributed to all employees by October 29, 1999.

The guidelines require punctuality from all employees in reporting to work, returning from lunch or break periods, and departing at the end of the assigned working hours. The guidelines set forth that the Department will maintain daily records on each employee's time and attendance; dock an employee's pay for tardiness at his/her hourly salary rate; and take corrective measures, including disciplinary procedures, when employees exhibit a pattern of tardiness or excessive absenteeism. The guidelines set forth the procedures for reporting tardiness, docking pay, and imposing discipline. The guidelines are referred to as "revised," but neither party has submitted any previous guidelines or policies relating to tardiness or absenteeism.

On December 9, 1999, PESU filed a step 2 grievance concerning the tardiness guidelines. Specifically the grievance challenges this portion of the guidelines:

Although tardiness may be "excused" for disciplinary purposes, docking must occur. Employees cannot be paid for time not worked. Docking is not disciplinary action.

PESU asserts that this revision eliminates the discretion of the Office/Shift manager to excuse tardiness beyond the employee's control. The grievance stated:

Past practice (please see attached) and written policies allowed for "individual situation of tardiness, for an employee who has not established a pattern of tardiness if it can be demonstrated by the employee that the tardiness was beyond his/her control. A pattern of tardiness is defined as having exceeded an average of one tardiness per month on active duty for a twelve month period immediately preceding the month in which tardiness occurred. The FOM may make an exception even if a pattern of tardiness has been established, if in his/her judgment the situation is such that docking would not be appropriate."

The Tardiness Guidelines issued October 8, 1999, does not allow for discretion nor does it include an effective date as to when this clarification of policy will be implemented. The memorandum alludes to Supervisory and Disciplinary Action training scheduled for Winter 2000. This clearly violates the above referenced paragraph therefore we are proceeding to Step II of the Grievance Procedure.

On January 11, 2000, the Director denied the grievance.

PESU then moved the grievance to step 3. On March 6, Davis denied the grievance. She stated:

As we discussed at our meeting on February 16, 2000, docking an employee for tardiness of fifteen (15) minutes or more during a single pay period is not discretionary. If a supervisor and/or manager has a question concerning the application of the Tardiness Guidelines to a specific case, the issue must be raised with the Division Director or his designee, who is the Deputy Director. Immediate supervisors and administrators have never had the authority to waive docking the pay of an employee for tardiness in excess of fifteen (15) minutes per payroll period.

Since 1987, Attendance Guidelines have been reissued annually to all employees in the Department of Citizen Services. The Unions assisted the Department in the development and

revision processes. As noted in the attached documents, all Division Directors and Union Representatives were asked to comment on the Revised Attendance Guidelines before they were distributed to employees in February, 1999. If a response was not forthcoming, the assumption was made that the Guidelines were acceptable to a bargaining unit and would be finalized for distribution. We did not receive a response from the Public Employees' Supervisors Union. Consequently, the Guidelines were accepted.

On April 14, 2000, PESU demanded arbitration alleging a "violation of past practice by changing the Tardiness Guidelines." This petition ensued.

Our scope of negotiations jurisdiction is narrow.

Ridgefield Park Ed. Ass'n v. Ridgefield Park 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.

Under Local 195, IFPTE v. State, 88 N.J. 393 (1982), a subject matter involving public employees is mandatorily negotiable and a dispute over that subject matter is legally arbitrable if:

(1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. [Id. at 404-405]

The County argues that it has a managerial prerogative to establish, implement and change sick leave, tardiness and absenteeism policies. It asserts that PESU's grievance challenges its right to alter its policy and is therefore not subject to arbitration. The County also asserts that it has a managerial prerogative to require its supervisors to implement and enforce its tardiness guidelines. Finally, the County asserts that PESU cannot arbitrate the application of the guidelines to CWA-represented employees who are not in PESU's unit, but are supervised by PESU-represented employees.

PESU argues that its grievance contests the elimination of the past practice where employees were given the opportunity to avoid docking with an appropriate excuse. PESU asserts that this policy applies to PESU members, not only as supervisors, but as employees who are bound by the policy. PESU further asserts that whether a binding past practice exists goes to the merits of the grievance and is a question appropriately answered by an arbitrator:

The County responds that it has demonstrated that ongoing absenteeism and tardiness had impaired the operation of the department. The County continues to assert that PESU lacks standing to arbitrate this grievance because none of its members has been docked before or after implementation of the policy.

The employer has an interest in having government services performed punctually and regularly. Glassboro Bd. of Ed., P.E.R.C. No. 77-12, 2 NJPER 355 (1976). Employees have an interest in negotiating over their work hours and compensation and in having an opportunity to present any reasons for being tardy so as to avoid docking of that compensation.

PESU claims that the employer had a past practice of permitting employees to present a reason for tardiness before being docked and that the employer's new policy changes that practice by precluding the opportunity to present such an excuse. Applying the negotiability balancing test, we conclude that permitting employees to present an excuse for their tardiness before being docked would not significantly interfere with the employer's determination that it wants a punctual workforce. Cf. Town of Clarence, 25 NJPER 4581, 4583 n.4 (¶4533 1992) (docking of pay for tardiness is mandatory subject of bargaining).

The cases relied on by the employer are inapt. They affirm an employer's right to establish a sick leave verification



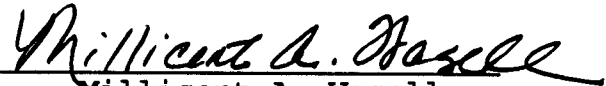
policy and an employee's right to challenge the application of the policy, particularly a disciplinary sanction or the denial of contractually allotted leave benefits. See, e.g., Willingboro Bd. of Ed., P.E.R.C. No. 85-74, 11 NJPER 57 (¶16030 1984); Glassboro. The cases do not establish an employer prerogative to deny an employee an opportunity to offer an excuse before a sanction is imposed. We will therefore not restrain binding arbitration over this aspect of the grievance. Whether such a past practice exists and whether it is a breach of contract to have changed that practice is for the arbitrator to decide.

We will, however, restrain arbitration to the extent, if any, PESU seeks to challenge application of the tardiness policy to non-unit employees. PESU may not negotiate the terms and conditions of employment of non-unit employees, nor may it arbitrate claims involving terms and conditions of employment of non-unit employees. See State of New Jersey (Dept. of Military and Veterans Affairs), P.E.R.C. No. 98-159, 24 NJPER 351 (¶29166 1998); City of Newark, P.E.R.C. No. 86-74, 12 NJPER 26, 29 (¶17010 1985); City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300, 302 (¶16106 1985); Trenton Bd. of Ed., P.E.R.C. No. 83-37, 8 NJPER 574 (¶13265 1982), recon. den. P.E.R.C. No. 83-62, 9 NJPER 15 (¶14006 1982), aff'd NJPER Supp.2d 140 (¶123 App. Div. 1984).

ORDER

The request of the County of Essex (Department of Citizens Services) for a restraint of binding arbitration is granted to the extent PESU seeks to arbitrate aspects of the tardiness guidelines that do not relate to the terms and conditions of employment of PESU-represented employees. The request is otherwise denied.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: October 25, 2001  
Trenton, New Jersey  
ISSUED: October 26, 2001